

Chevron Deference: Mend It, Don't End It

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In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹ the Supreme Court unanimously adopted an approach to interpreting federal statutes under which the courts are required to give substantial deference to the interpretations by the administrative agencies that enforce them. The Republicans in the House of Representatives have declared war on the *Chevron* doctrine, and they managed to pass H.R. 4768, the “Separation of Powers Restoration Act of 2016,” which amends section 706 of the Administrative Procedure Act (APA) to require federal courts reviewing decisions of law of administrative agencies to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions.”² There appeared to be little chance that the Senate would join the House, at least in part because of the filibuster. And if it had, President Obama would have vetoed the bill, as would almost any other President.³

Politics aside, is the *Chevron* doctrine sensible, at least in most cases, or is it as ill-advised as its opponents claim? This essay will argue that, by and large, *Chevron* makes sense in most cases, but that it needs some fine-tuning around the edges. In other words, mend it, don't end it. Before turning to possible adjustments, it is worth taking a minute to recall the origins of *Chevron*, and how the Supreme Court considered it to be quite unremarkable at the time it was decided.

I. THE ORIGINS

Chevron started as a challenge by environmental groups to the “bubble rule” that the Environmental Protection Agency (EPA) issued in 1981, at the start of the Reagan Presidency. The Carter Administration had proposed a

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¹ 467 U.S. 837 (1984).

² Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (as passed by House, July 12, 2016). The version of H.R. 4768 in the current Congress is H.R. 76. For convenience, this essay will refer only to H.R. 4768.

³ As a technical matter, the choice made by the authors of H.R. 4768 to overrule *Chevron* only by amending 5 U.S.C. § 706 may leave a gaping loophole. For example, the Court was recently faced with a *Chevron* issue in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), a private action, not brought under the APA. Given the specificity with which this amendment was written, the Court might well conclude that de novo review does not apply outside the APA, even though many cases of statutory interpretation of laws administered by federal agencies arise in private actions. *Remanded*, 845 F.3d 925, 926–27 (9th Cir. 2017), *cert. granted*, 198 L. Ed. 2d 780 (Sept. 28, 2017).

rule that was much more favorable to the environmentalists, but the Reagan people reversed course, which brought about the challenge. The D.C. Circuit, in an opinion by then Circuit Judge Ruth Bader Ginsburg, joined by Judge Abner Mikva and a visiting district judge, struck down the rule,⁴ and Chevron and the EPA persuaded the Court to hear the case. The Supreme Court, in a unanimous opinion by Justice John Paul Stevens, reversed and upheld the EPA's rule, with Justices Thurgood Marshall, William Rehnquist, and Sandra Day O'Connor not participating. Siding with Chevron and the Reagan Administration as amici were the American Gas Association and two conservative public interest law firms.⁵ The environmentalists were joined by the Attorneys General from eight states.⁶

This is the issue as the Court described it:

Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. 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."⁷

The Court then went on to set forth what has become known as the *Chevron* doctrine, under which the Court first decides if the statute is clear, and if it is not, it will defer to an agency's interpretation, provided that it is reasonable.⁸ The Court cited several cases for each aspect of the test in a very matter-of-fact manner as if it were not making any new law. Indeed,

⁴ *Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron*, 467 U.S. 837.

⁵ *Chevron*, 467 U.S. at 839.

⁶ *Id.*

⁷ *Id.* at 840 (footnotes omitted).

⁸ *Id.* at 842-43.

in summing up what it concluded was the proper approach to its task, which it then found the Court of Appeals to have “misconceived,” the Court stated that it was applying “well-settled principles.”⁹ To read the opinion today, one would hardly think that the Court was doing anything controversial or novel in the least, or that it was doing anything more than follow its prior teachings on statutory interpretation of federal laws when the relevant agency had offered its opinion on the question. Indeed, at the very time that *Chevron* was before the Court, there was pending in Congress a legislative attempt to impose more rigorous review of agency interpretations of law, known as the Bumpers amendment,¹⁰ and the Court did not even give it a nod.

Quoting *Morton v. Ruiz*,¹¹ the *Chevron* Court observed that the power to administer congressional programs “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”¹² The Court further described the situation this way:

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.¹³

Put another way, the Court viewed this as a case in which the EPA was being asked by two competing interests to resolve a question in diametrically opposite ways, and there was no reason to think that, in the absence of clear statutory guidance, Congress intended the courts rather than the EPA to decide it. As the Court further pointed out,

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making

⁹ *Id.* at 845.

¹⁰ See Ronald M. Levin, *Review of “Jurisdictional” Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355 (1983).

¹¹ 415 U.S. 199, 231 (1974).

¹² *Chevron*, 467 U.S. at 843.

¹³ *Id.* at 865 (footnotes omitted).

responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹⁴

There is, of course, room for debate as to some of the Court's premises, but they were surely not novel at the time, and there was nothing in the APA that contradicted what the Court concluded had been decided in its prior rulings. Moreover, if, as the sponsors of H.R. 4768 contended, there are serious separation of powers issues with delegating the power to fill in the gaps in federal statutes to the federal agencies that enforce them, the opinion does not reflect any such concerns. Before examining some of the benefits of *Chevron* and its arguable, but I believe fixable, flaws, a few overall observations about the effort to overturn *Chevron* are in order.

II. WHY H.R. 4768?

First, the opposition to *Chevron* is almost surely based on objections to what President Obama has done (and a prediction of what Hillary Clinton might have done had she been elected), not on neutral principles of separation of powers or administrative law. There is no other explanation for why all the supporters for H.R. 4768 in committee were Republicans, and all of the opponents were Democrats.¹⁵ This view is confirmed by the timing of the legislation: *Chevron* has been debated for years by academics, yet Congress became interested enough to advance a bill in an election year, only when the House was controlled by the Republican Party. Indeed, the timing of the bill's House passage on July 12, 2016, is rather ironic, since the previous month, the Court in *Encino Motorcars* rejected the Department of Labor's interpretation of a statute under its jurisdiction for failure to

¹⁴ *Id.* at 865–66.

¹⁵ The bill ultimately passed in the House 240 to 171, with 239 aye votes from Republicans and 1 aye vote from a Democrat, Collin Peterson of Minnesota. OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 416 (2016), <http://clerk.house.gov/evs/2016/roll416.xml>.

engage in the kind of full debate of the issues that the Court said *Chevron* requires.¹⁶

Second, *Chevron* is not a Democratic or Republican doctrine, but one that advantages Presidents of all parties. *Chevron* itself upheld a Reagan Administration reversal of a Carter Administration statutory interpretation, with the result favoring industry over environmentalists. Nor, properly understood, is the proposed change one that will always, or even often, favor regulated industry more than *Chevron* will, and in fact did in that case. And if an agency's initial decision is upheld in court, a subsequent Administration has much more flexibility under *Chevron* to change its mind than it would under H.R. 4768, as *Chevron* itself recognized:

The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.¹⁷

Thus, unless the sponsors of H.R. 4768 assumed that the White House and the federal agencies will never again be controlled by their own party, their support for de novo review is hard to understand. But perhaps at least some of the sponsors are legislators of principal, as evidenced by the introduction of H.R. 76 in this Congress although their party controls Congress and the White House.

Third, while there are principled objections to *Chevron* in theory as well as in practice, it is hard to believe that anything but politics is behind it. To be sure, there is academic support for changing *Chevron*, but that alone would not have produced a House-passed bill. And, as noted above, the politics seem to assume that judges will be more favorable to the less-

¹⁶ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016); see also *supra* note 3.

¹⁷ *Id.* at 863–64.

regulation approach favored by the sponsors of H.R. 4768, but if those judges have been appointed by Democratic Administrations, that assumption may well be in error, as evidenced by the outcome of *Chevron* in the court of appeals.

III. *CHEVRON'S* PROBLEMS

No matter how much politics influenced the House passage of H.R. 4768, there are respectable arguments against *Chevron*.¹⁸ First, its assumption that Congress actually delegated the power to fill gaps, either explicitly or implicitly, is doubtful, especially to the extent that the doctrine has been applied. The fact that Congress delegated to an agency the power to issue regulations generally does not mean that it intended to delegate that power to an agency over every possible decision that implicates the meaning of its governing statute. That is what the Court quite sensibly concluded in both *Gonzales v. Oregon*¹⁹ and *King v. Burwell*,²⁰ when the Court held that Congress did not intend to give either agency *Chevron* deference in those circumstances, striking down the agency rule in the first case and upholding it in the second.

Another case where the Court should have questioned whether Congress intended to delegate to the agency the authority to issue rules in the specific field at issue was *City of Arlington v. FCC*.²¹ The statute at issue there provided for judicial review in both federal and state courts over decisions by localities to deny permits for broadcast towers for wireless communications that were subject to certain FCC substantive requirements. The FCC's rules set times within which a state or local agency must act before judicial review could occur, and the question was whether the FCC had the authority to issue such rules. The claim of the localities was that the rules were "jurisdictional" and hence beyond the power of the FCC, but the Court rejected that argument, in part because of the difficulty of deciding what lines are "jurisdictional."²² The stronger argument, which the Court declined to hear, was that Congress never intended to delegate to this federal agency the power to tell state and local agencies how long is too long: if a tower operator claimed there was unreasonable delay, the court – state or

¹⁸ I do not agree that the Constitution forbids Congress from expressly delegating to agencies the power to fill in gaps and interpret statutes, subject to the protections afforded under *Chevron*. See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

¹⁹ 546 U.S. 243 (2006).

²⁰ 135 S. Ct. 2480 (2015).

²¹ 133 S. Ct. 1863 (2013).

²² *Id.* at 1868–71.

federal – would decide that question, not the FCC. Thus, the first objection to *Chevron* is that it improperly assumes that Congress actually intended to make broad and unwarranted delegations to federal agencies over all areas in which they have *any* responsibilities. To which the answer is not to end *Chevron*, but for the courts to be more circumspect in assuming such delegation, while still recognizing that the general premise is valid in most cases.

Second, the fact that Congress cannot think of everything when it writes its statutes does not mean that it intends for terms it uses to have ever-changing meanings. Take the issue of whether certain workers are “employees” or “independent contractors” as applied to two different situations: Uber drivers and drivers for transport companies such as FedEx and UPS. Although there are some different fact-patterns within each category, there are a limited number of them, and the basic question is whether Congress wanted the application of the law to be the same for each pattern or for the relevant agency to be able to change its mind from time to time, thereby making it challenging, at best, for workers, their unions, and employers to conduct their activities under the law. That problem is exacerbated when agency interpretations are issued in adjudications, like those at the NLRB, rather than as part of a final rule, which the agency must follow until it amends or repeals the rule. And if the issue as to whether someone is an employee arises under the FLSA, as it did in *Glatt v. Fox Searchlight Pictures Corp.*,²³ a private action in which plaintiffs contended that the law required them to be paid as employees even though they were classified by the company as “interns,” a judge or possibly a jury will decide the question, subject to limited appellate review, even with undisputed facts. Moreover, the “employee” question arises under many statutes, administered by such divergent agencies as the IRS, DOL, EEOC, and NLRB, so that if *Chevron* applies to all of them, there is virtually no chance of achieving uniformity.

Whatever Congress may have intended on any specific set of facts regarding whether an individual is an employee under one federal law, there is no reason to think that it meant to have different results under almost identical statutory language, simply because the laws are administered by different agencies. The Supreme Court has the power to decide cases in a way that will finally establish a single meaning for disputed terms in a particular statute. However, the Court is only taking seventy-five or so cases a year and has shown no inclination to resolve the many disputes in the lower

²³ 811 F.3d 528 (2d Cir. 2016).

courts over the meaning of federal statutes, let alone to issue cross-statutory rulings that clarify the application of all of those laws. It is unfortunate enough to have different courts of appeals issuing different interpretations of similar federal laws, but adding the ability of different federal agencies to change their views, to which *Chevron* deference must be applied, complicates an already confused area. This suggests that there are at least some areas where the need for uniformity should outweigh the flexibility that *Chevron* grants agencies and takes power away from the courts.

Third, *Chevron* deference only applies when the statutory language is ambiguous, *i.e.*, not clear. But clarity, like beauty, is in the eye of the beholder, and far from providing a clear dividing line, the question of ambiguity itself is debatable. For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the dissent thought that “read literally,” the definition of medical devices included tobacco products,²⁴ whereas the majority concluded that “Congress has directly spoken to the issue here and precluded the FDA’s jurisdiction to regulate tobacco products.”²⁵ It does not matter which side has the better of that particular argument; the fact that there can be legitimate arguments on whether a statute is ambiguous suggests that the assurance that courts will honor congressional directions when they are clear rings somewhat hollow. At the very least, it suggests that courts should forthrightly admit that ambiguities are almost inevitable, and even more so in cases that reach a court of appeals or the Supreme Court. Thus, in *Brown & Williamson*, the Court should have acknowledged that Congress had never actually focused on whether tobacco products fell within the statutory language and thus could not provide the kind of certainty that *Chevron* step one requires. In other words, to the extent that *Chevron* is defended on the ground that it still assures that the will of Congress is being carried out, there is arguably too much wiggle-room at step one that enables the courts to defer to an agency when, on balance, the better reading of the law favors those challenging the agency decision.

Fourth, there are a number of situations where the assumption of delegation does not make sense because the agency has what amounts to a conflict of interest in deciding a particular question. One subject-area where this arises is federal taxation, when the IRS takes a position in interpreting a provision in the tax code which requires the taxpayer to pay more into the Treasury. For example, in *Mayo Foundation for Education and Research v. United States*, the issue was whether doctors who had completed medical

²⁴ 529 U.S. 120, 162 (2000) (Breyer, J., dissenting).

²⁵ *Id.* at 133.

school, but were residents who had to do several more years in that capacity to become licensed in their specialty, were “students” whose earnings were exempt from Social Security taxes that their employer would otherwise have to pay.²⁶ The Court unanimously rejected the taxpayer’s efforts to apply the less deferential standard found in pre-*Chevron* tax cases: “We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”²⁷ But unlike *Chevron* itself, in which the EPA was essentially neutral as between the claims of environmentalists, who wanted greater regulation, and of industry, which wanted less, the IRS is hardly neutral in most cases: its job is to collect revenue. This reality does not mean that *Chevron* is irrelevant or should be disregarded, because the IRS does have expertise that should not be shunted aside. It only suggests that courts should be a little more cautious in determining whether the IRS’s interpretations are reasonable under step two.²⁸

Similarly, in contract disputes with the Government, statutory terms are often included in the contract, and there is no reason to think that Congress intended to give the Government a *Chevron* advantage in a routine contract dispute, yet some courts have extended *Chevron* to cover that situation: “*Chevron* has implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation.”²⁹ Put another way, the delegation theory often used to support *Chevron* seems to fit less well in situations in which the agency’s neutrality can reasonably be questioned. And when it can, then at least the courts should engage in a more rigorous review under *Chevron* without abandoning it entirely.

IV. CHEVRON’S ADVANTAGES

There are, however, a number of arguments on the other side that support *Chevron*’s basic approach, while recognizing some of its weaknesses. First, with the odds less favorable to agencies as a result of H.R. 4768, there would be more court challenges to agency decisions on the ground that their interpretations of the governing statutes were incorrect. With deference,

²⁶ 562 U.S. 44, 47 (2011).

²⁷ *Id.* at 56.

²⁸ In some situations, the IRS is truly neutral. For example, in deciding whether certain payments are alimony or child support, one of the former spouses will pay more taxes and the other less, depending on the outcome, which is what Congress intended. See 26 U.S.C. §§ 71, 215 (1986). Thus, in that situation, the IRS has no incentive to favor one interpretation rather than another.

²⁹ *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir.) (Bork, J.), *cert. denied*, 484 U.S. 869 (1987).

agencies have a leg up, and without it, at least at the margins, there will be more cases filed and more appeals taken from adverse lower court decisions. It is impossible to estimate the increase, but there can be little doubt that it will occur – that seems to be the point of H.R. 4768. And, in the end, more disputes between citizens and their governments (or cases like *Chevron*, where the real battle was between industry and environmentalists) will be decided by federal judges rather than by appointees of the elected President. It is a little surprising to see Republican lawmakers, who often rail against “the judicial activism of unelected judges,” deciding that they would like to have judges, rather than agency officials, have a greater say on interpretations of federal law, because that is what H.R. 4768 does.

Second, H.R. 4768 applies only to questions of law, and in many cases, it is unclear whether an agency has decided a question of law or has exercised its discretion and applied the law to a particular set of facts. For example, in *Chevron* itself, the disputed term was “stationary source,” and as the Court points out, there were many possible meanings of that term, in part because the question arose for the EPA in a number of different contexts.³⁰ Indeed, it is not clear that the question presented in *Chevron* was a legal one, in the sense that the statute could answer the relevant question without regard to the many factual contexts in which the EPA will have to employ it.³¹ Thus, if the phrase has one and only one meaning, which is what would happen if the courts have the final say, the EPA would lose its flexibility to apply a term differently in different contexts or change its position over time. Even if the courts were to find a challenge not to be a legal one, they would still be able to review the decision under the arbitrary and capricious standard of the APA.³² Under that standard, agencies are given considerable leeway, just as they are under step two of *Chevron*. If H.R. 4768 had been enacted, agencies could still have attempted to get around it by describing their decisions as application of law to facts and hence subject to arbitrary and capricious review, instead of *de novo* review for questions of law. Until now, it mattered much less whether review was under *Chevron* or under the arbitrary and capricious standard because agencies received the benefit of the doubt under both. If that is no longer the case, challengers will dispute the agency’s characterization, potentially adding another issue to every case.

³⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 457 U.S. 837, 842 (1984).

³¹ *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007) (refusing to eliminate “the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term, where it occurs.”).

³² 5 U.S.C. § 706(2)(A) (2012).

Third, the supporters of H.R. 4768 argued that cutting back on agency deference would create incentives for Congress to do a better job of writing clear statutes. That goal is surely a desirable one, but the likelihood of achieving it ranges between small and none for several reasons. Congress has so much on its plate these days that it is unrealistic to think that its members will spend the kind of time needed on every bill that comes before them to be sure that ambiguities are reduced to an absolute minimum. Even if its members had the will and the time, clarity is often unavailable because there is genuine disagreement on the proper outcome, and so the problem is passed on to the agencies or courts to resolve. Moreover, it is simply not possible for Congress to think through every question that might arise under a pending bill and come up with an answer. Take the current controversy over whether the prohibition in Title IX against denying students benefits based on “sex” requires public schools to allow transgender students to utilize the restroom with which they identify and not the one for use by individuals with their birth sex assignment. Whatever the answer is today, no one can fault Congress for not coming up with it when Title IX was enacted in 1972.³³

One other point about the text of H.R. 4768: it obligates courts to undertake de novo review of constitutional as well as statutory legal issues. In one sense, the Court since *Marbury v. Madison*³⁴ has done just that, but in some cases, involving the legality of the exercise of presidential power, the Court has looked to prior presidential practice and the response, or lack of response, of Congress to it.³⁵ I have expressed doubts as to the propriety of listening to the sounds of silence,³⁶ and this provision could be read to require courts in all cases to pay no attention to the history of congressional-presidential actions and congressional responses when deciding how constitutional powers are allocated between the two branches. The committee report makes no mention of the constitutional interpretation mandate, but it is hard to imagine that courts will not wonder what it means and how it is to be applied, especially in light of prior Supreme Court opinions on this issue.

³³ G.G. *ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.); *stay granted*, 136 S. Ct. 2442 (2016); *j. vacated*, 137 S. Ct. 1239 (2017).

³⁴ 5 U.S. 137 (1803).

³⁵ *NLRB v. Noel Canning*, 135 S. Ct. 2550 (2014); *Dames & Moore v. Reagan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951).

³⁶ Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211 (2013).

V. CONCLUSION

Since *Chevron* is the status quo, the proponents of H.R. 4768 have the burden of overcoming legislative inertia and demonstrating that de novo review is better than *Chevron* review. They have not made the case, and indeed in some respects their solution would create different and, perhaps, more serious problems in judicial review. But that does not mean that everything is just fine with *Chevron* and that no changes are needed. The Court has shown its ability to make adjustments in the application of the doctrine in cases like *United States v. Mead Corp.*,³⁷ and found it to be inapplicable in *King v. Burwell*,³⁸ without congressional intervention. *Chevron* is not now, and may never have been, an all-or-nothing proposition, and there is no reason why the Court cannot make further adjustments at the margins, mainly in those situations in which the basic premise that Congress expressly or impliedly delegated the power to an agency to fill particular gaps in a law is unfounded. There is no reason to abandon *Chevron*'s underlying delegation premise, but courts should openly bring a little skepticism to its application when the rationale for the premise seems more doubtful, and would smooth out some of the rough edges without the radical changes that H.R. 4768 would compel.

³⁷ 533 U.S. 218 (2001).

³⁸ 135 S. Ct. 2480 (2015).