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Justice Stevens and the *Chevron* Puzzle

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JUSTICE STEVENS AND THE *CHEVRON* PUZZLE

Thomas W. Merrill

ABSTRACT—Justice Stevens’s most famous decision—*Chevron U.S.A. Inc. v. NRDC*—has come to stand for an institutional choice approach to agency interpretation. But there is no evidence that Justice Stevens shared this understanding. Instead, he followed an equilibrium-preserving approach, which sought to nudge agencies to reconsider decisions the Justice regarded as unreasonable. Although the equilibrium-preserving approach is consistent with what a common law judge would embrace, the institutional choice perspective is probably more consistent with the needs of the modern administrative state, and it appears the Court as a whole is gradually adopting that perspective.

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INTRODUCTION

It was a privilege to speak at the gathering honoring the judicial career of Justice Stevens. I was able to observe Justice Stevens on the Court for many years—first as a law clerk to Justice Blackmun, later as a lawyer in the Solicitor General’s office, and finally as an academic and occasional participant in Supreme Court cases. It was a special honor for me when I was named the inaugural John Paul Stevens Professor of Law at Northwestern in 1993, a position I held for ten years. This was because I had come to regard Justice Stevens as the Court’s best lawyer. One may not always agree with the results Justice Stevens reached—I certainly did not. But he was the quintessential common law judge, who approached each case with its own particularity. He was always prepared, with a sure grasp of the record and the relevant precedents in each case, and an uncanny insight into strengths and weaknesses of the competing positions. This meant he had a unique ability to spot—and expose—the weaknesses in every lawyer’s case, to the frequent discomfort of the advocates. For this, if no other reason, the Court was greatly strengthened as an institution during his long tenure.

This Article addresses Justice Stevens’s most famous decision, *Chevron U.S.A. Inc. v. NRDC*.¹ Certainly it is his most cited. A Westlaw search reveals that *Chevron* has been cited in 11,760 judicial decisions and 2130 administrative decisions.² It continues to accumulate judicial citations at the rate of about 1000 per year. It is eclipsed only by decisions like *Erie Railroad v. Tompkins*³ (14,663 decisions) and *Bell Atlantic Corp. v. Twombly*⁴ (47,339 decisions). The company it keeps provides a clue about the reason for its frequent invocation. *Chevron* has become the leading decision expressing the standard courts should apply in reviewing an administrative agency’s interpretation of a statute it administers. As such, it has transsubstantive significance—it is potentially relevant in any case in which an administrative body has weighed in on a statutory interpretation issue before a court, which includes a high percentage of cases on the noncriminal docket.

¹ 467 U.S. 837 (1984).

² This and all following citation counts are based on Westlaw searches conducted on July 28, 2011.

³ 304 U.S. 64 (1938).

⁴ 550 U.S. 544 (2007).

Chevron's significance goes far beyond its utility as a statement of the standard of review, however. This is revealed by its frequency of citation in law review articles. *Chevron* has been cited by 8009 articles included in the Westlaw database.⁵ The fascination academics have for *Chevron* means it has now been cited far more than *Erie* (5052), a decision Bruce Ackerman once described as the "Pole Star" for an entire generation of legal scholarship.⁶ Indeed, *Chevron*'s frequency of citation in law review articles puts it in roughly the same league as *Marbury v. Madison*⁷ (8492), which is perhaps appropriate given that *Chevron* has been called the "counter-*Marbury*" for the administrative state.⁸

When we seek to evaluate this most consequential of decisions in light of what we know about its author, however, we encounter a puzzle. *Chevron* has come to stand for judicial deference to administrative interpretations of law; yet overall, Justice Stevens was not especially deferential to agency decisions.⁹ *Chevron* has also been understood to mark the beginning of a willingness on the part of the federal courts to share interpretational authority with administrative agencies; yet there is little indication that Justice Stevens ever doubted the unqualified judicial prerogative to "say what the law is."¹⁰ The disconnect between *Chevron* and the revealed values of its author has led commentators to search for some metaprinciple that would square things up between Justice Stevens and his most famous progeny.¹¹

The solution to the puzzle, in my view, lies in Justice Stevens's orientation to deciding cases in the manner of a common law judge. He viewed each challenge to administrative action as a discrete occasion to ask

⁵ In addition, *Chevron* has also been cited in 30 American Law Reports articles, 58 Westlaw journals, and over 3600 miscellaneous other pieces of legal authority including digests, practice guides, circulars, and practitioner's handbooks.

⁶ BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977).

⁷ 5 U.S. (1 Cranch) 137 (1803).

⁸ Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

⁹ Justice Stevens concurred with agency interpretations in 60.9% of cases from 1975–2006. William N. Eskridge, Jr. & Lauren B. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO L.J. 1083, 1154 tbl.20 (2008). This means he was less deferential than Justices Scalia (64.5% from 1986–2006), Ginsburg (69.5% from 1993–2006), Breyer (72.0% from 1994–2006), and Burger (81.3% from 1969–1986), although somewhat more deferential than Justice Brennan (52.6% from 1956–1990). *Id.*

¹⁰ *Marbury*, 5 U.S. (1 Cranch) at 177.

¹¹ Especially notable is Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1040 (2010). Professor Watts argues that Justice Stevens deferred to agency interpretations when a statute contains conflicting purposes (*Chevron*) but not when the statute contains a single dominant purpose (*Massachusetts*). *Id.* at 1052. The problem with this is that every statute contains a least two purposes: a desire to achieve a goal and a desire to limit pursuit of that goal after some point. If it is unclear where Congress drew the line, then deference should be in order.

whether the agency was proceeding in a reasonable fashion. If the agency was acting within the bounds of reason as he saw it, then he was happy to defer.¹² But if he thought the agency had gone off track, either by exhibiting excessive regulatory zeal or by abdicating its mandate to address matters of public concern, he considered it appropriate for the Court to provide a nudge pushing the agency back toward the path of reason.¹³ One might call this an equilibrium-preserving approach to judicial review.¹⁴ I do not favor this approach myself: it puts too much stock in the ability of judges to discern the path of reason and hence suffers from the same kind of hubris associated with the advocates of judicial “pragmatism.”¹⁵ But it is not at all surprising that it would be congenial to a common law judge, especially one possessed of unusual talent and self-confidence.¹⁶

I will begin by offering a thumbnail sketch of why I think *Chevron* came to stand for a development of transformative significance. I will then explain briefly why I think Justice Stevens never intended to endorse the perspective for which his opinion has come to stand. I will close with some reflections about why I think Justice Stevens regarded the function of judicial review of administrative action to entail what I have called an equilibrium-preserving approach, and why I think this is problematic.

I. INTEGRATIVE AND INSTITUTIONAL CHOICE APPROACHES TO JUDICIAL REVIEW

Chevron's importance, from a jurisprudential perspective, is that it is associated with a fundamental change in the relationship between courts and agencies.¹⁷ Before *Chevron*, courts approached agency interpretations using what I will call the integrative method of interpretation.¹⁸ Under this approach, the court seeks to fix the meaning of a contested statutory

¹² See, e.g., *Rapanos v. United States*, 547 U.S. 715, 788 (2006) (Stevens, J., dissenting); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 348 (1994) (Stevens, J., dissenting).

¹³ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also *infra* notes 61–71 and accompanying text (discussing *Massachusetts v. EPA*).

¹⁴ Cf. William N. Eskridge, Jr. & Philip F. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28 (1994) (describing law as “an equilibrium, a state of balance among competing forces or institutions”).

¹⁵ E.g., RICHARD A. POSNER, *HOW JUDGES THINK* 40, 246–48 (2010).

¹⁶ The connection between the common law style of judging and aggressive judicial review of questions of law finds an early and articulate proponent in JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (1927). See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 972–79 (2011) (discussing Dickinson's influence on the development of the appellate review model of administrative law).

¹⁷ Thomas W. Merrill, *The Story of Chevron USA Inc. v. Natural Resources Defense Council, Inc.: Sometimes Great Cases Are Made Not Born*, in *STATUTORY INTERPRETATION STORIES*, 166–68 (William N. Eskridge, Jr. et al. eds., 2011).

¹⁸ For further explication of integrative interpretation, see Thomas W. Merrill, *Faithful Agent, Integrative, and Welfareist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1569–72 (2010).

provision by integrating or synthesizing as many data points as possible that bear on the question of its meaning. The objective is to adopt the interpretation that supplies the best “fit” with these data points. The relevant data points include, of course, the text and legislative history of the statute. But they also include past statutory interpretation precedents by courts, evidence of approval or disapproval of past interpretations by Congress, and—most crucially for present purposes—administrative interpretations.

Under the integrative approach, administrative interpretations are generally factored into statutory interpretation through a process that grades the agency interpretation along a number of dimensions. For example, the longevity of an administrative interpretation is a critical factor.¹⁹ The longer an administrative interpretation has been around, the more weight it is given, the assumption being that longstanding interpretations are more likely to have induced reliance by a variety of actors, and protecting reliance is an important judicial function. Other grading factors include whether the interpretation has been adopted contemporaneously with the enactment of the statute,²⁰ whether the issue is a technical one as to which the agency has expertise,²¹ whether the agency has offered a reasoned explanation for its interpretation,²² and whether the interpretation had been adopted through a process in which affected interests had been allowed to present their views.²³

After *Chevron*, a different approach to assessing administrative interpretations began to emerge. I will call this the “institutional choice” approach to agency interpretation. The root idea here is not to seek the best interpretation in each case, but to ask which institution is the preferred interpreter of the issue in question.²⁴ The choice of the preferred institution, moreover, is understood to be under the control of Congress. Consequently, the inquiry is framed in terms of congressional delegation: has Congress delegated authority to the agency or to the court to act as the primary

¹⁹ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1018–19 (1992).

²⁰ *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (“[A] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . .”).

²¹ *Aluminum Co. of Am. v. Cent. Lincoln Peoples’ Util. Dist.*, 467 U.S. 380, 390 (1984) (noting the “technical and complex” nature of the subject matter and the agency’s particular expertise).

²² *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that an administrator’s determination should be weighed upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”).

²³ See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985).

²⁴ See generally ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (urging a super-strong version of the *Chevron* doctrine based on principles of comparative institutional choice analysis).

interpreter of the statute in question?²⁵ If the agency has been chosen, then the agency should fill gaps and ambiguities in the statute, provided it does so reasonably. If the matter has been assigned to the courts, then the courts should play this role.

I am not suggesting that all members of the Court have accepted the institutional choice approach to agency interpretation. Some, like Justice Breyer, seem resolutely committed to the old integrative method.²⁶ Nor am I suggesting that all of the difficulties posed by the institutional choice approach have been worked out. The Court's decision in *United States v. Mead Corp.*,²⁷ in particular, although generally consistent with the institutional choice perspective, has sown much confusion in the lower courts.²⁸

But it is worth emphasizing the great divide between the integrative and institutional choice approaches. Under the integrative method, deference to agency views is always discretionary; under the institutional choice approach, it is often mandated because it is implicitly required by Congress.²⁹ Under the integrative method, the focus is always on the individual case and how it should be correctly decided; under the institutional choice approach, the focus shifts to a higher order inquiry into the allocation of institutional authority. Under the integrative method, judges enjoy great flexibility in moving from one source of interpretative data to another; under the institutional choice approach, the aspiration is to confine judges to a sequential inquiry that remains uniform in all cases.

II. JUSTICE STEVENS AND THE INSTITUTIONAL CHOICE APPROACH

The new institutional choice perspective is associated with *Chevron* and indeed is often called the "*Chevron* doctrine." Yet I think it is clear that Justice Stevens had no intention of advocating something like the institutional choice approach when he authored the unanimous opinion for the Court in *Chevron*. I say this for several reasons.

²⁵ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 881 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 196–97 (2006).

²⁶ *E.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89–90 (2007) (Breyer, J.) (departing from two-step process prescribed by *Chevron* for "purposes of exposition"); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J.) (considering multiple factors in applying *Chevron*); *Christensen v. Harris Cnty.*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) ("*Chevron* made no relevant change."); Steven Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

²⁷ 533 U.S. 218 (2001).

²⁸ *See* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 355–56 (2003).

²⁹ The mandate from Congress is widely acknowledged to be implicit because the express signals Congress has given generally cut in favor of independent judicial judgment rather than deference. *See* Merrill & Hickman, *supra* note 25, at 870–72.

The first is based on the opinion itself. *Chevron* contains passages at the beginning and end of the analytical portion of the opinion that have been invoked in support of the institutional choice position. The famous two-step characterization of the review function—instructing courts to ask first whether Congress has directly spoken to the issue and if not, whether the agency’s interpretation is reasonable³⁰—contains no obvious place for the grading factors central to the integrative approach. The opinion spoke about express and implied delegations of interpretative authority by Congress to agencies, and seemed to say that any ambiguity in a statute administered by an agency is an implied delegation, making the agency the preferred interpreter.³¹ And the opinion broke new ground by noting in a closing paragraph that agencies are accountable to the President, who is elected by all the people, and thus agencies are better suited to resolve disputed policy questions, including disputes over the resolution of gaps and ambiguities in statutes, than are nonrepresentative federal courts.³² These passages are of course the ones excerpted in casebooks and quoted extensively in subsequent decisions.

But the *Chevron* opinion is relatively long—twenty-nine pages and forty-one footnotes. If one reads the opinion from end to end, the overall impression one gains is that it is not much different from an opinion following the conventional integrative approach. There is a meticulous discussion of the evolution of the statutory text,³³ an examination of the legislative history,³⁴ and a discussion of legislative purposes.³⁵ We find also references to agency expertise, to the technical and complex subject matter, to the EPA’s detailed and reasoned decisions, and to the need to reconcile conflicting policies.³⁶ Read as a whole, the passages that would later become famous can be seen as a framing device for a thorough analysis of particulars relevant under the then-standard integrative approach, and a peroration designed to carry the reader away by associating the decision with norms of judicial restraint.

Second, as I have detailed in other writing, there is no evidence from what we know of the Court’s internal deliberations that any of the participating Justices viewed *Chevron* as a decision of significance.³⁷ Although the Justices were divided at conference, all participating Justices were happy to join Justice Stevens’s draft opinion without commenting on its content. Nor is there evidence that Justice Stevens himself regarded

³⁰ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

³¹ *See id.* at 844.

³² *See id.* at 865–66.

³³ *Id.* at 859–61.

³⁴ *Id.* at 845–47.

³⁵ *Id.* at 862–63.

³⁶ *Id.* at 857, 864–65.

³⁷ Merrill, *supra* note 17, at 180–84.

Chevron as having inaugurated any change in the way courts approach agency interpretations. *Chevron*'s status as a landmark decision was a product of the D.C. Circuit's response to the decision, Justice Scalia's advocacy as an emissary from the D.C. Circuit to the Supreme Court, and the Justice Department's relentless invocation of the decision in briefs filed at all levels of the judicial system.³⁸

Third, Justice Stevens authored three opinions after *Chevron* expressing the view that where "pure question[s] of statutory construction" are involved, courts should exercise independent judgment giving no deference to executive or administrative views.³⁹ This understanding of the judicial role is what one would expect from a common law judge who believes in the autonomy and "artificial reason" of the law.⁴⁰ But it is clearly inconsistent with the institutional choice perspective, which requires that courts defer to administrative interpretations of pure questions of law, provided Congress has delegated authority to the agency to make such determinations.⁴¹

Fourth, if Justice Stevens intended that *Chevron* inaugurate some transformative, institutional choice perspective, it is curious that he remained mostly silent in later cases where the Court engaged in spirited debate over rationale and preconditions for *Chevron* deference.⁴² Of course, he never disowned *Chevron*, and he often applied it.⁴³ But if he regarded *Chevron* as a decision of great consequence, why would he not speak up in support of that vision? Instead, he let other Justices expound on the meaning and significance of his decision.

Aziz Huq, writing in this symposium, argues that Justice Stevens was the architect of an "institution matching canon," which is similar to what I have called the institutional choice interpretation of *Chevron*.⁴⁴ I am not

³⁸ *Id.* at 188.

³⁹ *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987); *see also* *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part); *Republic of Austria v. Altmann*, 541 U.S. 677, 701–02 (2004).

⁴⁰ Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 821–24 (2010).

⁴¹ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

⁴² *See* *Gonzales v. Oregon*, 546 U.S. 243 (2006) (Justice Stevens joining Justice Kennedy's opinion for the Court without comment); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (Justice Stevens joining Justice Souter's opinion for the Court without comment); *cf.* *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) (stating that subordination of a court of appeals to agency interpretations under *Chevron* may not apply to Supreme Court interpretations, but offering no reason for the distinction); *Christensen v. Harris Cnty.*, 529 U.S. 576, 595 n.2 (2000) (Stevens, J., dissenting) (dissenting on the merits and stating in one unelaborated footnote that he agrees with Justice Breyer about the meaning and significance of *Chevron*).

⁴³ *See* *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 471 (2002) (Stevens, J., dissenting); *Lopez v. Davis*, 531 U.S. 230, 245 (2001) (Stevens, J., dissenting).

⁴⁴ Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417 (2012).

convinced this is correct, at least as a characterization of the position of Justice Stevens.

The primary evidence Professor Huq cites in support of Justice Stevens's institution matching approach is his very first opinion for the Court, *Hampton v. Mow Sun Wong*,⁴⁵ which struck down a civil service regulation barring those who are not American citizens from federal employment. As Professor Huq acknowledges, the opinion is widely regarded as a sport and has had little direct influence in terms of being cited or followed.⁴⁶ Perhaps more importantly from my perspective, which is primarily biographical, Justice Stevens did not himself refer to the decision in later opinions as supporting an institution matching approach.⁴⁷ It is particularly telling that Justice Stevens did not cite *Hampton* in *Chevron*, which would be a natural thing to do if he had conceived of an institution matching canon in *Hampton* and was then intent on extending this in later decisions.

Professor Huq cites a number of more recent decisions that I agree can be characterized as reflecting an institution matching perspective, such as *Apprendi v. New Jersey*,⁴⁸ *United States v. Mead Corp.*,⁴⁹ and *Gonzales v. Oregon*.⁵⁰ Other than *Apprendi*, however, Justice Stevens played no authorial role in these cases. It is particularly noteworthy that Professor Huq strives valiantly to characterize Justice Stevens's opinions for the Court in *Massachusetts v. EPA*⁵¹ and *Hamdan v. Rumsfeld*⁵² as reflecting institution matching. But in both cases he says, in effect, that Justice Stevens's objection was not to the identity of the deciding institution, but rather to the quality of the reasoning it used in reaching the decision.⁵³ To my mind, this stretches the meaning of institution matching too far. To object to the quality of reasoning is to engage in review on the merits, not to match issues with institutions.

In short, I do not disagree with Professor Huq's claim that institution matching is an emergent theme in decisions of the Supreme Court in a variety of areas. But I am not persuaded that Justice Stevens played a leading role in this movement, or that he can even be regarded as a

⁴⁵ 426 U.S. 88 (1976).

⁴⁶ See Huq, *supra* note 44.

⁴⁷ See *id.* ("Justice Stevens himself would look back to *Hampton* occasionally as authority for the more abstract proposition that government must 'govern impartially' and for the claim that restrictions on constitutional interests can be authorized only on the basis of real, not hypothesized, justifications for the government's actions." (footnote omitted)).

⁴⁸ 530 U.S. 466 (2000).

⁴⁹ 533 U.S. 218 (2001).

⁵⁰ 546 U.S. 243 (2006).

⁵¹ 549 U.S. 497 (2007).

⁵² 548 U.S. 557 (2006).

⁵³ See Huq, *supra* note 44, at 443–47.

proponent of this perspective. To the contrary, Justice Stevens was not a proponent of the institutional choice reading of *Chevron*. He consistently advanced a more modest reading of the decision and largely absented himself from both internal and scholarly debate about whether *Chevron* is appropriately regarded as mandating the institutional choice approach.

III. THE EQUILIBRIUM-PRESERVING FUNCTION OF JUDICIAL REVIEW

If Justice Stevens was not a partisan of the institutional choice perspective, how then should we characterize his approach to judicial review of administrative interpretations of law?

This is my hypothesis: I believe that Justice Stevens saw the role of the Court in administrative review cases as entailing an equilibrium-preserving function. It is not the Court's job to make regulatory policy. Still, Congress has provided for judicial review in significant part so that courts can supply a corrective for extreme or improvident decisions. Judicial review, in this as in other contexts, is part of the checks and balances that keep our system of government from veering off course or embracing positions that are unreasonable. In support of this hypothesis, I will consider the four opinions authored by Justice Stevens that are generally regarded as canonical in administrative law. These are the four discussed and analyzed in nearly every administrative law course in this country.

The first, from relatively early in Justice Stevens's tenure on the Court, is the so-called *Benzene* decision rendered in 1980, four years before *Chevron*.⁵⁴ The question as framed by the parties was whether the Occupational Health and Safety Act (OSHA) required that potential carcinogens in the workplace be regulated as long as it was economically feasible to do so, or regulated only to the point where the costs exceeded the benefits.⁵⁵ The agency argued for feasibility; the industry for cost-benefit.⁵⁶ Justice Stevens's plurality opinion, which was to prove enormously influential in the subsequent evolution of risk analysis,⁵⁷ rejected both approaches.⁵⁸ Instead, he creatively interpreted the statute as requiring a threshold determination by the agency that a cancer risk in the workplace is "significant" before it undertakes to develop a standard that extrapolates beyond existing epidemiological evidence.⁵⁹

There is not a word in the opinion about deferring to OSHA's interpretation. What is clear is that Justice Stevens regarded the

⁵⁴ See *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980).

⁵⁵ *Id.* at 639.

⁵⁶ *Id.*

⁵⁷ Matthew D. Adler, *Against "Individual Risk": A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1128 (2005).

⁵⁸ See *Benzene*, 448 U.S. at 640-43.

⁵⁹ See *id.* at 646-48.

government's interpretation as unreasonable: it would give the agency, as he wrote, "too much power over American industry" and would impose enormous costs for what might be insubstantial benefits.⁶⁰ The significant risk threshold was designed to temper the perceived extremism of this view without necessarily committing to the industry's position that all regulations had to be justified by a cost-benefit analysis. In effect, Justice Stevens used the traditional power of judicial interpretation to force the agency—or perhaps Congress—to reconsider whether it wanted to persist in what seemed to be overregulation of the workplace.

The second example comes from late in Justice Stevens's tenure: his opinion for the Court in *Massachusetts v. EPA*⁶¹ holding that greenhouse gases are air pollutants subject to regulation under the Clean Air Act.⁶² Massachusetts and others filed a petition asking the EPA to commence a rulemaking to regulate tailpipe emissions of greenhouse gases thought to contribute to global warming.⁶³ The EPA denied the petition, citing a legal analysis by its general counsel concluding that carbon dioxide and other greenhouse gases are not air pollutants within the meaning of the Act.⁶⁴ Justice Stevens rejected this construction under step one of the *Chevron* framework.⁶⁵ The Act defines air pollutant to include "any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."⁶⁶ Justice Stevens concluded that carbon dioxide is clearly a chemical substance that enters the air.⁶⁷ Therefore, the EPA was required to consider whether its emission by motor vehicles "may reasonably be anticipated to endanger" public welfare.⁶⁸

The argument was purely textualist. The best argument on the other side was that "ambient air" in the context of the Act referred to the layer of atmosphere in which human beings live and breathe, since the regulatory mechanisms in the Act only made sense in the context of these sorts of pollutants.⁶⁹ But the opinion resolutely rejected all arguments from statutory structure, various legislative responses to climate change that seemed to assume no existing EPA authority, the legislative response to other global pollution problems, and the assignment of tasks to different agencies of

⁶⁰ *Id.* at 651–52.

⁶¹ 549 U.S. 497 (2007).

⁶² *Id.* at 532.

⁶³ *Id.* at 510, 519–21.

⁶⁴ *Id.* at 511.

⁶⁵ *Id.* at 534–35.

⁶⁶ 42 U.S.C. § 7602(g) (2006).

⁶⁷ *Massachusetts v. EPA*, 549 U.S. at 528–29.

⁶⁸ *Id.* at 528–29.

⁶⁹ *Id.* at 559–60 (Scalia, J., dissenting). For a discussion of the many incompatibilities between greenhouse gas regulation and the structure of the Clean Air Act, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421, 444–49 (2011).

government.⁷⁰ In short, the opinion rested on the plain meaning theory of the text, something ordinarily associated with Justices other than Justice Stevens.⁷¹

The explanation for this flight to textualism, I think, lies in the introduction and Part I of the opinion, describing the “well-documented rise in global temperatures” and the consensus among “[r]espected scientists” that carbon dioxide concentrations are at least partly responsible for this.⁷² Justice Stevens and his colleagues clearly thought the Bush Administration was stonewalling on the problem of climate change, and that this was unreasonable in the face of mounting cause for concern. Statutory interpretation, in this case of the textualist variety, allowed the Court to use judicial review to perform a nudging function—forcing the administration and Congress to reconsider apparent underregulation of a problem of global dimensions.

The third landmark Stevens opinion is *Hamdan v. Rumsfeld*,⁷³ one in a series of dramatic decisions by the Supreme Court in the final years of the George W. Bush Administration concerning the rights of terror suspects held by the government at Guantánamo Bay, Cuba.⁷⁴ Hamdan, who was alleged to have been Osama bin Laden’s personal driver and bodyguard, was a Yemeni national apprehended in Afghanistan during the battles with the Taliban in 2001.⁷⁵ He was sent to Guantánamo, and eventually was scheduled to be tried for conspiracy by a specially constituted military commission.⁷⁶

Writing for the Court, Justice Stevens determined that the military commission had no jurisdiction to hear the charges against Hamdan.⁷⁷ Among the many issues resolved in the lengthy opinion, a key conclusion was that the military commission violated a provision of the Uniform Code of Military Justice that requires military commissions and courts martial to observe procedures that are “uniform insofar as practicable.”⁷⁸ The procedures to be followed by the military commission deviated from those followed in courts martial in critical respects. The President of the United States, according to Justice Stevens, had failed to offer any persuasive

⁷⁰ *Massachusetts v. EPA*, 549 U.S. at 529, 532–33 (majority opinion).

⁷¹ Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365–68 (1994).

⁷² *Massachusetts v. EPA*, 549 U.S. at 504–05.

⁷³ 548 U.S. 557 (2005).

⁷⁴ See also *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

⁷⁵ 548 U.S. at 566.

⁷⁶ *Id.* at 566, 569–71.

⁷⁷ *Id.* at 567, 594–95.

⁷⁸ *Id.* at 620 (quoting Uniform Code of Military Justice, 10 U.S.C. § 836(b) (2000)).

reason why uniformity was not “practicable” in the circumstances of the Guantánamo terror suspects.⁷⁹

Dozens of sharply contested legal issues were presented in *Hamdan*—issues regarding the meaning of international treaties, military statutes, the law of war, U.S. military common law, military treatises, and Supreme Court precedent.⁸⁰ Although much of this was far removed from the types of issues with which the Court is familiar, Justice Stevens resolved all these issues by exercising pure independent judgment—and resolved them all against the government. There was not a word about deference to the President’s understanding of the law in a matter clearly at the core of his military and foreign affairs functions.⁸¹ This is in striking contrast to the general tenor of the Court’s jurisprudence, which has nearly always afforded the strongest deference to the Executive in such matters.⁸²

The proverbial visitor from another planet who had no information beyond the opinions in *Hamdan* would be hard pressed to explain the complete lack of deference to the President’s determination that it was not “practicable” to use the same procedures for trying suspected foreign terrorists as are used in trying U.S. military personnel charged with crimes while on active duty.⁸³ But the reason was obvious enough to anyone who lived through this era. The case was decided in the midst of enormous criticism of the President and his administration for its aggressive treatment of detainees, especially for the use of waterboarding and other harsh interrogation techniques.⁸⁴ *Hamdan* was designed to send a message to the Executive that it had gone too far in its treatment of detainees. Judicial

⁷⁹ *Id.* at 622–23.

⁸⁰ *Id.* at 590–93.

⁸¹ Justice Stevens at one point said that “complete deference” would be owed to a determination by the President that the trial of an enemy combatant in a United States district court was not practicable. *Id.* at 623. But he said the President was entitled to only “a measure” of deference in deciding that the procedures to be followed by military commissions should deviate from those used by courts martial, *id.* at 623 n.51, and he proceeded to find no justification for a finding of impracticability on this issue. *Id.* at 623–24.

⁸² See Eskridge & Baer, *supra* note 9, at 1100 (concluding based on empirical survey of Supreme Court decisions that “the strongest form of deference we encountered” was the “super-strong deference to executive department interpretations in matters of foreign affairs and national security”).

⁸³ A very astute planetary visitor might take note of the extreme imbalance in amicus curiae briefs, with 22 urging reversal and only 4 urging affirmance, and a clear preponderance among the amicus briefs not explicitly urging reversal nevertheless supporting the detainees. See *Hamdan*, 548 U.S. at 565–66 n.*. I am not suggesting that the Court is directly influenced by lopsided amicus filings. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 813–15 (2000) (concluding that there is little evidence that disproportionate amicus filings influence outcomes). In *Hamdan*, however, it is safe to say that the amicus filings accurately reflected elite opinion among journalists, academics, and the organized bar, which was overwhelmingly hostile to the Bush Administration’s handling of detainee issues.

⁸⁴ See Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1148–52, 1167 (2006); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1686–87 (2005).

review was once again performing a checking function, pushing the Executive back toward a posture more consistent with what Justice Stevens regarded as prudent.

The final canonical Justice Stevens opinion is of course *Chevron* itself. *Chevron* too can be seen as performing an equilibrium-preserving function—as using judicial review to push back against behavior of other institutions perceived as having gone off track or as having locked on to unreasonable positions. In this case, however, the institution being checked was not an administrative agency, but rather the D.C. Circuit. The Court in *Chevron* was confronted with a line of D.C. Circuit decisions holding that a plant-wide or “bubble” definition of stationary sources of air pollution must always be used in sections of the Act designed to preserve air quality, but can never be used in sections of the Act designed to improve air quality.⁸⁵ Justice Stevens’s meticulous unraveling of the administrative and legislative history established that this was not a distinction intended by Congress.⁸⁶ Nor was it the distinction the EPA would have adopted if left to its own devices. It was a distinction thrust on the agency by rival panels of the D.C. Circuit, each pursuing its own policy preferences. *Chevron* was designed to reign in the D.C. Circuit from meddling with policy determinations clearly more suited to the agency. Hence the genesis of the passages about implied delegations and democratic accountability.

Notice that three of the four canonical decisions—*Benzene*, *Massachusetts*, and *Hamdan*—gave no deference to the executive position, as *Chevron*, certainly in its institutional choice incarnation, would lead one to expect. Moreover, two of the three decisions giving no deference eschew the integrative method; neither *Benzene* nor *Massachusetts* made much effort to measure the administrative view against the larger fabric of the law. *Hamdan* was written as an integrative decision, and Justice Stevens’s opinion assiduously sought to reconcile his conclusions with prior precedents and military authorities.⁸⁷ But it made no effort to square its aggressive interpretation of these precedents with the larger tradition of deference to executive judgments in foreign and military affairs. The continuing turmoil over how to handle detainees accused of having links to terror groups suggests that the Court gave inadequate weight to the Administration’s concern for the “practicalities” of the issue.

⁸⁵ See *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982) (bubble prohibited under the nonattainment provisions of the Act); *Ala. Power Co. v. Costle*, 636 F.2d 323, 395–401 (D.C. Cir. 1979) (bubble required under the Prevention of Significant Deterioration provisions of the Act); *ASARCO Inc. v. EPA*, 578 F.2d 319, 329 (D.C. Cir. 1978) (bubble prohibited under the new source review provisions of the Clean Air Act).

⁸⁶ See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 854–59 (1984).

⁸⁷ See *Hamdan*, 548 U.S. at 590 (history of military commissions) (2006); *id.* at 591 (concurrence with U.S. Constitution); *id.* at 593 (Supreme Court precedent); *id.* at 596 (post-World War II German Criminal Code); *id.* at 597 (military treatise).

What each of the nondeferential opinions was designed to do was to deliver a jolt to the legal system—to cause it to reconsider the course it was pursuing. In other words, they were designed to rein in particular deviations from the path of reason by other branches of government. *Chevron*, I suggest, was the product of a similar aspiration, directed to the D.C. Circuit rather than the Executive.

IV. THE IMPERATIVE OF INSTITUTIONAL CHOICE

The jolt delivered by *Chevron* took a path wholly unforeseen by its author and the other members of the Court who joined his opinion. It became, over time, a landmark decision invoked for the institutional choice conception of the judicial review function. This unanticipated consequence, I would suggest, is one of the risks one takes in conceiving of judicial review as an equilibrium-preserving function, applied in case-specific fashion. Decisions motivated by a desire to nudge particular actors back toward the path of reason, as perceived by the Court, are likely to be misperceived by the next generation of jurists as stating principles that can be generalized beyond the circumstances that produced them.

I would go further and argue that the case-specific conception of judicial review—as least if deployed by the Supreme Court—is inadequate to the needs of the modern administrative state. The Supreme Court decides only a limited number of cases (currently around eighty) each year. Only a fraction of these cases involve the powers of the Executive and the myriad administrative bodies that perform executive functions. Episodic decisions by a tribunal grounded in perceptions about the particularities of a small number of cases cannot possibly generate a set of internally coherent principles that can be drawn upon by lower courts and agencies to resolve the proliferating complexities generated by the system. The system requires a stable set of rules about the allocation of authority over regulatory policy, not a series of ad hoc interventions by a committee of elders designed to nudge particular institutions back to the path of wisdom as they see it.

A majority of Justices have now realized, in one decision or another, that some version of the institutional choice perspective is needed to provide consistent and predictable guidance to lower courts and administrators.⁸⁸ The process has been severely hampered by the resistance

⁸⁸ Chief Justice Roberts and Justice Thomas are most clearly in the institutional choice camp. See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) (Roberts, C.J.) (explicating *Chevron* and *Mead* and holding that interpretation of tax statute by Treasury Department regulation should be reviewed under *Chevron* rather than pre-*Chevron* precedent); *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 982–84 (2005) (Thomas, J.) (explicating *Chevron* and *Mead* and holding that agency interpretations of ambiguous statutes supersede judicial interpretations); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587–88 (2000) (Thomas, J.) (adopting analysis that anticipates *Mead*). Justice Kennedy should likewise be included in this camp. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Kennedy, J., concurring) (criticizing Justice Breyer for “invert[ing] *Chevron*’s logical progression”); *United States v. Haggar*

of Justices Scalia and Breyer, both (ironically) former administrative law professors. Justice Scalia's resistance takes the form of an overblown conception of what courts should decide at step one of *Chevron*, using aggressive statutory interpretation.⁸⁹ Justice Breyer's resistance takes the form of a conception of the Court as a kind of supervising agency for the entire administrative state. In a curious twist of fate, it may fall to Justice Stevens's successor, Justice Elena Kagan—another former administrative law professor—to resolve the matter. Justice Kagan has written insightfully about *Chevron* from an institutional choice perspective.⁹⁰ Her predecessor, although the author of *Chevron*, was never comfortable with this perspective. He was the Court's last great common law lawyer. His retirement may mark the passing of the common law approach to judicial review, but this may be inevitable and necessary, at least in the context of administrative law.

Apparel Co., 526 U.S. 380, 390–92 (1999) (Kennedy, J.) (extending *Chevron* to regulations adopted under statute expressly conferring de novo review on courts). His opinion for the Court in *Gonzalez v. Oregon*, 546 U.S. 243, 258–260 (2006), is arguably equilibrium preserving in spirit but in form is consistent with the institutional choice perspective. Justice Alito has rarely written about *Chevron*, although he appears sympathetic to resolving cases based on *Chevron* deference. See *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665–67 (2007) (Alito, J.) (adopting broad reading of *Chevron* in sustaining agency's reconciliation of apparently conflicting statutory directives); *Zuni*, 550 U.S. at 107 (Kennedy, J., joined by Alito, J., concurring) (criticizing Justice Breyer for "invert[ing]" *Chevron*). Justice Ginsburg is wary of categorical statements about agency interpretation but in practice is relatively deferential to agency interpretation. See, e.g., *Astrue v. Capato*, 80 U.S.L.W. 4369 (U.S. May 21, 2012) (No. 11-159) (Ginsburg, J.) (deferring to agency under *Chevron*); *Lopez v. Davis*, 531 U.S. 230, 243–44 (2001) (Ginsburg, J.) (same); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457–64 (1998) (Ginsburg, J.) (same); *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 274–75 (1996) (deferring to agency without expressly invoking *Chevron*). She can perhaps be classified as institutional choice lite.

⁸⁹ See Scalia, *supra* note 41, at 520–21.

⁹⁰ See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 249–57; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2374–83 (2001).