

Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine

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I. INTRODUCTION

Justice Antonin Scalia's nearly thirty-year service on the Supreme Court, along with his four-year stint on the U.S. Court of Appeals for the District of Columbia Circuit, left an indelible mark on an extraordinary array of legal doctrines, interpretations, and approaches across the administrative law landscape. Or perhaps a partly "delible" mark.

A large share of the current debates on administrative law topics—debates about the present and future shape of administrative law—reduce to questions about the impact of Justice Scalia's views as expressed in his tenure on the courts. Will they continue to shape aspects of the law they came to dominate? Will they gain force in aspects of the law that remain uncertain? Or will they recede in force as with the passing winds of a gale that has blown through town and countryside, garnering everyone's attention and upending life with its raw power but ultimately proving only an opportunity for resetting things to look pretty much as they were? In some matters, Justice Scalia's voice was incredibly clear and consistent; in others, his tune changed, not in his central concerns or interpretive approaches but in what he thought best fit the foundation stones of his approach to the law under the circumstances. Where his views on the conclusions were evolving, his voice may have a different impact on the present and future of administrative law.

With deepest respect for Justice Scalia, I will frequently refer to him in this paper as Nino. That is the name by which his family, his friends, all who were close or felt close, knew him. I first met Nino nearly forty years before his too-soon passing; we co-taught law classes together, lectured and spoke together in various places, talked often about law and life, and shared an ever-closer friendship—ourselves and our families—in many ways.

While I attempt to bring dispassionate judgment to the issues discussed here, there truly can be nothing in reflection on and discussion of Nino that is free from passion. He lived a passionate life, in every nook and cranny. Nino loved his wife and family deeply, engaged with friends unsparingly, enjoyed his pastimes and pleasures ardently (hunting and fishing, the opera,

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reading and joking, food and wine, and so much more), and brought that same passion to teaching, learning, writing, and exploring the law.

His opinions reflect his passion and his humor. They are notable in part for his memorable turn of phrase. For example, reflecting skepticism that a major change in law would be embedded in minor linguistic fiddling, he opined: “Congress . . . does not, one might say, hide elephants in mouse-holes.”¹ Similarly, addressing a plain departure from normal assignments of executive authority, Nino observed that efforts to expand the power of one branch of government at the expense of another frequently “come before the Court clad, so to speak, in sheep’s clothing . . . But this wolf comes as a wolf.”² The witty language sticks with you and makes his points vivid in a way more prosaic legalese cannot.

The greater part of Nino’s impact, however, came from the clarity of his explanations, the power of his logic, and the connections he made between his approaches to the law and the purposes he saw for law and for the rule of law. His concerns over the scope of judicial discretion and the penchant of Congress to reassign functions in ways that advantage its members—in one of his favorite Madisonian quotes, “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex”³—informed almost every aspect of his administrative law jurisprudence, though at times these concerns are at odds with one another.

In brief compass, this paper reviews some of the areas of administrative law that were most closely associated with Judge-and-Justice Scalia’s legal corpus, explaining in admittedly too simple fashion where the law is, how it has changed or is changing, and where it might go.

¹ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

² *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

³ THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

II. RULE OF LAW, POWER, INTERPRETATION

Before moving on to the areas of doctrine that merit special mention, three points need to be made about the conceptual underpinning for Nino's administrative law jurisprudence.

First, his most basic concern was with the rule of law. Assuring that a nation is bound by law—that it is governed by principled, predictable, legitimate legal rules and not by the preferences and predilections of the individuals wielding official power—is essential to individual liberty and broadly to a society's success.⁴ For Nino, the concern that the rule of law govern, that legal rules are clear and their application predictable, that those interpreting and applying the law are servants of the law, not the other way around, was paramount. Everything else, from the way laws should be written to the way they should be interpreted, followed from that.⁵

Second, Nino understood from his own experience in government, as well as from a more academic perspective, that the essential element in virtually every dispute over the organization and operation of government is a dispute about power. That was the understanding that informed the choices made in framing our government. Madison's expositions of the concerns about excessive concentrations of power, especially discretionary power, about the ways in which officials exploit opportunities to expand their power, and about the mechanisms selected to restrain those inclinations are especially clear on these points.⁶ They also were especially admired by Nino. In *Morrison v. Olson*, Nino called out, in Madisonian fashion, what the real issue was in the framing of and arguments about the Independent Counsel law:

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts . . .⁷

Administrative law cannot be understood when that message goes unheeded, when obsession with doctrine and detail obscures the real debate over the

⁴ See, e.g., RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 80–87 (1944); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 679–89 (1995). The same point about the basic aspects and importance of the rule of law is made by scholars and commentators with very different instincts on some of its details. See, e.g., LON FULLER, THE MORALITY OF LAW 46–94, 209–13 (rev. ed. 1969); MICHAEL OAKESHOTT, *The Rule of Law*, in ON HISTORY AND OTHER ESSAYS 119, 130–32, 136–40 (1983); JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213–14 (1979).

⁵ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁶ THE FEDERALIST NOS. 47–51 (James Madison).

⁷ *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

allocation of power and its consistency with the framework of separated powers the Constitution provides.

Third, his approaches to interpretation—both of constitutional issues and statutory issues—were selected to advance fidelity to law (especially law as *rules*) and to limit uncabined discretion of those in power and those who seek to influence them.⁸ Textualism insists that words have meaning (how could courts be justified otherwise?) and that grounding decisions in attention to what is said, not what we can surmise might have been intended despite what has been said, respects the law-making process.⁹ It also restrains the range of choices judges have and restricts payoffs from strategic action by lobbyists and lawmakers, who can anticipate significantly greater opportunities for self-advantage from approaches that elevate legislative history over text.¹⁰

Similarly, originalism, while not addressing the rent-seeking issues that attach to statutory framing, reduces the degrees of freedom for judges and makes the social contract that contemporaries thought they were adopting more law-like—which is exactly the view of the Constitution that was embraced by Chief Justice Marshall in explaining why courts have a role to play in elucidating its terms.¹¹ That understanding will not appease all concerns about the composition of the elements of society who framed the Constitution or about the content of at least some of the terms of the document.¹²

⁸ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997).

⁹ See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005); Scalia, *supra* note 5.

¹⁰ See, e.g., Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 8, at 129–49; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

¹¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also THE FEDERALIST NO. 78 (Alexander Hamilton); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3, 32 (1971); Scalia, *supra* note 8.

¹² See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. REV. 1085 (1989); see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 81–115 (2013) (exploring objections to originalism and offering defenses, primarily based in legal certainty and super-majoritarian features of adoption, amendment, and maintenance of

But it does restrain (not eliminate) avenues for courts to work surreptitious realignments of power under the guise of interpretation.¹³

Justice Scalia's approaches to judges' interpretive tasks have not been adopted wholesale by his colleagues. That is an observation that will get little push-back. Yet his approaches certainly have altered the way everyone looks at questions of interpretation, judicial colleagues included.¹⁴ Everyone now begins with the text and pays attention to the text. That sounds obvious—after all, who would deny the importance of legal text to questions that are supposed to be matters of interpretation? While no one denies that text is important—at least not *now*—it was quite common for people actually implementing laws, in government offices as well as on the bench, routinely to start with a sense of what the provision at issue meant or was intended to mean rather than with the words of the law. Anyone who had experience in government before Nino's textualist approach was an established fixture has had the experience of hearing legal arguments grounded in text-free understandings of the law, understandings that become far more difficult to defend when juxtaposed to the words they supposedly implement. At least when folks head to court now, they no longer talk that way.

III. STANDING, DEFERENCE, AND DELEGATION: THREE VIEWS OF THE CATHEDRAL

Guido Calabresi and Douglas Melamed famously explored similarities among property rules, liability rules, and inalienability by invoking a metaphor favored by Yale Law Professor (later Dean) Harry Wellington, referencing Claude Monet's many different paintings of the cathedral at Rouen.¹⁵

constitutional rules).

¹³ Obviously, the degree to which originalism constrains judges—as well as its relative merits and demerits compared with other interpretive approaches—is highly contested, but Justice Scalia's goal should not be in doubt, nor should the comparative advantage originalism enjoys over many other approaches on the margin of judicial constraint. Compare Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989), with BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991), RONALD DWORKIN, LAW'S EMPIRE 50–65, 228–38 (1986), and CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 40–67 (1993).

¹⁴ See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation: Review of Robert A. Katzmann, Judging Statutes*, 129 HARV. L. REV. 2118, 2118 (2016) (citing Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY, at 8:09, 8:28 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>).

¹⁵ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

In the same fashion, legal rules respecting standing, deference, and delegation all share roots in concerns about allocation of power. That was a position that Nino pushed forcefully.

A. Standing

Take standing law, for example. Nino saw standing first through the lens of the Constitution's assignment of power to courts to resolve legal conflicts. The political branches have power to write laws and to implement them, while courts' authority is limited to deciding matters brought to them and interpreting legal texts (including the Constitution) only when those texts provide rules essential for resolution of the disputes properly before the courts.¹⁶ Standing requirements assure that the courts do not take on powers of general superintendence of the other branches, open to any claimant who is disappointed with the political branches' resolution of political conflicts.¹⁷ In de Tocqueville's words:

[T]he American judge is brought into the political arena independently of his own will. He judges the law only because he is obliged to judge a case. The political question that he is called upon to resolve is connected with the interests of the parties, and he cannot refuse to decide it without a denial of justice. . . . [U]pon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that precise species of contest which is termed a lawsuit; and even when such a contest is possible,

¹⁶ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881–82 (1983). His standard references were *Marbury*, Hamilton's essay in FEDERALIST NO. 78, and de Tocqueville. Each of these references emphasized the limited scope for judicial action and the essential pre-requisite of a private conflict dependent on specific questions of law.

¹⁷ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 99–104 (J.P. Mayer ed., 1969); Scalia, *supra* note 16.

it may happen that no one cares to bring it before a court of justice.¹⁸

Standing requirements, then, serve separation of powers purposes central to the constitutional design. The elements of standing Nino articulated so often and so forcefully—“(1) a ‘concrete and particularized’ ‘injury in fact’ that is (2) fairly traceable to the defendant’s alleged unlawful conduct and (3) likely to be redressed by a favorable decision”¹⁹—are designed to make sure that cases presenting claims of governmental violation of law are not mere pretexts for asking judges to supplant the mechanisms that channel political decision-making. Political decisions are supposed to be made by elected representatives, through mechanisms that refract popular views through officials elected in different ways for different time periods to represent different sorts of constituencies, that require concurrence of two houses of Congress and the President. These arrangements are far more constraining and far more congruent with legitimate democratic-representative decision-making than turning to a judge, a panel of appellate judges, or a nine-member Supreme Court. That is why Nino’s view of standing was so restrictive, repeatedly emphasizing the limitations of injury in fact, causality-traceability, and redressability.²⁰

The Supreme Court, however, has followed a far less clear path, at times giving majority voice to just the sort of standing requirements Nino (among others) championed, other times veering onto a different course. The Court has, for instance, accepted claims of injury that are fanciful at best (and more likely entirely contrived), that are disconnected from the official actions being challenged, or that cannot be ameliorated regardless of the litigation’s outcome.²¹

Several members of the Court, despite having joined standing decisions authored by Nino, plainly view standing not as an important safeguard for constitutionally prescribed separation of powers but, instead, as an artificial impediment to protecting interests that are not fully secured through ordinary political processes. That certainly is the inescapable import of decisions such as *Friends of the Earth, Inc. v. Laidlaw Environmental Services*,

¹⁸ DE TOCQUEVILLE, *supra* note 17, at 103.

¹⁹ *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring in judgment) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

²⁰ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Steel Co. v. Citizens For a Better Env’t*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992).

²¹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000).

*Inc.*²² Apart from the question whether penalties accruing to the government, not the plaintiffs, suffice to generate a continuing conflict, Justices Scalia and Thomas have a great deal of fun in their *Laidlaw* dissent poking holes in the case for standing by painstakingly reviewing details of the affidavits relied on by the Court and by pointing to inconsistencies between the lower court's decision on environmental harm and the assumptions made by the majority.²³ Whether Justice Ginsburg succeeds or fails in trying to connect the claims made to the tests of cases like *Lujan*²⁴ and *Steel Co.*,²⁵ it is impossible to see her opinion as embracing those precedents.

The unsteady course charted by the Court through standing cases reflects the Court's fragmentation on what goals standing requirements serve, where the requirements come from (constitutional or prudential sources), what the requirements are, and how they should be applied. While some justices clearly are on a different plane, there remain several justices committed to visions of standing quite similar to Nino's, not always seeing every case the same way but starting with the same understanding and commitment to standing as an important component of federal jurisdiction, a commitment especially pertinent to challenges to agency action.²⁶ To further muddy the waters, some justices fall between the "anything goes" view of standing (at least one justice would embrace the Cole Porter salute) and the standing-as-constitutional-bulwark view that Nino took. The division among the justices makes it very unlikely that standing law will change dramatically, but any movement that takes place probably will be in the direction of looser, not stricter, standing requirements.

B. *Defe*rence

²² See *Laidlaw*, 528 U.S. 167.

²³ *Id.* at 200–01.

²⁴ See *Lujan*, 504 U.S. at 560–61.

²⁵ See *Steel Co.*, 523 U.S. at 102–04.

²⁶ For example, Justice Thomas joined with Justice Scalia in *Laidlaw*, 528 U.S. at 198; Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, cogently critiqued the majority's standing analysis in *Massachusetts v. EPA*, 549 U.S. at 535; and Justice Alito's decision for a plurality in *Hein*, 551 U.S. at 608–09, endeavored to pull standing analysis in the establishment clause arena back toward the more restrictive approach that prevails in most other cases (with the possible exception of more politically-sensitive environmental law disputes).

A second area tied to Nino's view of constitutional separation of powers is the question of deference: what deference should courts give to administrative decisions? Deference on factual determinations—commonly using a standard of review that accords a presumption of accuracy to administrators' decisions on fact, where those are reviewed by judges—has not been controversial. Nor has there been debate over the notion that a range of policy judgments may be committed to administrators, free from judicial superintendence or subject to it under standards that insist on reasonableness, absence of caprice or arbitrariness, or similarly modest restraints.²⁷ The generally applicable standards of the Administrative Procedure Act (APA) set out both the standard for review of decisions on matters of fact and of policy.²⁸

The controversy, which has killed many trees and supported many academic careers, starts with the question, how should federal courts review administrative determinations that turn on interpretation of an agency's governing law? The Supreme Court's answer for the past 32 years has revolved around its decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*.²⁹ *Chevron* declared that an agency's interpretation of its governing mandate should be given deference by courts so long as (1) the law lacked a plain meaning, being either silent or ambiguous on the apposite interpretive issue ("the precise question at issue"), and (2) the agency's interpretation was reasonable (or "permissible").³⁰

Although the language used by Justice Stevens in laying out what would become Step One and Step Two of the "*Chevron* test" looked as if it were directing courts to allow agencies to supplant courts as interpreters of law (subject only to a modest reasonableness check), other language in the opinion as well as evidence recounted in research into the opinion's construction point in a different direction. Immediately after stating that courts are limited to giving effect to "the unambiguously expressed intent of Congress" on "the precise question at issue," the *Chevron* opinion notes that:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which

²⁷ The one caveat here concerns limitations on delegation of legislative authority. See *infra* Section III.C.

²⁸ See Administrative Procedure Act, 5 U.S.C. § 706 (2012).

²⁹ 467 U.S. 837 (1984).

³⁰ *Id.* at 842–43.

are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.³¹

Thoughtful academic commentary has explained that the opinion was not conceived at the time as marking a departure from prevailing law on the scope of judicial review,³² that it created a test thought at the time to be radically different from what it became,³³ and that the test as frequently implemented is at odds with the requirements of the APA, the framework law governing judicial review of agency actions.³⁴ Other writings have described conflicts among different applications of the *Chevron* test and between some of these applications and the constitutional division of responsibilities between the executive and the courts.³⁵

Why then was Justice Scalia so passionate a defender of *Chevron*? For Nino, *Chevron* was consistent with the assignment of tasks to the courts and the executive because, in his vision, it did not commit the task of law interpretation *per se* to the agencies. In directing courts to defer to reasonable interpretations of an agency's governing statute, he saw *Chevron* telling courts that when laws give administrative officers policy discretion, their exercise of discretion within the bounds of law should be checked only for

³¹ *Id.* at 843 n.9 (citations omitted).

³² See, e.g., Thomas W. Merrill, *The Story of Chevron: The Making of An Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398, 398–400 (Peter L. Strauss ed., 2006).

³³ See, e.g., Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 3–5 (2013).

³⁴ See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–93 (2010); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998).

³⁵ See, e.g., Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988) (divergence between some visions of *Chevron* and the APA, and overlap between *Chevron*'s steps); Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016) (*Chevron* at odds with APA, in tension with constitutional allocation of authority, and inconsistently applied); Duffy, *supra* note 34 (conflict between APA and *Chevron*); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (*Chevron* at odds with constitutional allocation of powers).

reasonableness—courts should not, under the guise of interpretation, second-guess policy judgments granted to executive officials.³⁶ The scope of agencies’ discretion—what the limits are to the set of choices executive officials may select from—is a matter of *law*, and courts must be the bodies to say what exceeds those limits.³⁷ For Nino, however, because judges should not make policy choices, the division between the two types of decision was critical.

The obvious problem is that policy choices often will be characterized as legal interpretation. When the Federal Communications Commission makes a policy choice on communications policy respecting broadcasting, for example, its authority is limited by the Communications Act’s commitment of power to make “fair, efficient, and equitable” allocations of the radio spectrum and to license broadcast stations to advance “public interest, convenience, and necessity.”³⁸ An allocation of the radio spectrum that assigned 80 percent of the available spectrum to stations in Tuscaloosa would not pass the legal test; nor would assignment of licenses on the basis of the applicants’ party affiliation. But the FCC’s decisions on a host of matters can be defended as policy choices, even if arguments about those choices are cast in terms of their consistency with the law’s terms.³⁹ Nino’s approach saw the policy choices as entitled to deference so long as reasonable; that fit a common understanding of how legislation works and how government works; that fit the APA; and that was the meaning of *Chevron* for him.⁴⁰

Unfortunately, *Chevron* in practice did not clearly allocate policy choices under law to administrators (subject to reasonableness review) and decision on the bounds placed by law around those choices to judges. Instead, *Chevron* created a muddle in which administrators felt enabled to stretch the contours of the law, expecting deference from courts, and judges gave varying

³⁶ See, e.g., Util. Air Regulatory Grp. v. EPA, (*UARG*) 134 S. Ct. 2427 (2014); Massachusetts v. EPA, 549 U.S. 497, 549–53 (2007) (Scalia, J., dissenting); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511. This view also seems consistent with *Chevron*. Justice Stevens’ opinion for the Court repeatedly emphasized the policy aspects of the issue at stake there—the propriety of the “bubble” approach to enforcing Clean Air Act requirements—even though the legal question was whether that approach could be squared with a legal application of rules to a “stationary source.” See *Chevron*, 467 U.S. at 844–45, 865–66.

³⁷ See, e.g., *UARG*, 134 S. Ct. 2427; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994); Byse, *supra* note 35; Cass, *supra* note 35; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Scalia, *supra* note 36.

³⁸ See 47 U.S.C. § 307 (2012).

³⁹ See, e.g., Nat’l Broad. Co. v. United States, 319 U.S. 190 (1943).

⁴⁰ See, e.g., Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996); Scalia, *supra* note 36, at 516.

degrees of deference to administrative decisions, perhaps influenced by the nature of the specific matter decided or of the administrative decision.⁴¹ However confused and confusing rules on judicial review were before *Chevron*—however much a case can be made for the effort to make *Chevron* a vehicle for clarifying the dividing line between the courts' interpretive role and the agencies' implementation role—it is hard to argue that the change in terminology attached to *Chevron* constituted an improvement.⁴²

The loss of a long-time vociferous supporter of *Chevron*—especially one of Nino's stature—would seem to augur for a movement away from that framework, a movement that is already underway.⁴³ Yet that movement actually may have been slowed, not sped up, by Nino's departure. Much as he admired the framework *Chevron* should have been, he had come to be more skeptical of the benefit of the decision, and colleagues whose views on separation of powers closely aligned with his have clearly called for abandonment of *Chevron*.⁴⁴ Some other justices long have been uncomfortable with *Chevron* as a generally applicable doctrine of deference, while others may be content to preserve a doctrine that, together with alternative deference rules, grants substantial leeway for judges to pick the degree of deference they are comfortable with in particular circumstances.⁴⁵

Even more clearly, Nino had abandoned support for the *Auer-Seminole Rock* doctrine of deference for an agency's interpretation of its own rules, despite the doctrine's frequent conflation with *Chevron*—and despite his

⁴¹ See, e.g., Beermann, *supra* note 34; Cass, *supra* note 35, at 68; Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1314–22 (2015); Herz, *supra* note 37.

⁴² See, e.g., Beermann, *supra* note 34; Cass, *supra* note 35; Herz, *supra* note 37; Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1379 (1997); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 V.A. L. REV. 597, 597–98 (2009); Peter L. Strauss, “*Deference* Is Too Confusing—Let's Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012).

⁴³ See, e.g., King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); United States v. Mead Corp., 533 U.S. 218 (2001).

⁴⁴ See, e.g., Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

⁴⁵ In fact, fear of excessive judicial discretion was one of Justice Scalia's complaints about decisions in cases such as *Mead* and *King*. See, e.g., *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting); *Mead*, 533 U.S. at 239–56 (Scalia, J., dissenting).

having authored the *Auer* decision which constituted a central pillar of the doctrine.⁴⁶ Justice Clarence Thomas has articulated concerns related to *Auer* that go to the heart of the problem; in coming years, those concerns may persuade other justices to move away from a deference rule that makes some insightful observers particularly skittish.⁴⁷ The arguments that were most significant in Nino's view of this matter, however, have been in the public domain for two decades and have yet to pull a majority of the justices away from the *Auer-Seminole Rock* rule. The rule's fate may depend more on the way justices come to view broader deference issues—and even underlying questions about separation of powers—than on narrow considerations about an agency's interpretation of its own rules.

C. Delegation

One administrative law issue that deserves attention as a potential margin for change in coming years is not on the short list of most observers of the field: the delegation doctrine. For nearly 200 years, dating back to the Marshall Court, it has been well-accepted that Congress cannot delegate legislative power to other branches.⁴⁸ That teaching is encapsulated in the non-delegation doctrine, given its current formulation by Chief Justice William Howard Taft in his *J.W. Hampton* opinion in 1928, asking only that Congress articulate an “intelligible principle” to guide executive actions broadly authorized by law.⁴⁹

Despite the doctrine’s sterling pedigree, only twice have statutory authorizations of administrative action been struck down as invalid attempts to delegate legislative authority. The tsunami of assignments of unstructured—or, charitably, only lightly structured—authority to administrators to adopt and enforce rules respecting private conduct during the New Deal era, along with political pressure to preserve those assignments, simply overwhelmed judicial resolve to maintain the delegation doctrine as a viable bulwark against realignment of

⁴⁶ See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring in the judgment); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1217–25 (Thomas, J., concurring in the judgment).

⁴⁷ See *Perez*, 135 S. Ct. at 1217–25 (Thomas, J., concurring). For different arguments against *Auer-Seminole Rock* deference, see, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

⁴⁸ See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41–46 (1825); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147 (2017) (hereinafter *Delegation Reconsidered*); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

⁴⁹ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

constitutionally vested powers.⁵⁰ While some commentators see the relevant constitutional provisions as not barring delegation of constitutionally vested powers or as essentially trivial limitations—letting any formally legislated assignment of authority constitute an exercise of the legislative power vested in Congress, for example, with virtually no limitation on the content of the assignment⁵¹—it is hard to square these constructions with the structure of the Constitution, early historical practices, or judicial decisions for the first century and more of dealing with this issue.⁵²

The obvious fit between enforcement of a non-delegation constraint and Nino's views on separation of powers was not enough to convince him that a *suitable* non-delegation doctrine could be crafted. His concerns about unrestrained judicial discretion in this instance, much like those supporting his initial inclination to support *Chevron* deference, outweighed his concerns about congressional and administrative adventurism.⁵³ In large measure, Nino was doubtful that the “intelligible principle” test could be used to draw meaningful distinctions among congressional authorizations without granting excessive judicial freedom to pick and choose based on which administrative assignments individual judges found more and less congenial based on personal preferences.⁵⁴ Yet he still found ways to restrain some of the most questionable authorizations of administrative authority, for example, emphasizing the necessary connection of any such authorization to the constitutionally assigned functions of those authorized to act.⁵⁵

Even as Nino shied away from taking on the delegation issue more directly, two of his colleagues, Justices Samuel Alito and Clarence Thomas,

⁵⁰ See, e.g., Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1043 (2007); Cass, *Delegation Reconsidered*, *supra* note 48, at 162–70; Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994); Schoenbrod, *supra* note 48, at 1224–25.

⁵¹ See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87 (2010); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

⁵² See, e.g., Alexander & Prakash, *supra* note 50; Cass, *Delegation Reconsidered*, *supra* note 48, at 151–61; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Schoenbrod, *supra* note 48, at 1227–28.

⁵³ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

⁵⁴ See *id.* at 416 (Scalia, J., dissenting).

⁵⁵ See, e.g., *id.* at 417–22 (Scalia, J., dissenting).

made clear that the absence of serious enforcement of a non-delegation doctrine was undercutting the Constitution's separated powers design. Both justices wrote separate opinions in the *Association of American Railroads* case challenging Amtrak's participation in regulating other railroads; their opinions expose the difficulty of squaring that regulatory role with the separation of powers ideals that animate concerns over delegation of legislative power.⁵⁶ Although the *American Railroads* case initially focused on the conflict between Amtrak's existence as a private, for-profit corporation and its exercise of regulatory authority, Justices Alito and Thomas made clear that the case implicated broader concerns about grants of regulatory authority—administratively exercised *governmental* regulatory authority—over private conduct. For them, the problem was not solved by deeming Amtrak part of the government; it went deeper into the question of whether administrative officials could wield power to create the sort of rules that look a great deal like what legislative processes were designed for—that is, the question for Alito and Thomas was whether, with or without an intelligible principle to guide it, this was the sort of judgment that was constitutionally vested in Congress.⁵⁷

It would be extraordinary to think that, after eighty years of acquiescing in the assignment of broad, uncabined regulatory authority to federal administrative officers, the Supreme Court might take separation of powers concerns sufficiently seriously to revisit the delegation issue. Yet, unlikely as it may be, that seems at least a possibility. Apart from its centrality to cases such as *American Railroads*, the delegation issue, though long suppressed, is at the heart of other doctrinal debates, including the question of what deference is due to an agency's interpretation of its own rules—the *Auer-Seminole Rock* doctrine discussed above—and what rules should apply to consideration of requests to stay agency rules.⁵⁸ Even without a bold reinvigoration of non-delegation doctrine, infusion of concerns about delegation into judicial consideration of other matters could alter the way justices and judges apply administrative law canon. Not betting on it; just sayin'.

IV. CONCLUSION

⁵⁶ See Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1237, 1240 (2015) (Alito, J., concurring); *id.* at 1240–41 (Thomas, J., concurring in judgment).

⁵⁷ See *id.* at 1237 (Alito, J., concurring); *id.* at 1246, 1250–51 (Thomas, J., concurring in judgment).

⁵⁸ See, e.g., Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225 (2017); Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects* (in progress) (draft on file with author).

Administrative law remains a field in flux. It draws together threads from constitutional analysis, statutory interpretation, and broader jurisprudential concerns at the heart of our political system. Further, application of doctrine to specific cases frequently has tangents to current political debates. It is no surprise, then, that this is a field in which division and debate over interpretive approaches and doctrinal content are endemic.

Notwithstanding these ongoing contests, practical as well as analytical, Nino's influence will continue to be felt, in administrative law as much as any field, because he so forcefully articulated a set of considerations, interpretive approaches that followed from them, and rules of law that encapsulated his view of what the governing text and structure of our laws require. Many in the current generation of administrative law debates will be settled in his wake, guided along the channels his *oeuvre* marked or bumping through the waves he made.

Which direction the new solutions will take—following his path or crossing his wake—is not an easy call. The judgments offered here are that standing law will be less faithful to Nino's canon; that deference doctrines will move away from *Chevron* as lodestar, much as Nino was moving in that direction (but not necessarily for the same reasons); and that concerns over delegation of broad administrative authority will increase, though perhaps not giving rise to a real delegation doctrine that can capture majority support from the Supreme Court. Whatever the outcome, however good or bad those predictions, Justice Scalia's contributions to the field are too many, too strong, and too important to be ignored in decisions yet to come.