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The Future of *Chevron* Deference: A Fitting Sequel to *Inherit the Wind* or *Gone with the Wind*?

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The U.S. Supreme Court's landmark *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] decision is under scrutiny, if not outright attack, by some members of Congress, preeminent jurists, scholars, and even several of the Court's current justices. Under *Chevron,* not only are courts duty-bound to uphold the "unambiguously" expressed intent of Congress when reviewing agency decisions, but they are also required to defer to an agency's interpretation of a statute where the statute is "ambiguous" and the agency's interpretation is "permissible."[2] In the nearly 35 years since the Court conceived "*Chevron* deference," the executive branch has aggressively pushed its own policy agenda through agency action.

The executive branch's aggressive behavior, coupled with the synergistic effect of *Chevron* deference, led Chief Justice John Roberts to observe that the doctrine "is a powerful weapon in an agency's regulatory arsenal," and warn that "the danger posed by the growing power of the administrative state cannot be dismissed."[3] The following discussion examines the constitutional and legal underpinnings for and against *Chevron* and offers observations as to how the doctrine could be altered by the Supreme Court.

Chevron was never intended to be transformative. The case dealt with the narrow question of whether, under the Clean Air Act, the Environmental Protection Agency could permit states to treat all polluting devices within a facility-wide "bubble" as a single stationary source.[4] As scholar Andrew Grossman has observed, *Chevron*'s author, Justice John Paul Stevens, "had no firm opinion on th[e] question and was sympathetic to the agency's exercise of discretion in an area fraught with competing legal and policy considerations."[5] It took several years for *Chevron* to be recognized as a watershed

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[1] 467 U.S. 837 (1984).

[2] 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction. … Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[3] *City of Arlington v. FCC*, 569 U.S. 290, 314-15 (2013)(Roberts, C.J., dissenting).

[4] *See* Andrew M. Grossman, City of Arlington v. FCC*: Justice Scalia's Triumph*, 2013 CATO Sup. Ct. Rev. 331 (2013)(prior to *Chevron*, "the Supreme Court routinely conducted open-ended 'totality of the circumstances' inquiries before deciding to go with its own view of a statute's 'most natural or logical' meaning")(internal quotations and citations omitted).

[5] *Id*. at 333-34.

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decision.[6] In 1986, Justice Antonin Scalia joined the Court and became a champion for *Chevron*'s doctrine.[7] *Chevron* reached its broadest precedential apex in the 2013 decision *City of Arlington v. FCC,* where a divided Supreme Court held that *Chevron's* two-step framework applies whenever "a court reviews an agency's construction of the statute which it administers,"[8] including in a case where the agency's interpretation of its own jurisdiction under the statute is at issue. Writing for the majority,[9] Justice Scalia distilled the *Chevron* inquiry to: "*whether the agency has stayed within the bounds of its statutory authority*."[10] And because "[t]hese lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges," Justice Scalia's principal constitutional argument for *Chevron* is separation of powers.[11]

Justice Scalia's theory is that *Chevron's* constitutional foundation rests on Article III and limits judicial power when deciding matters committed to the executive branch. In contrast, the *City of Arlington* dissent, authored by Chief Justice Roberts,[12] focuses on *Chevron*'s assumption that where a statute is "ambiguous," such ambiguity represents an implicit delegation by Congress to the agency ("*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority").[13] Accordingly, based on the constitutional obligation of the judiciary to limit the other branches of government to their proper constitutional role, Chief Justice Roberts and the minority opine that an agency's "interpretive authority" should be reviewed *de novo*.

The ranks of *Chevron*'s critics have grown since Chief Justice Roberts' *City of Arlington* dissent. Perhaps the most thorough critique of the doctrine is then-Judge Neil Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*.[14] The U.S. Court of Appeals for the Tenth Circuit prevented the retroactive application of a Board of Immigration Appeals decision, which held that an alien who entered the country illegally more than once was barred from adjusting their status. Judge Gorsuch, citing *Chevron*, succinctly framed the issue: "*accepting that an agency may overrule a court*, may it do so not only prospectively but also retroactively, applying its new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control?"[15] Referring to *Chevron* as the "elephant in the room … permit[ting] executive bureaucracies to swallow huge amounts of core judicial and legislative power…," Judge Gorsuch critically assessed the doctrine.[16] His fundamental assertion is that *Chevron* tramples the Founders' constitutional framework, in which the judiciary interprets the law and guards against the expansion of the executive and legislative branches. Allowing the executive branch to resolve the meaning of an ambiguous statutory provision is a "judge-made doctrine for the abdication of the judicial duty."[17]

Judge Gorsuch reasoned that *Chevron* affronts Article III. But objections to *Chevron* also implicate the proper separation of power between the Article I and Article II branches. *Chevron* is seen as allowing unchecked, legislative power in the "entity charged with enforcing the law"[18] because it permits an

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[6] Kenneth W. Starr, *Judicial Review in the Post*-Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986).
[7] *See* Grossman, *supra* note 4, at 335.
[8] *City of Arlington*, 569 U.S. at 296.
[9] Justice Scalia's opinion was joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan.
[10] *City of Arlington*, 569 U.S. at 297 (emphasis in original).
[11] *Id*. at 305.
[12] Chief Justice Roberts' dissenting opinion was joined by Justices Kennedy and Alito.
[13] *City of Arlington*, 569 U.S. at 321 (Roberts, C.J., dissenting).
[14] 834 F.3d. 1142 (10th Cir. 2016).
[15] *Id*. at 1144 (emphasis added).
[16] *Id.* at 1149 (Gorsuch, J., concurring).
[17] *Id*. at 1152 (Gorsuch, J., concurring).
[18] *Id.* at 1155 (Gorsuch, J., concurring)(citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892), for the proposition that

agency to set policy by aggressively interpreting "ambiguous" statutory terms. Of course, one response to this charge is that Congress should delegate authority narrowly, reserving broad policy decisions for itself.[19] Here, courts would assure that Congress does not delegate its legislative authority to the executive branch, thus preserving the role of the judiciary intended by the Framers.[20]

Another charge is that *Chevron* runs contrary to the Administrative Procedure Act (APA)[21] in which Congress instructed courts—not agencies—to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[22] The APA does not explicitly delegate these duties to the executive branch, which prompted D.C. Circuit Judge Brett Kavanaugh to term *Chevron* "an atextual invention by courts" and "a judicially orchestrated shift of power from Congress to the Executive Branch."[23]

Because its legal foundation was unclear from the beginning, *Chevron*'s contours remain uncertain. It does not apply in the criminal context because it might abdicate the judiciary's constitutional role.[24] It does not apply where there are "question[s] of deep 'economic and political significance.'"[25] Nor does it apply unless Congress has delegated general rulemaking authority to the agency and the challenged agency action furthers that authority.[26] Finally, it does not apply to agency opinion letters, policy statements, or informal guidance, which have become a form of agency policy making. [27] Thus, *Chevron* is evolving and it appears that the Supreme Court is paring back, rather than expanding, its application.

So what of *Chevron*'s future and how might the Supreme Court continue the doctrine's evolution? The Court is changing to include justices that have at least questioned *Chevron*. Chief Justice Roberts, Justice Samuel Alito, and Justice Gorsuch have all questioned the doctrine. Although Justice Clarence Thomas joined with Justice Scalia's majority opinion in *City of Arlington*, endorsing *Chevron*'s value, he has also pared it back.[28] And Judge Kavanaugh, whose confirmation to the Court is pending, has written extensively against *Chevron.* Although the honored principle of *stare decisis* will likely preserve *Chevron*'s validity, the principled constitutional objections against it, together with a less durable majority of justices favoring it, may further erode the doctrine. How might that occur?

First, in matters of technical judgment within an agency's expertise, the Supreme Court is highly unlikely to alter the deference doctrine in a manner that would allow courts to substitute their judgment for that of an agency. Because courts must be "most deferential"[29] in reviewing technical issues within the scope of an agency's expertise, such as whether a medical procedure constitutes a reimbursable expense under the Medicaid Act, or whether an environmental corrective action meets statutory

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"congress cannot delegate legislative power to the president").

[19] *See* G. Marfin and C. Marraro, *What Happened in Vagueness Stayed In Deference: A Note on Leaving* Chevron, 32 WLF Legal Backgrounder 15 (June 30, 2017), at 3.

[20] The non-delegation doctrine conceived in *A.L.A. Schechter Poultry Corp v. U.S.*, 295 U.S. 495 (1935), has fallen into disuse. Revitalizing that doctrine might satisfy one concern of the *Chevron* critics—stemming the tide against an out of control administrative state. But it also could have problematic effects, like increased litigation.

[21] 5 U.S.C. §§ 551 *et seq*. (2012).

[22] 5 U.S.C § 706 (2012).

[23] Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

[24] *Abramski v. United States*, 134 S. Ct. 2259 (2014).

[25] *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015).

[26] *United States v. Mead Corp.*, 533 U.S. 218 (2001).

[27] *Christensen v. Harris Cnty*., 529 U.S. 576 (2000).

[28] *See, e.g*., *id*. (Thomas, J.).

[29] *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 103 (1983).

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requirements, the Court will likely continue reviewing only for procedural error or lack of reason.[30]

However, where an agency interprets the statutory wording of its enabling authority, change is plausible. Judge Kavanaugh observes powerfully that: "[d]etermining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion."[31]

One doesn't have go far in the past to validate his observation. In *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018), the Court divided 5-4 over the issue of statutory clarity concerning "inter partes review" under the Patent Act, title 35, § 318(a) of the United States Code.[32] The Director of the Patent and Trademark Office failed to decide the patentability of all 16 claims presented, relying on a regulation that allowed review only of a subset of the "most promising challenges." The issue became whether § 318(a) of the statute required the Director to decide the patentability of every claim presented. Rejecting the Director's claim that the statute was ambiguous and thus *Chevron* applied, the Justice Gorsuch-led majority found the statute to be unambiguous based upon text and context.

However, in reviewing the identical statutory language, Justice Stephen Breyer and the minority found the statute to be ambiguous, siding with the Director. Underscoring Judge Kavanaugh's concern about the difficulties of consistently applying *Chevron*'s unambiguous/ambiguous dichotomy, Justice Breyer explained in his dissent that "[w]hich reading we give the statute makes a difference."[33] That "$64,000 dollar" issue presents the intrinsic difficulty in administering the *Chevron* doctrine.

So what might be a better rule of the road where decisions about the meaning of a statute are concerned? How can the judiciary be permitted to discharge its constitutional role to say what the law is by allowing judges to do what they have traditionally done—to impartially call balls and strikes, in a way that achieves more consistent interpretation of statutes? Justice Gorsuch and Judge Kavanaugh have one answer, which is for courts to discard the unambiguous/ambiguous *Chevron* dichotomy in favor of courts determining "the best reading of the statute."[34] As Judge Kavanaugh points out, "Judges are trained to do that"[35] and have many tools to help them, including statutory text and context, legislative history, and a variety of judicial canons developed over centuries.

Whether *Chevron* deference will ultimately fall is unknown. Will it disappear into the night like Butler in *Gone with the Wind* or will it engender the battle of titans for its cause like Drummond and Brady in *Inherit the Wind*? One can only guess, but in the meantime, one can take comfort in knowing that the federal bench strives to protect America's constitutional form of government and improve judicial decision making, so that it is as principled, rational and even-handed as possible.

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[30] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency's decision is arbitrary or capricious if its explanation runs counter to the evidence before the agency, the agency relied on factors which Congress did not intend the agency to consider, and/or the decision is not otherwise the product of reasoned decision making.

[31] Kavanaugh, *supra* note 24, at 2137.

[32] 35 U.S.C. § 318(a).

[33] *SAS Institute Inc.*, 138 S. Ct. at 1362 (Breyer, J., dissenting).

[34] Kavanaugh, *supra* note 24, at 2144; *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring)("courts would then fulfill their duty to exercise their independent judgment about what the law *is*").

[35] Kavanaugh, *supra* note 24, at 2154.

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