



## IS IT TIME TO RECONSIDER *CHEVRON* DEFERENCE?

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As this year marks the thirtieth anniversary of the Supreme Court's landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council*, it is both timely and appropriate to ask: have the courts gone too far in deferring to agency interpretations of the law, and indeed, to agency decisions in general?<sup>1</sup>

*Chevron* deference, the doctrine arising from the Court's decision, has been a guiding principle during my entire legal career. I have had the opportunity to experience it from several vantage points: first in private practice representing clients before various regulatory agencies, then during my time on the Hill as a Senate staffer drafting environmental laws, then again in my roles in the executive branch, and now finally as the chief environmental officer at GE.

From these very different vantage points, I have concluded that Justice Scalia may have been engaging in a bit of hyperbole when, on the fifth anniversary of the *Chevron* decision, he remarked, "[a]dministrative law is not for sissies."<sup>2</sup>

Based on my experience, administrative law, and particularly environmental law, is no more challenging than many other areas of law that our federal courts eagerly dive into every day. The interpretation and enforcement of technology patents come to mind, for example.

But challenging or not, I do think it is fair to say that the practice of administrative law has been made more frustrating by *Chevron*.

I have seen how *Chevron* can shape the application of laws and regulations, both positively and negatively; how it affects agency behavior

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<sup>1</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>2</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

and, in particular, the behavior of agency staff; and how it can bias the playing field in litigation, sometimes leading to patently unfair results.

All of this has led me to ask the question that I will try to answer here: is it time for us to reconsider *Chevron*, or at least reconsider the extent to which we apply it?

The answer, simply, is “yes.” Whether or not our environmental laws are complex, the *Chevron* decision, especially as it has been applied, is inconsistent with the most basic notion of our constitutional democracy—namely that three coequal branches of government serve as checks and balances against each other.

In that respect, our federal courts have a critically important constitutional role to play in reviewing agency interpretations of the law and agency decisions. Here I would agree with Justice Scalia: administrative law is not for sissies, especially if they are federal judges. Judges should not be so ready to defer to administrative agencies, as *Chevron* encourages them to do.

My hypothesis is that we would all be better off, as a nation and as individuals, if the federal judiciary would reassert its role more consistently in acting as a balance against the executive branch and its regulatory agencies.

The *Chevron* doctrine’s flaws, and problems generated by the deferential landscape that it has created, are threefold. First, there is no *statutory* support for the doctrine, and its *constitutional* underpinning is shaky, to say the least. Second, the expansion of its application has had pernicious effects, reducing the accountability of an already relatively unaccountable government-by-bureaucracy. Finally, the doctrine, especially as expanded, is generally unnecessary as a practical matter. The federal courts have often used *Chevron* as a fig leaf to avoid reviewing agency decisions, especially on technical matters.

I should stop here and note that I am not anti-regulation. I have been in the shoes of a regulator, and I believe that regulations are important and necessary, especially in areas like environmental protection. But I also believe that regulations must be reasonable and consistent with their authorizing legislation. Congress’s role is also important here, and at the end of the day democratic accountability is key.

I am also not naive. I recognize that *Chevron* probably is not going anywhere any time soon. Still, a doctrine that is so persistent—cited more than 66,000 times and mentioned in more than 13,000 federal court opinions—should be re-examined from time to time so that its application might be *tempered* by an appreciation of its flaws and changed circumstances.

It is clearly time to take a hard look at *Chevron* deference.

### I. CHEVRON’S LACK OF STATUTORY SUPPORT

In and of itself, *Chevron U.S.A. v. Natural Resources Defense Council* was not a particularly interesting case. It dealt with a very specific, somewhat

boring, technical and arcane regulation promulgated by the U.S. Environmental Protection Agency (EPA), one defining a “stationary source” under the Clean Air Act.<sup>3</sup>

Here is how Justice Stevens summed up the pivotal issue of the case:

The question presented by these cases is whether EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single “bubble” is based on a reasonable construction of the statutory term “stationary source.”<sup>4</sup>

This is hardly the kind of legal question that you might think would generate a foundational principle of administrative law: the requirement that courts defer to agency interpretations of the law.

For environmental policy wonks who spend their professional lives regulating, or trying to *comply* with regulations, the specific question presented by *Chevron* is bread-and-butter stuff—but the technical aspects of regulation are less familiar for most federal judges. I think that explains, at least to some degree, why the Supreme Court decided the issue in the way that it did, and why the doctrine has grown and expanded.

Given the breadth of Article III, federal judges are generalists. When the *Chevron* case arrived at the Supreme Court, I do not imagine that the justices were chomping at the bit to dig into the details of the meaning of “stationary source” in the Clean Air Act.<sup>5</sup>

To the contrary, several of the justices immediately headed for the exits. Chief Justice Rehnquist and Justice Marshall recused themselves from the outset, and Justice O’Connor followed them—for family reasons—during the deliberations. The six remaining justices signed on to a unanimous opinion authored by Justice Stevens.

We can get some insight into Justice Stevens’ approach from the papers donated by other justices to the Library of Congress. Apparently, Justice Stevens originally voted to affirm the D.C. Circuit, which had rejected the EPA’s interpretation of the statute and adopted its own definition of the term “stationary source.” But he subsequently changed his mind, and instead authored the decision to reverse the appeals court and defer to the EPA’s interpretation.

The papers in the Library of Congress contain several of Justice Stevens’ margin notes and are illuminating. At one point he noted that the Conference Committee report was “confusing!”<sup>6</sup> In my favorite quote, Justice

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<sup>3</sup> 42 U.S.C. § 85.

<sup>4</sup> *Chevron*, 467 U.S. at 837.

<sup>5</sup> U.S. CONST. art. III.

<sup>6</sup> Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers* (University of Maryland School of Law, Legal Studies Research Paper 2005-45, 2005).

Blackmun recorded that Justice Stevens said, “When I am confused, I go with the agency.”<sup>7</sup>

If you had to distill the *Chevron* doctrine to nine words, I do not think you could do better than: “When I am confused, I go with the agency.”

Now, you may ask: what’s wrong with that? After all, the subjects administered by agencies like the EPA *are* confusing. And when it comes to the Clean Air Act, the staff at the EPA *are* specialists.

The average federal judge, a generalist by necessity, may never have heard of the phrase “stationary source” before a Clean Air Act case hits his or her docket. So why shouldn’t that judge “go with the agency”? Why not defer to the technical expertise of the government’s technical specialists?

As I said at the outset, I think there are several problems with simply accepting an agency’s interpretation of the law, or its regulations, or even its decisions.

The first problem is a lack of statutory authority. When a federal court interprets or applies a federal statute, it is constrained by the language of the statute. The court must do what the statute tells it to do, and it cannot do what the statute does not tell it to do.

In *Chevron*, the courts were interpreting the Clean Air Act, and they were applying the Administrative Procedure Act (APA).<sup>8</sup> Nothing in the Clean Air Act itself suggested that Congress preferred that the courts defer to the EPA’s interpretation of the statute because of the agency’s superior technical expertise.

As for the Administrative Procedure Act, its text, as I read it, is not just in tension with the *Chevron* doctrine. I would say it is downright contrary to it. Section 706 of the APA says that the “reviewing court shall decide *all* relevant questions of law, [and] *interpret* statutory provisions.”<sup>9</sup> The language is clear: “[T]he reviewing court shall . . . interpret statutory provisions.”

There is nothing in the APA that suggests courts should defer to the regulatory agency. Rather, it states plainly that it is up to the *courts* to decide what a statute like the Clean Air Act means and does not mean. Isn’t that how administrative law is supposed to work in a constitutional system founded on concepts like “checks and balances” and “separation of powers”?

## II. PUTTING FOXES IN CHARGE OF GUARDING HENHOUSES

In 1920, in a case called *Federal Trade Commission v. Gratz*, which involved the construction of the statute that created the Federal Trade Commission (FTC), the U.S. Supreme Court took up the words “unfair method of competition” and said that “[i]t is for the courts, not the commission, ultimately to determine as a matter of law what they include.”<sup>10</sup>

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<sup>7</sup> Mark Sherman, *Supreme Court Climate Case Looks at EPA’s Power*, HUFFINGTON POST (Feb. 23, 2014), [https://web.archive.org/web/20141010063855/http://www.huffingtonpost.com/2014/02/23/supreme-court-climate-cas\\_n\\_4841901.html](https://web.archive.org/web/20141010063855/http://www.huffingtonpost.com/2014/02/23/supreme-court-climate-cas_n_4841901.html).

<sup>8</sup> 5 U.S.C. § 551.

<sup>9</sup> 5 U.S.C. § 706 (1994).

<sup>10</sup> *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920).

The underpinning of that case was *Marbury v. Madison*. In *Marbury*, the Court said that, as a matter of *constitutional* power and prerogative, “[t] is emphatically the province and duty of the Judicial Department to say what the law is.”<sup>11</sup> You can draw a straight line from *Marbury* to *Gratz*. Both decisions are premised on the fundamental judicial principle that it is up to the *courts* to say what the law is.

*Chevron U.S.A. v. Natural Resources Defense Council* takes a diametrically opposed view.<sup>12</sup> Under the rule of *Chevron*, it is up to the *agencies* to say what the law is, and the courts should defer as long as the agency is not being “unreasonable.” This reversal led legal scholar Cass Sunstein to describe *Chevron* as “merely a counter-*Marbury* for the executive branch.”<sup>13</sup>

It is somewhat surprising how little attention has been paid to the fundamental incongruity between *Chevron* and *Marbury*. *Chevron* abdicates the role that the Court assumed in *Marbury*, surrendering territory that Justice Marshall definitively claimed for the judiciary in 1803.

This brings me to a further problem with *Chevron*. The broad application of *Chevron* deference has created a regulatory landscape where agencies may in some cases do what they want, rather than what the law requires or allows them to do. The doctrine puts foxes in charge of guarding the agency henhouse.

The U.S. Environmental Protection Agency’s (EPA) position in the case *Utility Air Regulatory Group v. EPA*, which was recently decided by the Supreme Court, is illustrative.<sup>14</sup> In that case, to further a policy objective—albeit a very commendable one—the EPA simply “rewrote” the statutory trigger for entering a pollution control program from 100 tons to 100,000 tons. Although the Supreme Court ultimately upheld the underlying EPA rule, Justice Scalia, writing for the majority, admonished the EPA that its authority to administer the law “does not include a power to revise clear statutory terms.”<sup>15</sup>

I recognize that agencies must have some ability to interpret the bounds of their authority and implement statutes passed by Congress, but as a matter of constitutional principle and democratic prudence, that authority has to be subject to some oversight. The executive branch should not simply be allowed to construe statutory ambiguities—or to fill statutory gaps—unfettered and solely as it sees fit.

That’s *part* of the problem, but it goes deeper than that. When talking about the power of the executive branch, you have to keep in mind how that power actually is wielded.

It is certainly true that the president is accountable to the electorate, and the people that he appoints to manage his agencies are accountable to him. The problem is that, in the vast majority of cases, the power that *Chevron*

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<sup>11</sup> *Marbury v. Madison*, 5 U.S. 137 (1802).

<sup>12</sup> *Chevron*, 467 U.S. at 837.

<sup>13</sup> Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 *YALE L.J.* 2580, 2580 (2006).

<sup>14</sup> *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

<sup>15</sup> *Id.*

cedes to the executive branch is actually held and exercised, not by the president, and not by his political appointees, but by career staff. This power often resides at relatively low levels, with the bureaucrats who run the agencies on a day-to-day, decision-by-decision, policy-by-policy basis.

Let me give you an example. Last May, the Supreme Court denied a petition for review of the First Circuit's decision in a case called *Upper Blackstone Water Pollution Abatement District v. EPA*.<sup>16</sup> The issue in that case was another boring, technical, arcane EPA issue—this time involving an EPA permit requiring a public entity to spend more than \$200 million to upgrade a regional wastewater treatment facility.

That's a lot of money, especially when you consider that the District had just spent \$180 million on upgrades to the same treatment facility in 2009. The District asked the EPA to delay requiring further upgrades until an ongoing study of the effect of those 2009 upgrades was completed. EPA staff refused the District's request, and the First Circuit deferred to the EPA's decision. In fact, the U.S. Court of Appeals for the First Circuit said that a court "must generally be at its most deferential" to such EPA decision-making, even if it is "of less than ideal clarity."<sup>17</sup>

My point is not that the EPA was right or wrong in this case. My point is that a career permit writer—the quintessential faceless bureaucrat—made a decision costing hundreds of million dollars and that deference to the agency effectively insulated that decision from meaningful accountability.

### III. REBUILDING ACCOUNTABILITY IN THE ADMINISTRATIVE STATE

If a faceless staff permit writer is not held accountable to the courts, then she probably is not accountable to anybody. Sure, she's got a boss, who's got a boss, whose boss is a political appointee who owes *her* job to a president who is accountable to the electorate. Even in theory, that is a very attenuated kind of accountability.

And if you have worked at an agency, you know that in practice the political appointees routinely defer to the career staff on the technical matters that are often the subject of litigation and the object of *Chevron U.S.A. v. Natural Resources Defense Council* deference.<sup>18</sup> So, in many or even most cases, the agency leadership itself is not likely to provide meaningful oversight. This leaves the courts as an essential, and often the only meaningful, check and balance on bureaucratic power.

If you, like me, are uncomfortable with the rise of what I will call "the administrative state," then the concept of largely unfettered deference, whether under *Chevron* or the Administrative Procedure Act, has to make you squirm.<sup>19</sup>

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<sup>16</sup> Orders in Pending Cases, 569 U.S. (2013); *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9 (2012), *cert. denied*, 569 U.S. \_\_ (2013).

<sup>17</sup> *Id.*

<sup>18</sup> *Chevron*, 467 U.S. at 837.

<sup>19</sup> *Supra* note 8.

*Chevron* deference operates on the theory that the rule of law will be enhanced if the judicial branch defers to the technical expertise of the career staff in the agencies. But all too often the reality is that, as Professor Epstein has put it, the “bureaucrats will be more intent on expanding their power than behaving like disinterested experts whose first allegiance is to the rule of law.”<sup>20</sup>

Just consider what a senior U.S. Environmental Protection Agency (EPA) official recently said at a public meeting when asked about a decision that he was about to issue. When asked if he was worried that the decision would be challenged, he replied “no, because we will win as long as our decision is not clearly wrong.” The *Chevron* doctrine emboldens bad decision-making.

Career agency staff members are people with real power, in large part because of their technical expertise. But if that same expertise *exempts* them from accountability to the courts, then they are effectively not accountable to anybody. Power without accountability is never a good thing in a democracy.

The irony is that this deference is completely unnecessary. For nearly thirty years, the courts have deferred to the experts in the agencies under *Chevron* because of a perceived helplessness: it’s all so “confusing” for a judge; and when you’re confused, you “go with the agency.” But for at least the last twenty of those years, the *same* courts have been showing they are actually quite capable of evaluating the judgments of “experts.”

The context is different, of course, but the courts have demonstrated their ability to wade into highly technical areas following *Daubert v. Merrill Dow Pharmaceuticals* and its progeny.<sup>21</sup> In those cases, the federal courts have taken on the role of “gatekeepers” by assessing expert evidence for reliability before allowing it to be admitted.

*Daubert* has required the courts to weigh in on matters of real scientific and technical controversy and to do so with complex and consequential litigation hanging in the balance. Even if *Daubert* has not been an unqualified success, it has enabled the federal courts, however imperfectly, to fulfill an essential judicial function.

*Daubert* empowers the courts to ensure that the “experts,” simply by virtue of their proclaimed expertise, do not hold unchecked sway over the outcome of processes that the Constitution delegated to our courts. *Chevron*, in contrast, has caused the federal judiciary to abdicate a parallel, and equally essential, function.

So what we should do?

Again, I am not so naive as to think that *Chevron* will be going away any time soon. I am also realistic enough to know that there is no single solution. Certainly, some of the responsibility must fall on Congress to be clearer when it delegates responsibility to an agency about what it can, and cannot, do.

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<sup>20</sup> Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491, 505 (2008).

<sup>21</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Tailored amendments to the APA could be another response: to better define the degree of review that courts should bring to bear when reviewing agencies' technical decisions, especially today when technical expertise is no longer uniquely, or even primarily, housed in regulatory agencies.

And, finally, I would argue that the courts should do more themselves, as they do under *Daubert*. In so doing, they should demand more rigor as well from the agencies that are defending their actions. It should no longer be sufficient for agency decision makers to assume that the only hurdle they have to meet is simply not being "clearly wrong."