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Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and *Chevron* Deference

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Abstract

James Madison called the accumulation of legislative, executive, and judicial powers in the same hands the "very definition of tyranny." The Founders sought to prevent such tyranny and to safeguard Americans' individual liberties by dividing the powers of the federal government among three coordinate branches. The modern administrative state, however, blurs the separation of powers and the system of checks and balances and has become an unaccountable fourth branch of government. Administrative agencies issue, enforce, and settle disputes involving regulations that have the force of law in every aspect of daily life. Though the courts have a duty to check the abuses of the political branches in appropriate cases, they rely on deferential doctrines in reviewing agency actions. Given the inconsistent application of Chevron *deference and concerns about the separation of powers, the Supreme Court should reconsider when and how much deference is owed to administrative agencies.*

The Schoolhouse Rock classic "Three Ring Government" teaches children about the separation of powers embodied in the Constitution by comparing the three branches of government to a three-ring circus. The song explains that "no one part [of government] can be more powerful than any other." The President is the "ringmaster of the government," Congress is tasked with "passing laws and juggling bills," and the courts "take the law and they tame the crimes ... balancing the wrongs with your rights."[1]

But Schoolhouse Rock's basic overview of American government overlooks the largest and perhaps most powerful part of the federal government: administrative agencies.

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Key Points

- Administrative agencies perform legislative, executive, and judicial functions by issuing, enforcing, and settling disputes involving regulations that have the force of law.
- This blurs the separation of powers and the system of checks and balances, making the administrative state an unaccountable fourth branch of government.
- Courts have the duty to act as a check on abuses by the political branches, but they rely on deferential doctrines in reviewing agency actions.
- Under *Chevron* deference, a court defers to an agency's interpretation of statutes that Congress has instructed the agency to administer.
- If Congress was silent or ambiguous on the matter, the court will uphold the agency's interpretation as long as it is a reasonable or permissible reading of the statute.
- The Supreme Court should reconsider when and how much deference is owed to administrative agencies, given the inconsistent application of *Chevron* deference and concerns about the separation of powers.

An Unaccountable Fourth Branch of Government

Though typically categorized as part of the executive branch, administrative agencies perform legislative, executive, and judicial functions by issuing, enforcing, and settling disputes involving regulations that have the force of law. James Madison called such an accumulation of power the "very definition of tyranny."[2] The Founders sought to prevent such tyranny—thereby safeguarding Americans' individual liberties—by dividing the powers of the federal government among three coordinate branches. The modern administrative state, however, blurs the separation of powers and the system of checks and balances and has become an unaccountable fourth branch of government.

The Progressive Era led to the creation and strengthening of agencies like the Federal Trade Commission and the Food and Drug Administration; the New Deal brought the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission; the 1970s heralded the Environmental Protection Agency; and more recently has come the Consumer Financial Protection Bureau.[3] The result is that administrative agencies today "pok[e] into every nook and cranny of daily life."[4]

As described by Supreme Court Justice Stephen Breyer, agencies "come in different shapes and sizes, and they employ millions of government officials and ordinary workers" to deal with issues that include "taxes, welfare, Social Security, medicine, pharmaceutical drugs, education, highways, railroads, electricity, natural gas, stocks and bonds, banking, medical care, public health, safety, the environment, fair employment practices, consumer protection, and much else...."[5] The idea may have been to put impartial, scientific experts in charge of highly technical areas of regulation,[6] but today, as Justice Breyer explains:

> Political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply "scientific" considerations. Agency decisions will also occasionally reflect "tunnel vision," an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside....[7]

In turn, Congress passes the buck to agencies, enacting "vast and vaguely worded legislation ... grant[ing] broad discretion to regulatory agencies."[8] This allows Members of Congress to "claim credit for 'doing something' while evading blame for specific regulations."[9] Though the nondelegation doctrine prohibits Congress from delegating legislative functions to the executive branch, the Supreme Court has allowed Congress to delegate regulatory authority to agencies as long as Congress specifies an "intelligible principle" to guide the agency in the exercise of its discretion.[10]

Moreover, oversight from the executive or judicial branches is limited. The President lacks the ability to actively supervise the myriad agencies,[11] and Congress has even insulated some "independent"

1. *SchoolHouse Rock Three Ring Government*, YouTube, https://www.youtube.com/watch?v=tEPd98CbbMk (last visited May 4, 2015).
2. The Federalist No. 47, at 298 (Clinton Rossiter, ed. 2003).
3. *See* Joseph Postell, *From Administrative State to Constitutional Government*, Heritage Foundation Special Report No. 116, Dec. 14, 2012, *available at* http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government (history of administrative and independent agencies).
4. City of Arlington v. Federal Communications Commission, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).
5. Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 Cardozo L. Rev. 2189, 2190–91 (2011).
6. *See* Postell, *supra* note 3.
7. Breyer, *supra* note 5 at 4.
8. James Gattuso & Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, Heritage Foundation Backgrounder No. 2895, March 26, 2014, *available at* http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion.
9. *Id.*
10. To date, the Supreme Court has struck down only two statutes—both in the 1930s—as unconstitutional delegations because of Congress's failure to provide a sufficient "intelligible principle" to guide the applicable agency.
11. The Office of Management and Budget provides oversight of agencies and reports directly to the President. Likewise, most agencies have an inspector general that is tasked with identifying abuses.

agencies from executive branch control by limiting the President's ability to remove agency heads at will. As President Harry Truman put it, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."[12]

Further, the courts have the duty to act as a check on abuses by the political branches (when an appropriate case or controversy is before them).[13] Yet courts rely on deferential doctrines in reviewing agency actions in an effort to avoid encroaching on the executive branch's ability to administer the law. According to a 2008 study, agencies prevailed 76 percent of the time in cases involving "*Chevron* deference," discussed below.[14] Thus, agencies wield massive amounts of power with little oversight and are precisely the accumulation of power that Madison feared.

Judicial Deference to Agencies

An agency has "no power to act ... unless and until Congress confers power upon it."[15] Once Congress confers power on an agency, courts give considerable deference to the agency's interpretation of statutes that Congress has instructed it to administer. In the seminal Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984),[16] Justice John Paul Stevens explained that "[t]he 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."[17]

Chevron dealt with a challenge to the Environmental Protection Agency's interpretation of "stationary sources" in the Clean Air Act. The Court found that such a challenge "must fail" when it "really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress."[18]

Out of this decision came what is known as *Chevron* deference, which instructs a court reviewing an agency's statutory interpretation to determine first "whether Congress has directly spoken to the precise question at issue."[19] If Congress has spoken, then the court "must give effect to the unambiguously expressed intent of Congress."[20] But if Congress was silent or ambiguous on the matter, the court should uphold the agency's interpretation as long as it is a reasonable or permissible reading of the statute. This doctrine has been described as the "counter-*Marbury* for the administrative state ... [that] it is emphatically the province and duty of the *administrative* department to say what the law is."[21]

Problems with *Chevron* Deference

Step Zero: Does *Chevron* Apply?[22] While the *Chevron* test may sound relatively straightforward, as a threshold matter, it is not always clear whether

12. *City of Arlington*, 133 S. Ct. at 1878.
13. *See* John Malcolm & Elizabeth Slattery, *Boehner v. Obama: Can the House of Representatives Force the President to Comply with the Law?* Heritage Foundation Legal Memorandum No. 132, July 24, 2014, *available at* http://www.heritage.org/research/reports/2014/07/boehner-v-obama-can-the-house-of-representatives-force-the-president-to-comply-with-the-law (discussing Article III standing and when the courts will decline to hear disputes between the political branches).
14. *See* William Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1129 (2008).
15. New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1, 18 (2002).
16. 467 U.S. 837 (1984). The Court has never harmonized the conflict between *Chevron* and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, which requires courts reviewing agency action to decide "all relevant questions of law, including the interpretation of constitutional or statutory provision." *See* John F. Duffy, *Administrative Common Law and the Original Meaning of Judicial Review Under the APA*, Federalist Society Administrative Law Practice Group Newsletter Vol. 3, Issue 2 (Summer 1999), *available at* http://www.fed-soc.org/publications/detail/administrative-common-law-and-the-original-meaning-of-judicial-review-under-the-apa.
17. *Chevron*, 467 U.S. at 843 (internal citations omitted).
18. *Id.* at 866.
19. *Id.* at 842.
20. *Id.*
21. Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006). In the landmark decision *Marbury v. Madison*, 1 Cranch 137 (1803), the Supreme Court declared, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."
22. *Id.* at 191.

or not *Chevron* deference applies in a particular case. For example, in *City of Arlington v. Federal Communications Commission* (2013),[23] the Supreme Court, in an opinion authored by Justice Antonin Scalia, held that an agency's interpretation of the scope of its authority (not simply its interpretation of the law) was entitled to *Chevron* deference.

Chief Justice John Roberts, however, forcefully dissented, writing that "we do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide."[24] Roberts pointed out that while *Chevron* deference was intended to prevent the judiciary from "arrogating to itself policymaking properly left ... to the Executive," it is still the judiciary's "duty to police the boundary between the Legislature and the Executive."[25]

Allowing agencies to police the limits of their regulatory authority is like letting "foxes ... guard henhouses."[26] Thus, deciding whether *Chevron* deference applies is not necessarily as easy as one might think.

Step One: Did Congress Speak? Under the first step in *Chevron* deference, a court must determine whether Congress expressly addressed the particular issue. Courts reviewing the same agency interpretation often disagree about what Congress did or did not say. This occurred with one of the biggest cases of the Supreme Court's current term.

In *King v. Burwell*, which deals with a provision in the Affordable Care Act that authorizes tax credit subsidies for certain individuals who purchase insurance "through an Exchange established by the State," one appellate court deferred to the IRS's interpretation that these subsidies were available to those who purchased insurance on the federally established exchange as well as on state-established exchanges. Another appellate court reviewing the same language determined that the statute unambiguously restricted the tax subsidies to individuals purchasing insurance on state exchanges, not on the federal exchange.

Given the politically charged nature of *King* and other cases involving the Affordable Care Act, some might assume that the judges let politics affect their analysis of the tax subsidy provision, but it is not just high-profile issues that lead to this type of conflict. For example, two appellate courts reached opposite conclusions upon reviewing the Magnuson–Moss Warranty Act, a federal law detailing legal remedies for violations of consumer product warranties. One court found the law permits binding arbitration as a way to resolve warranty violations, whereas the other court determined that the law did not address arbitration and that Congress authorized the Federal Trade Commission to set standards for "informal dispute settlement procedures."[27]

Likewise, two appellate courts disagreed about the definition of an "applicant" under the Equal Credit Opportunity Act. One appellate court ruled that Congress provided a definition in the statute, whereas another found the language ambiguous and deferred to the Federal Reserve Board's interpretation.[28] Consequently, determining whether or not Congress left a gap for an agency to fill is not necessarily a simple matter.

Step Two: Is the Agency's Interpretation Reasonable? Once a court determines that Congress was silent or ambiguous, it must decide whether the agency's interpretation is within a range of permissible constructions of the statute. It may not "substitute its own construction [of the law] for a reasonable interpretation" by the agency.[29] As long as the agency's interpretation is not "arbitrary, capricious,

23. *Supra* note 4.
24. *Id.* at 1883.
25. *Id.* at 1886.
26. Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1533 (2009).
27. Kolev v. Euromotors West/The Auto Gallery, 658 F.3d 1024 (9th Cir. 2011), *overruled on other grounds by* 676 F.3d. 867 (9th Cir. 2012); Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002).
28. Hawkins v. Community Bank of Raymore, 761 F.3d 937 (8th Cir. 2014); RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC, 754 F.3d 380 (6th Cir. 2014).
29. *Chevron*, 467 U.S. at 844.

or manifestly contrary to the statute," the court must uphold it.[30]

This step has spawned numerous law review articles and confusion among the lower courts. Some scholars argue that there are not two steps to the analysis and that reasonableness is the sole consideration.[31] In *Entergy Corp. v. Riverkeeper, Inc.* (2009), Justice Scalia wrote, "[S]urely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."[32] Others claim that step two has "virtually no teeth."[33]

The reasonableness of EPA's interpretation of a provision of the Clean Air Act is currently pending before the Supreme Court in *Michigan v. Environmental Protection Agency*. The law authorized EPA to study the effect of hazardous air pollutant emissions by certain electric utilities on public health and to regulate them when "appropriate and necessary." EPA refused to consider costs in promulgating its new rule, and a number of states and industry groups challenged the rule, arguing that excluding costs was unreasonable.[34] The lower court upheld EPA's interpretation, but a dissenting judge wrote: "[I]t is well-accepted that consideration of costs is a central and well-established part of the regulatory decisionmaking process.... [A]ccording to EPA, it is irrelevant how large the costs are or whether the benefits outweigh the costs...."[35]

"Reasonable" and "permissible" are malleable terms that allow courts to defer to an agency's interpretation of a statute, even in the face of a better construction. The Supreme Court has not given clear guidance to the lower courts on applying *Chevron* step two, and this is unfair to citizens challenging agency action.

Restoring the Balance

The Supreme Court should reconsider when and how much deference is owed to administrative agencies, given the inconsistent application of *Chevron* deference as well as broader concerns about the judicial branch's duty to act as a check on abuses by the political branches in appropriate cases or controversies. Courts should exercise independent judgment rather than simply accept an agency's "reasonable" interpretation of the law.

Many of the justices have expressed concerns about unchecked agencies, and in the appropriate case, they could revisit *Chevron* deference. As Justice Scalia has noted, "Too many important decisions of the Federal Government are made nowadays by unelected agency officials ... rather than by the people's representatives in Congress."[36] Justice Breyer has summed it up succinctly: "[T]he public now relies more heavily on courts to ensure the fairness and rationality of agency decisions."[37]

In a recent case, Justice Samuel Alito seemed eager to throw out another deference doctrine, highlighting the "aggrandizement of the power of administrative agencies."[38] In the same case, Justice Clarence Thomas explained, "This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."[39] Thomas further pointed out that courts abdicate their duty when they "refuse even to decide what the best interpretation is under the law."[40] Though

30. *Id.*
31. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597 (2009).
32. 556 U.S. 208, 218 (2009).
33. Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 785 (2010).
34. EPA estimated that the rule would cost $9.6 billion per year while generating $4 million–$6 million in societal benefits.
35. White Stallion Energy Center, LLC v. Envtl. Protection Agency, 748 F.3d 1222, 1263 (2014) (Kavanaugh, J., dissenting). The Supreme Court granted review in three consolidated cases: *Michigan v. EPA.*, *Utility Air Regulatory Group v. EPA.*, and *National Min. Ass'n v. EPA*.
36. EPA v. EME Homer City Generation, LP, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).
37. Breyer, *supra* note 5 at 4.
38. Perez v. Mortgage Bankers Association, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring).
39. *Id.* at 1213 (Thomas, J., concurring).
40. *Id.* at 1221.

Thomas was discussing *Auer/Seminole Rock* deference (instructing courts to defer to an agency's interpretation of regulations it has promulgated),[41] his concerns apply with equal force to *Chevron* deference.

The modern administrative state touches nearly every aspect of daily life, from highways to electricity to health care. Administrative agencies perform a combination of legislative, executive, and judicial functions, blurring the separation of powers and the system of checks and balances carefully devised by the Framers.

Courts should ensure that "no one part ... can be more powerful than any other," as the Schoolhouse Rock song goes, and act as a check to keep agencies within the limits of their delegated authority. If the courts will not, who will regulate the regulators?

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41. Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).