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CHEVRON THEN AND NOW

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I was a junior lawyer in the Solicitor General's office when the now-famous *Chevron* decision came down.[1] It was a significant victory, but to my memory no one noticed that the case had announced a new "doctrine" of deference to agency legal interpretations. The opinion did not seem to establish *Chevron* Steps One or Two, let alone Step Zero.[2] To the lawyers in "The Office," *Chevron* was a rare but welcome vindication of reasonable agency action in the face of a decades-old pattern of meddlesome interference by the D.C. Circuit. The decision was not seen to stand for the proposition that agencies have interpretive authority superior to the courts. It stood for the more modest proposition that courts cannot overturn the policy decisions

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[1] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[2] *Cf.* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

of agencies without a solid basis in the relevant statutes – a point that should have been obvious all along. If the statute could reasonably be interpreted to support the agency action, the court should do so.[3]

In those days, the D.C. Circuit saw itself as the all-powerful overseer of the administrative arm of the federal government, as if the Constitution provided that "the D.C. Circuit shall take Care that the regulatory laws be faithfully executed." Lawyers in the S.G.'s Office – almost all of them Democrats – saw themselves as lawyers for their executive branch clients, rather than as exponents of any particular ideology or administrative theory. The D.C. Circuit was our primary adversary, not because it was liberal or conservative but because it was so incredibly intrusive.

The 1970s and early 1980s were the heyday of purposive interpretation. The text of the statute counted for little. The views of politically-appointed officials counted for even less, especially after the presidential election of 1980. The court imagined that it channeled the congressional will, and thus had democratic warrant, and believed that it was protecting expertise against the intrusion of politics.

The D.C. Circuit's mission of perfecting the regulatory state extended both to procedures and to substance. As to procedures, the court did not hesitate to demand that agencies institute new procedures that, in the judges' view, would enhance expert decisionmaking and public input (which meant, in practice, giving weight to the views of advocacy groups).[4] As to substance, the D.C. Circuit felt free to decide for itself what the congressional purpose was and to overturn administrative decisions that, in its judgment, fell short of accomplishing it. Remedial statutes were broadly, or "liberally,"

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[3] *Chevron*, 467 U.S. at 844-45.

[4] *See* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 352-54 (1978) (the author of this essay worked as a research assistant on this article).

construed, and if the agency allowed other considerations, such as cost, to prevail, it was likely to be reversed.

The *Vermont Yankee* decision in 1978 put an abrupt halt to the procedural side of this project.[5] That decision essentially held that the procedures set forth in the statute were the only ones agencies were required to obey.[6] The D.C. Circuit could not make up new procedures, however sensible they might be. When it came to administrative procedure, agencies were bound by statutes passed by Congress, and not by the preferences of the D.C. Circuit.

Chevron might have been the substance equivalent of *Vermont Yankee*: agencies are bound only by the substantive policies embodied in the statute, and not by purposive inferences read into the statute by the courts. But in the ensuing 35+ years, *Chevron* metastasized into a doctrine of executive branch interpretive supremacy in the regulatory sphere. That is, it morphed from a sensible principle about how courts should construe statutes in the context of challenges to agency action into an executive branch super-power.

Recall the context of *Chevron* itself. Congress had enacted a law making the EPA responsible for regulating major new "stationary sources" of air pollution. But Congress did not define what it meant by "stationary source."[7] The term might refer to each and every point within a facility that emits pollution, or it might mean each facility that does so. The choice of meaning has significant economic implications; compliance would be far more expensive if applied at the level of each individual point source. Moreover, regulation at the

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[5] Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

[6] *See id.* at 524 ("[T]he [Administrative Procedure] Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them . . . .") (internal footnote omitted).

[7] 42 U.S.C. §§ 7401-7671.

facility level gave the company an incentive to reduce pollution more than legally necessary at point sources where it was feasible and inexpensive to do so, thus reducing the total cost of bringing pollution levels in the facility as a whole down to permissible levels. But if "source" were defined as meaning each point source, this solution would not be permissible. The appellate court explicitly conceded that neither the statute nor the legislative history defined the operative term "stationary source," but it concluded that the "purposes" of the statute were better served by the point source definition, ruling as a result that the agency's use of a facility-wide approach was "contrary to law."

The problem is that the Supreme Court spoke in *Chevron* of deference to agency statutory "interpretation."[8] That created the impression that *Chevron* was in some sense a carve-out from the principle of *Marbury v. Madison* that it is emphatically the job of the courts to decide what the law is.[9] I think that was a misunderstanding. When the EPA decided to regulate new sources of air pollution at the facility level, it was simply enforcing the statutory command in what it thought was the most efficient way possible. In theory, the agency could have regulated one source of pollution at the facility level and another source of pollution at the point source level, if there were a difference in circumstances justifying the distinction. The Clean Air Act Amendments did not "mean" one thing or the other; so long as all new sources of air pollution were regulated, the agency had a choice of regulatory methodology. That choice was not predicated on agency lawyers squinting at the statute to discover the meaning of the word "source," but on agency engineers and economists figuring out the most practical way to carry out their duty.

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[8] *Chevron*, 467 U.S. at 844-45.

[9] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The *Chevron* decision did much to restore executive agency authority to set policy within the bounds of their operating statutes.[10] But old habits die hard, and the D.C. Circuit continued, in some cases, to substitute its policy choices for the agency's in the guise of statutory construction. And so, the Supreme Court progressively tightened the screws, making it clear that the court could overrule the agency only when the statutory meaning is "plain" or the agency's view of the statute is not merely wrong but unreasonable.[11] What had started as a sensible exercise of statutory interpretation became a full-bore "doctrine," with multiple parts and numerous subtleties. More strikingly, *Chevron* came to be conceived as an independent interpretive "power," to be invoked, or not, in the agency's discretion.[12]

By the early 2020s, *Chevron* came to look rather different than it did at its inception. Rather than protecting the agency's policy discretion within the bounds of its statutory mission, the *Chevron* doctrine was used in many cases to justify expansion of the agency's mission, without any evidence that Congress intended to delegate the authority, limited only by the "plain language" of the statute. In cases like the Covid-based eviction moratorium, the census questions case, the Deferred Action on Childhood Arrivals, or the Clean Power Plan (to name just a few), the correct question was not whether the agency had chosen a statutorily forbidden method of carrying out its assigned tasks, but whether it had authority to regulate the relevant

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[10] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[11] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 699, 702-04 (1995); *see also id.* at 718 (Scalia, J., dissenting).

[12] *See, e.g.*, Cargill v. Garland, 57 F.4th 447, 465 (5th Cir. 2023) (en banc) (holding that an agency must "invoke" *Chevron* or it does not apply).

subject matter to begin with.[13] *Chevron* had come to mean that the agency could define the scope of its own authority, without regard to congressional intent, if there was a scrap of language in the statute that, taken out of context, could be taken to delegate power to the agency.[14]

This extension of *Chevron* is in conflict with separation-of-powers principles and with the theory of *Chevron* itself. Fundamental to the distinction between legislation and execution is the principle that every exercise of coercive or spending authority by the executive branch must be authorized by an Act of Congress. Whether or not there is any meaningful, judicially enforceable limitation on the ability of Congress to delegate its legislative power to the executive (the so-called "non-delegation doctrine"), it should not be controversial that *unless* Congress delegates power, the executive cannot exercise it. Agencies should not be able to aggrandize their power through creative reinterpretation of statutes, when the most reasonable interpretation of the statute (even if not the "plain meaning") is to the contrary.

That conclusion follows from the theory of *Chevron* itself. The reason courts defer to agency interpretations is that Congress delegated that interpretive authority (assuming that "interpretive authority" is the proper analytic category) to the agency. The propriety of interpretive authority thus depends on a prior judgment that the agency has been given that authority. It makes no sense to say that courts should defer to agency judgments with regard to whether the agency has been given the authority to make those judgments.

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[13] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021); Dep't of Com. v. New York, 139 S. Ct. 2551, 2556-57 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1904 (2020); West Virginia v. EPA, 142 S. Ct. 2587, 2600 (2022).

[14] *See* Daniel B. Rodriguez et al., *Executive Opportunism, Presidential Signing Statements, and the Separation of Powers*, 8 J. LEGAL ANALYSIS 95, 114 (2016).

Unfortunately, a five-Justice majority (led by Justice Scalia) rejected this argument in *City of Arlington v. FCC* (2013).[15] Chief Justice Roberts wrote a powerful and (to me) persuasive opinion, beginning in this way:

> A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.[16]

Rather than scrap *Chevron* entirely, at least for now, I suggest that the Court reverse *City of Arlington* and return to the view that the scope of an agency's delegated authority is a matter for the courts to decide, using ordinary principles of statutory construction. (One might even make the argument that assertions of statutory authority should be *clear*, on the basis that delegation should never be presumed or accidental.) That would be a major step toward restoring the rule of law to the administrative realm and might even lower the stakes of the "major question" and the "non-delegation" arguments.

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[15] *See* City of Arlington v. FCC, 569 U.S. 290, 301-04, 307(2013).
[16] *Id.* at 312 (Roberts, C.J., dissenting).