A Softer, Simpler View of *Chevron*

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ABSTRACT

Justice Kennedy's concurrence in Pereira gives reason to hope that the Court may be finally catching on to the difficulties it created by Chevron's opening language, as distinct from its inherent reasoning. When courts quote language like "precise question" and "permissible" to limit themselves (as Justice Scalia and others unfortunately tended to reinforce by their quotations from the opinion), they stray not only from judicial function but also from the statute (APA) that instructs them how to review, and which strangely the opinion does not mention. But Chevron actually (a) independently found and defined a statutory gap within which the EPA would have authority to act (infra vires) and then (b) reviewed its action for reasonableness. There is no problem reconciling this approach with either proper judicial function or 5 USC 706.6.

Judges and scholars characterizing the holding of Chevron U.S.A., Inc. v. Natural Resources Defense Council often do so by quoting from a paragraph summarizing the Court’s reasoning that appears quite early in the opinion:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984) (emphasized added). Particularly for more conservative judges and writers, the repeated use of “whether Congress has directly spoken to the precise question at issue” to characterize the question asked at Chevron’s first step, and “permissible” to characterize the inquiry at the second, have fueled a quite dramatic understanding of the holding. Seeing Chevron as such a strong and dramatic holding makes easy to understand the unrest with it, and the legislative proposals to abrogate it. This understanding is hard to reconcile with either (1) the proposition (grounded in Marbury v. Madison) that “[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function,” United States v. American Trucking Ass’ns, 310 U.S. 534, 554 (1940), or (2) the Administrative Procedure Act (APA). In its provisions for judicial review of final agency actions, the APA repeatedly insists that reviewing courts are the ones to decide any questions of law and further provides that, after finding that an agency has acted within its statutory authority (that is, in at least one sense, “permissibly”), they are further to decide whether its action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. One could think it remarkable—or perhaps

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The actual reasoning of the opinion, however, belies so dramatic an account, and is not at all hard to reconcile with the APA’s review provision. The paragraph immediately following the one so often quoted reasons:

“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843. “Precise” has now disappeared, and so has the stronger meaning of “permissible.” As described in this paragraph and reflected in later passages in the opinion, the judicial function is independently to decide on the existence and the dimensions of any gap Congress has left in the statute. “What are the limits of the authority Congress has conferred on an agency?” is a “relevant question[…] of law” that is an element of the judiciary’s “exclusive[…] function,” satisfying both *Marbury* and the APA. Once a court has determined what those limits are, the very fact of that (independent judicial) determination requires the court to accept that the primary responsibility for decisions within those limits lies with the agency it has found to have been thus empowered. Then, for an action that is not *ultra vires*, the language of this paragraph invites the reviewing court to determine whether the action is “reasonable;” and that inquiry subsumes the further, second inquiry the APA requires the court to make. One reading the whole of the opinion readily appreciates both that the Court exercised its judicial responsibility to determine the extent of the Environmental Protection Agency’s (EPA) authority and that it has carefully considered the reasonableness of the EPA’s exercise of that judicially determined authority.

Indeed, if *Chevron* is not viewed in this softer, simpler way, it violates the judiciary’s statutory obligations. And the Court’s more prominent subsequent decisions are readily reconciled with this way of accommodating judicial and agency roles. *United States v. Mead Corporation* specifically cites the APA review provision as the basis for “reasonableness” determinations. 533 U.S. 218 (2001). *National Cable & Telecommunications Association v. Brand X Internet Services* is built on recognition that decisions taken within the realm of delegated agency law-making authority are, for that very reason, primarily agency responsibility—so that a judicial decision interpreting the statute in private litigation decided the case but did not displace that authority. 545 U.S. 967 (2005). Careful reading of *City of Arlington, Texas v. FCC*, that on its surface appears to treat issues of agency authority in *Chevron*’s terms, finds repeated reassurances that courts are independently

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responsible for *ultra vires* determinations. 569 U.S. 290 (2013); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789 (2015). *(Skidmore v. Swift & Co.,* 323 U.S. 134 (1944) was Justice Jackson’s account of the long-standing principle that judges, in independently deciding questions of statutory meaning on which agencies had expressed views, would often find reason to give those views considerable weight in reaching judgment. Four years earlier, a few pages after emphasizing that “[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function,” the *American Trucking* Court had described three important reasons for according agency views such weight.)

One could suppose the Court itself is coming to this understanding *King v. Burwell* and its ilk are readily seen as themselves independent judicial determinations of the scope of agency authority, appropriately driven by the “traditional tools of statutory interpretation” *Chevron* invokes. 135 S. Ct. 2480 (2015). For me, Justice Kennedy’s “concern with the way in which the Court’s opinion in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), has come to be understood and applied,” *Pereira v. Sessions*, 2018 WL 3058276 (U.S. 2018), indeed all of this Term’s ostensible nibbling at *Chevron*, can be understood in just this way. It is a lesson about the costs of an opinion’s injudicious use of language and failure of explicit attention to governing statutes.

This softer, simpler view of *Chevron* also supports its utility as a unifier of national law. As the author observed shortly after *Chevron* was decided, in a world in which the limited size of the Supreme Court’s docket confers presumptive finality on court of appeals judgments, and those judgments have precedential effect only within the circuit of the deciding court, uniform national law administration is promoted by an approach emphasizing judicial respect for decisions taken within a judicially determined range of authority, rather than the “precise” determination of questions of statutory meaning. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). The important empirical work of Professors Barnett, Boyd and Walker now appears to have confirmed this intuition.