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Reconceptualizing *Chevron* and Discretion: A Comment on Levin and Rubin

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RECONCEPTUALIZING *CHEVRON* AND DISCRETION: A COMMENT ON LEVIN AND RUBIN

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Professors Ronald Levin and Edward Rubin want to change the way we think about important administrative law concepts. Ronald Levin's paper, *The Anatomy of* Chevron: *Step Two Reconsidered*,[1] argues that *Chevron*'s[2] currently ill-defined second step ought to be reconceptualized as an application of arbitrary or capricious review. Edward Rubin's paper, *Discretion and Its Discontents*,[3] is part of his ongoing project to reconceptualize the way we think—and, more importantly, the way we talk—about the modern administrative state. Professor Rubin suggests that the oft-used word "discretion" does not usefully describe the bureaucratic operation of the modern managerial state and that it profitably could be replaced with vocabulary drawn from the theory of bureaucracy.[4]

I am in substantial agreement with both papers. Accordingly, my comments are directed to some implications of their analyses that warrant further consideration.[5]

I. THE ANATOMY OF *CHEVRON*: STEP TWO RECONSIDERED

Professor Levin's paper is a commentator's nightmare. It is well argued, well written, and almost certainly right. I couldn't have said it better myself.

Indeed, I have said it considerably worse myself. I recently argued that, under presently governing scope of review principles, application of *Chevron* should not exhaust judicial scrutiny of agency legal interpretations.[6] I argued that *Chevron* concerns the validity (reason-

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1. Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997).

2. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3. Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

4. *See id.* at 1323 n.71.

5. In other words, I am going to chide Professors Levin and Rubin for failing to address questions that no reasonable authors in their positions would have thought it necessary or appropriate to address.

6. *See* Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 314-16 (1996). My previous work, like Professor Levin's article, did not address the normative question whether current scope of review doctrine is desirable, and I intend to avoid that issue here as well.

ableness) of the agency's *outcome*, while the arbitrary or capricious standard, codified in § 706(2)(A) of the Administrative Procedure Act ("APA"),[7] further regulates the *process* by which the agency reached its decision.[8] The two tests work in tandem to ensure that agencies interpreting statutes reach reasonable results through reasonable decisionmaking processes. I described the instructions that the combination of *Chevron* and the arbitrary or capricious test gives to judges reviewing agency legal conclusions in the following terms:

> Ensure that the agency provided all procedures required by law. Then ask, pursuant to *Chevron*, if the agency's *outcome* is a reasonable "fit" with the statute. Do not require the agency's interpretation of the statute to be *correct* (as determined by whatever theory of statutory interpretation the court employs), but rather require that the conclusion be one that a reasonable person could reach. If the agency's interpretation satisfies this deferential outcome test, then ask whether the *process* by which the agency reached that conclusion was "arbitrary" or "capricious." A nonarbitrary, noncapricious agency process must at least attempt to determine the correct interpretation of the statute. Require the agency to explain how it tried to reach a conclusion using traditional tools of statutory interpretation. Generously defer to the agency's identification and application of the relevant interpretative tools, but ensure that the agency sincerely attempted to use actual interpretative tools. If, but *only* if, the agency genuinely and reasonably concludes that traditional tools of statutory interpretation are ineffective in this case, allow the agency to employ considerations of policy in resolving the matter. Review of those considerations should follow the traditional "hard look" approach: ensure that the agency identifies and articulates the factors that it considers and the assumptions that it makes; determine (with an appropriately deferential attitude) if those factors and assumptions are substantively rational; and ensure that the agency applied its articulated considerations reasonably, logically and consistently.[9]

Professor Levin reaches essentially the same conclusion through a different route.[10] Rather than have both steps of *Chevron* govern the agency's outcome, Professor Levin would convert step one into an

7. *See* 5 U.S.C. § 706(2)(A) (1994) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

8. *See* Lawson, *supra* note 6, at 325-26.

9. *Id.* at 331.

10. Professor Mark Seidenfeld has also strongly urged extension of "hard look" principles to *Chevron*. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994). And Professor Bernard Bell has urged courts to look closely at the interpretive methodologies employed by agencies in statutory cases. *See* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 106 (1997).

all-things-considered assessment of the substantive reasonableness of the agency's interpretation and make step two a straightforward application of arbitrary or capricious review.[11] There would then be no separate application of § 706(2)(A) to agency legal conclusions.

Sign me up. Because Professor Levin's reconceptualized step two does exactly the same work as arbitrary or capricious review, the effect of his proposal is to convert the statutory interpretation aspect of *Chevron* into a one-step determination on the merits: is the agency's interpretation reasonable, taking into account everything that is relevant to statutory interpretation in the modern administrative state? This would be a major step forward for scope of review doctrine.[12] After all, we have a "*Chevron* two-step" only because of the accident of Justice Stevens' prose in *Chevron*. And it was clearly an accident. As Professor Levin points out, the Supreme Court in *Chevron* had no intention of reformulating the law of scope of review; the Court evidently thought that it was simply applying settled law.[13] Justice Stevens, at least, certainly had no intention of fomenting a revolution, as evidenced by the fact that he tried to undo the changes wrought by *Chevron* at his first opportunity.[14] It is therefore a bit odd to treat the precise language employed by Justice Stevens in *Chevron* as the canonical formulation of the principle of deference to agency legal interpretations. The odd and seemingly inconvenient attempt to divide the world of statutory interpretation between steps one and two has made the already difficult task of judicial review almost unmanageable.[15] If Professor Levin can effectively eliminate step two as an independent

11. *See* Levin, *supra* note 1, at 1282-86.

12. I have previously advocated reformulating *Chevron* as a one-step test, though without offering much explanation. *See* Lawson, *supra* note 6, at 314 n.5; Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 884 n.78 (1992).

13. *See* Levin, *supra* note 1, at 1257 & n.16.

14. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48 (1987) (attempting to limit *Chevron* to cases of law application). The four-Justice concurrence in *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 133-34 (1988), has generally been taken as a reaffirmation of the "strong" reading of *Chevron* that grants deference to agency decisions on pure (or abstract) questions of law. *See, e.g.*, Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991):

> Wagner contends that because this dispute concerns a "pure question of statutory interpretation," no deference is due to the EPA. In this regard, it relies upon certain decisions of this court that were superseded by the *Food Workers* case, 484 U.S. at 123, 108 S. Ct. at 420-21. The Court there confirmed that judicial deference is owed to the agency under step two of *Chevron* even when the only ambiguity involves "a pure question of statutory interpretation." *See id.* at 133-34, 108 S. Ct. at 426 (Scalia, J., concurring) . . . .

15. As Professor Levin, myself, and others such as Mark Seidenfeld have pointed out, courts have managed the problem largely by ignoring step two. *See, e.g.*, Seidenfeld, *supra* note 10.

(and undefined) aspect of the review process, he will have done us all a favor.

Professor Levin's reconceptualization, however, will not avoid one critical problem that faces all of us who insist—whether we rely on *Chevron*, § 706(2)(A) of the APA, or both—that agencies must explain and justify their choices among permissible interpretations of ambiguous statutes. Under Professor Levin's formulation, an agency survives step one of *Chevron* if its interpretation is a reasonable reading of the statute, taking into consideration all factors that legitimately enter into the interpretative process.[16] Step two then applies traditional arbitrary or capricious review, which includes the requirement that agencies articulate reasons for exercising their discretion in one way rather than another.[17] In the *Chevron* context, this would require agencies to explain why they chose their particular interpretation of an ambiguous statute from among the universe of available choices that also would have passed step one if they had been selected. As Professor Levin puts it, "asking for a reasoned explanation of the agency's choice is precisely what step two is about."[18]

But defining what counts as a "reasoned explanation" for choosing from among a range of permissible interpretations of a statute is a bit more complicated than it seems. Agencies make many important decisions that cannot, in any realistic way, be traced to the statutes that they administer. Nothing in § 655(b)(5) of the Occupational Safety and Health Act ("OSHA"),[19] for example, tells OSHA how to draw a dose-response curve for toxic substances in the absence of any data concerning low-level exposure.[20] The agency's choice of a curve is a *legislative* choice that must be explained (justified) by reference to efficiency, fairness, administrative convenience, and a host of other considerations that courts accept as legitimate tools of policymaking. This traditional arbitrary or capricious review for agency policymaking[21] only kicks in when statutory analysis breaks down or is obviously

16. *See* Levin, *supra* note 1, at 1282-86.
17. *See id.*
18. *Id.* at 1285-86 n.140.
19. 29 U.S.C. § 655 (b)(5) (1994).
20. *See* Lawson, *supra* note 6, at 330.
21. Arbitrary or capricious review, of course, applies to many agency actions besides discretionary acts of policymaking. It applies to agency fact-finding when no other review provision governs, *see* Association of Data Processing Serv. Org., Inc. v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984), and it applies to mundane acts of discretion, such as a choice not to grant more procedures than positive law requires, *see* Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), not to initiate a rulemaking, *see* WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981), and not to reopen a proceeding in the face of changed circumstances or new evidence, *see* ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987).

futile. By the same token, *Chevron* only kicks in when the relevant statute seems to have something to say on the subject at hand. If the statute says enough to dictate the correct decision with sufficient clarity to satisfy step one of *Chevron*,[22] then the case is resolved on that basis. But if the statute does not *clearly* dictate the correct decision, then the agency's interpretation survives step one as long as the interpretation is within a (potentially broad) zone of reasonableness. In the normal case, many interpretations will fall within this zone; any of those interpretations, by hypothesis, will survive judicial review under step one. Professor Levin's step two then instructs judges to require agencies to explain why they picked the interpretation under review from among the set of interpretations that are within the zone of reasonableness under the statute.[23] Here, however, is where Professor Levin's easy equation of traditional hard look review with his anticipated *Chevron* step two review may break down. The kinds of reasons that courts generally accept as legitimate for agency policy choices are not necessarily the kinds of reasons that courts should accept for agency interpretations of statutes. Instead, agencies should have to justify their choices of statutory interpretations, in the first instance, by reference to theories of statutory interpretation.[24]

An example that I have used elsewhere[25] illustrates the point. The substantial evidence test for fact-finding gives considerable deference to agencies; courts are obliged to affirm agency decisions even when the court thinks, on balance, that the agency is wrong. But the substantial evidence test is a standard of proof for appellate courts to apply on review; it is not the standard of proof that the agency should be expected to employ in its initial decision. It would not be proper for an agency to say, "We think that the facts, on balance, support a decision for X. But we have policy reasons for wanting Y to win, and although the weight of the evidence supports X, there is enough in the record on Y's behalf to survive substantial evidence review. Accordingly, we will rule in favor of Y." Agencies may in fact do this all the time, but it is not a proper exercise of agency authority. Standards of appellate review are deferential for reasons of efficiency, economy, and fairness.[26] They presuppose that there has already been a full and

22. How clearly the statute must dictate the result is a major, and perhaps the major, issue in the application of *Chevron*.

23. *See* Levin, *supra* note 1, at 1285.

24. For a powerful elaboration of this point, see Bell, *supra* note 10, at 156.

25. *See* Lawson, *supra* note 6, at 329.

26. *See* Lawson, *supra* note 12, at 883-87.

fair opportunity for the parties to win before a previous tribunal. It would be a perversion of those standards of review to allow the initial decisionmakers to treat them as licenses to reach, with legitimacy (as opposed to impunity), any results that will survive appellate review. If a reviewing court knows that an agency deliberately let the weaker factual argument defeat the stronger, the agency decision should be reversed as arbitrary or capricious, even if the weaker argument survives the substantial evidence test.

The same principles hold true when agencies interpret statutes. *Chevron* instructs courts to give agencies some leeway by affirming interpretations that the courts think are wrong, but not too egregiously wrong. That does not, however, relieve the agencies of their obligation to try to get the right answer in the first instance. An agency does not do its job simply by concluding that an interpretation that it favors on policy grounds will survive *Chevron* step one review on appeal. The agency must conclude that its chosen interpretation is, all things considered (and policy concerns may be part of that mixture), the best available interpretation of the relevant statute.[27] Accordingly, when an agency explains why it chose a particular interpretation of a statute, the first reasons out of its mouth should be framed in terms of conventional criteria of statutory interpretation. Traditional arbitrary or capricious review, framed in the language of policymaking, will be applicable only if (and this will sometimes happen) traditional tools of statutory interpretation do not yield even a best resolution to the question of statutory meaning. Professor Levin's step two and traditional arbitrary or capricious review therefore merge only when there is a "false *Chevron*" issue: that is, where at first glance the statute seems to say something meaningful about the problem, but on further inquiry, the problem turns out to be one of pure policymaking.

In order to make the scheme of review favored by Professor Levin (and by me) work, courts must ensure that agencies have made a good-faith effort to interpret statutes correctly. (Agencies in fact have an obligation to do their very best to interpret statutes correctly, but the deferential standard of review means that appellate courts enforce a somewhat lesser obligation.) That task, however, requires

27. I have elsewhere suggested that even the best available interpretation of the statute may not be good enough to be deemed correct. *See* Lawson, *supra* note 12, at 891-94. The best available alternative standard, however, is the *minimum* standard that one can reasonably impose.

courts to have some idea what a good-faith effort would look like. And that is not as simple a task as it seems.

The embarrassing fact is that our legal system has no governing theory of statutory interpretation. Various people will tell you that any or all of the following considerations are relevant: the language of the statute, the immediately surrounding context of the statutory language, the context of the entire act of which the statute is a part, the context of the entire universe of legislation, the general background and purpose of the statute, the statute's legislative history, canons of construction, and good social policy. The list is obviously partial, even on its own terms. For instance, in considering statutory language, in any of its variations, one might look for either the language's original meaning or its present meaning. Moreover, the phrases "legislative history" and "canons of construction" conceal enormous possible variations in what is considered admissible to prove statutory meaning. Legislative history, for example, can consist of hearing transcripts, floor statements, committee reports, conference committee reports, and presidential signing statements. The individual categories can be subdivided further: floor statements, for instance, might be viewed differently depending on whether they are statements by proponents or opponents of the legislation, statements by the legislation's sponsor(s), or statements that reliably can be known to have been actually made rather than inserted into the *Congressional Record* after the fact. There is simply no consensus in our legal system about which of these (and other) considerations are admissible evidence of statutory meaning.

Even more pointedly, once one determines which considerations are admissible, there is the additional problem of determining their relative weight. Two people can agree entirely that, for example, all of the considerations listed above are legitimate, but strongly disagree about the hierarchy of importance of the various considerations (for example, whether legislative history trumps canons of construction, or whether either of those considerations can trump any of the various admissible forms of statutory language). There is no consensus in our legal system about the appropriate significance or weight to be given to the many considerations that plausibly can be thought relevant to statutory interpretation.

Our legal system has dealt with this problem by burying it very deep beneath the ground. Apart from some occasional outbursts from

Justice Scalia,[28] judges say very little about interpretative methodology. And when they do speak, clarity and consistency are not often their hallmarks. Most judicial statutory interpretation takes place without *explicit* articulation of the governing norms of admissibility and significance.

Explicit articulation, however, is the focal point of arbitrary or capricious review in the modern administrative state. Professor Levin and I would effectively have courts force agencies to be clear about the considerations that drove their interpretative process. And courts accordingly have to be clear about their own rules of admissibility and significance for determining statutory meaning—at least to the extent of determining whether the agencies have relied on inadmissible considerations or have clearly assigned an inappropriate weight to admissible evidence of statutory meaning.

Perhaps it would be good for the legal system to bring these issues out into the open. Maybe we need some explicit judicial articulation of the rules of evidence for proving statutory meaning. Then again, considering the likely outcome of such a process, maybe the whole matter is best left buried, and Professor Levin and I should just shut up about *Chevron*.

II. *DISCRETION AND ITS DISCONTENTS*

Professor Rubin's paper is a commentator's nightmare. It is well argued, well written, and almost certainly right. I won't even try to say it myself.

It is very hard to argue with the proposition that bureaucratic organizations are best described by terminology designed to describe bureaucratic organizations. Professor Rubin correctly and usefully has pointed out that much of the language of modern administrative law is anachronistic.[29] Even those of us who long for the good old days of private law and constitutional government[30] can agree that events have overtaken our conceptual framework as rapidly as they have overtaken our Constitution and our liberties. Professor Rubin has amply demonstrated that the term "discretion" does not really

28. *See, e.g.*, Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring) (objecting to the use of legislative history).

29. *See* Rubin, *supra* note 3, at 1300.

30. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that most of the twentieth century, and a good portion of the nineteenth, is unconstitutional).

communicate very much that is useful in describing modern administration.[31]

The real question is: what do we do about that fact? Not every error should be corrected; the costs of error correction will sometimes exceed the benefits of getting it right. There are some errors that are simply best lived with. The use of the term "discretion" in administrative law, instead of more analytically useful terminology, may be such an error.

The costs of changing our vocabulary are likely to be very high. As Professor Rubin recognizes, the word "discretion" is deeply (even if inaptly) ingrained in our legal culture; it would require a large-scale transformation in the thought and speech patterns of a great many people in order to effect any significant change in legal vocabulary.[32] Moreover, the term "discretion" is not merely a part of the common parlance of administrative law; it is concretely embedded in some of our most important statutes. For instance, as Part I of this comment illustrates, the APA instructs courts to invalidate agency action that is "arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law."[33] Even if one fully accepts Professor Rubin's critique of the concept of discretion, one still must figure out what to do with the word as it appears in the APA[34] and in the numerous organic statutes that also employ it.

Thus, the transition costs from the present linguistic regime to a more accurate one are likely to be substantial, and the benefits of a change in vocabulary are uncertain and probably impossible to identify with any precision. When all is said and done, the game may indeed be worth the candle, but we cannot tell without some sense of just how much the distortion of understanding produced by our present conceptual framework generates a distortion in doctrine. Much of

31. *See* Rubin, *supra* note 3, at 1323.

32. *See id.* at 1336 ("The term discretion is too familiar to replace, and any concerted effort to do so would only seem awkward and artificial.").

33. 5 U.S.C. § 706(2)(A) (1994) (emphasis added).

34. The word "discretion" also appears in § 701(a)(2) of the APA, which exempts from the APA's judicial review provisions agency action that is "committed to agency discretion by law." *Id.* § 701(a)(2). Modern doctrine requires us to give meaning to this usage of "discretion"—and to reconcile it with the usage in § 706(2)(A). The correct interpretation of § 701(a)(2), however, probably relieves us of any obligation to interpret the word "discretion" in that context. Almost surely, the phrase "committed to agency discretion by law" was understood in 1946 to codify the range of questions that traditionally had been regarded as unreviewable by courts. The phrase, in other words, is essentially code for "those forms of agency action that courts traditionally have not reviewed." *See* Webster v. Doe, 486 U.S. 592, 607-10 (1988) (Scalia, J., dissenting). On this understanding, there is no occasion to give specific meaning to the term "discretion" in § 701(a)(2).

Professor Rubin's recent work addresses precisely this issue in other contexts. I eagerly look forward to seeing the present article integrated into his larger project.

STUDENT NOTES AND COMMENTS