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Litigation: Time to Revisit *Chevron* Deference?

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MILLENNIALS, EQUITY, AND THE RULE OF LAW

LITIGATION: TIME TO REVISIT *CHEVRON* DEFERENCE?

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Moderator:

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* Editor's Note: This panel discussion took place in 2014, prior to the passing of Justice Antonin Scalia. Justice Scalia's impact on the development of administrative law in the United States is unparalleled.

JUSTICE DON WILLETT: Good afternoon, everybody. I'm Don Willett. I'm honored to join you from Austin, Texas. It's not often you get to fly from one nation's capital to another, so I'm honored to join you.

[Laughter.]

JUSTICE DON WILLETT: As I was leaving for the airport yesterday, my 5-year-old daughter, Genevieve, whined, "Daddy, where are you going? Daddy, what are people going to be talking about?" And I knelt down, and I looked her in the eye, and I gently asked her, "Genevieve, baby, do you think it's time to revisit *Chevron* deference?"

[Laughter.]

JUSTICE DON WILLETT: And her big green eyes widened, and she grabbed my leg really tight, and she answered, "Daddy, do we have any bacon?"

[Laughter.]

JUSTICE DON WILLETT: Genevieve is a smart little girl, because *Chevron* deference is kind of like bacon. Some people like their *Chevron* deference rigid and crisp. Other people like it a little squishy and a little bendable. A few people dislike it altogether, no matter how it's served. But *Chevron*[1] is now thirty years old, older than a number of people in the audience today, and a lot has changed. The regulatory state has exploded, in terms of size and scope, over the last thirty years, becoming arguably a fourth branch of government altogether.

So, is it time to revisit and think anew about judicial deference to agency decision-making? Do *Chevron*'s virtues outweigh the vices? Have courts gone too far? Has *Chevron* deference devolved into *Chevron* dereliction? Are courts moving increasingly from adjudication to abdication, letting the foxes guard the agency henhouse? So it is a thorny question that vexes the Court, and not along the usual ideological lines. We have three

[1] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

former administrative law professors on the U.S. Supreme Court. They have very fervent, strongly held views on *Chevron* and *Chevron* deference. And the Court is going to have, undeniably, some pretty high-profile opportunities in the near term, I believe, to revisit and possibly recalibrate *Chevron*.

Our four impressive panelists are going to help untangle all of this. I'll keep the introductions mercifully short. They'll each speak for about 10 to 12 minutes, either where they are or at the podium, whatever they prefer, and then we'll have an opportunity for some intrapanel rebuttal. And then we'll open it up, as we always do, for audience Q&A. The microphone—it's kind of hard to see with that bright light—is in the middle of the ballroom, right there, so please go there, and not just stand up, so we can get you recorded.

Batting lead-off, on my right, Professor Amy Wildermuth, Professor of Law at the University of Utah, where she teaches and writes on civil procedure, administrative law, U.S. Supreme Court practice. She has more degrees than a thermometer, I think.

[Laughter.]

JUSTICE DON WILLETT: She has an AB in history and a BS in engineering and policy from Washington University in St. Louis, an MS in environmental engineering, and then, finally, a law degree from the University of Illinois. So four degrees and three clerkships. She clerked for Judge Calabresi on the Second Circuit, Judge Edwards on the D.C. Circuit, and, finally, for Justice Stevens on the U.S. Supreme Court.

To her left is Charles Cooper, a familiar face to a lot of us here, founding member of the Washington D.C. law firm Cooper & Kirk, named by the *National Law Journal* as one of the ten best civil litigators in Washington. Over thirty years of legal experience in government and private practice, with several appearances before the U.S. Supreme Court. Chuck was a law clerk to Judge Paul Roney of the Fifth Circuit, now the Eleventh Circuit—this was pre-split—and then for then-Justice Rehnquist on the U.S. Supreme Court, and then went to the Justice Department in the Civil Rights Division, and then, in '85, President Reagan appointed him to head up to the Office of Legal Counsel there at DOJ. Chuck's trial and appellate practice is national in scope. It

really covers the entire gamut. It is concentrated a bit in the areas of constitutional law, commercial law, administrative law, health care, and civil rights litigation.

Third, Professor Jack Beermann, Professor of Law at Boston University School of Law, which he joined the year *Chevron* was decided, in 1984. Professor Beermann clerked for Judge—pronounce this for me.

JACK BEERMANN: Which part of Wisconsin are you from?

JUSTICE DON WILLETT: I'm from deep south Wisconsin, as in Texas—Cudahy of the U.S. Court of Appeals for the Seventh Circuit; co-author of, at least, by my count, four books on administrative law, including a widely used leading case book, and, to the joy of a lot of law students, the Emanuel Law Outline for administrative law. He's been published virtually everywhere, not just in America but all over the globe, on administrative law, on civil rights. He's lectured in numerous countries throughout the world. But in his spare time, he does umpire high school and youth baseball games, where, no doubt, the fans give you unlimited deference, I'm sure, right? No second guessing at all.

Finally, Professor Thomas Merrill, the Charles Evans Hughes Professor of Law at Columbia Law School. Before that he was on the faculty at Northwestern and Yale Law Schools. A former deputy solicitor general from '87 to '90. He has taught administrative law for many, many years, and written extensively about the *Chevron* doctrine, among other topics.

So, Professor Wildermuth, if you want to start, you can stay where you are or come up here. I defer.

AMY WILDERMUTH: Thank you so much. It is great to be on this terrific panel, and I have to say, after a long flight from Utah, that I got off of about an hour ago, it's nice to stand, so I am going to stand for a little bit.

My job, I think, is to set the stage here for this panel. It's a little interesting because my most recent work is on *Auer* deference, which is going to come up in just a second. I'm going to try to tie all the deference doctrines together. But as any good administrative law professor will do, we should start by sort of setting the stage and talking about all the deference doctrines. Before I talk about that, I think what will be important to take

away from what I have learned is the historical background that I think we sometimes skip over when thinking about these doctrines, so that's where I'm going to come back to, and I am going to give you a little hint to where we're going to end up here. It concerns me. It deeply troubles me, from what I have discovered.

So here is the brief review first. When I teach this, where you talk about the five deference doctrines in administrative law, two of which we get out of the APA, the arbitrary and capricious standard and the substantial evidence standard, I'm going to set those to the side for right now and I'm really going to talk about the three judicially created deference doctrines—the *Chevron* doctrine, the *Skidmore* doctrine, and *Auer*.

Chevron, we all know, is the deference that's afforded to interpretations of statutes that have the force of law. I'll spend a little bit more time on that in just a second, but we all know this is the *Chevron* two-step, and I would presume that you would not all be here if we didn't remember what that two-step was. I usually do a dance right now, in my class, the two-step. No? Okay.

So, how about *Skidmore*? The recently revived, although not so recent now, *Skidmore* doctrine, which applies to interpretations of statutes that don't have the force of law, and just so we all remember, it's a sliding scale of deference here. It's determined by the thoroughness evident in its consideration, the validity of its reasoning—this is the interpretation—its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.

And then, finally in this constellation, we have *Auer* deference, which is the deference afforded to an agency's interpretation of its own regulations. This has, of course, been of some interest now, since the *Decker* case. I happened to be a part of one of the briefs that was cited by Scalia and by Chief Justice Roberts, talking about the concerns with respect to *Auer* deference. We will provide this deference to an agency's interpretation. It will be given controlling weight, unless it is plainly erroneous or inconsistent with the regulation.

Okay. At this point, when I go through all three of these, and I try to do a dance, all my administrative law students just sort of zone out, and I can imagine that might be the sense that you're

having, like, really? Do we have to go through all those details again? In fact, what this has prompted lots of professors to talk about is whether this should be simpler, and the two that come to mind here, Professor David Ziring and Richard Pierce, for example, have looked at the rates of deference under each of these doctrines, and, with one notable exception, have found that courts defer in about seventy percent of the cases, no matter what the doctrine is that is to be applied. And, of course, the exception here is my *Auer* deference in Supreme Court. The Supreme Court seems to really like *Auer* deference. It's had about a ninety percent rate.

But this then prompts the question, why we would spend time on a panel like this, thinking about and digging deeply into *Chevron* deference. The idea is that the courts should just accept the reality of these figures, and adopt a single rule of reasonableness, or at least we should understand it as that. Now, that would certainly make life a lot easier. It would be easier to teach. I could take a couple of classes off. My students would really like that. But I don't think that's as easy to swallow as it first appears.

For me, the real turning point has been this project that I've spent about a year now working on, looking at all the lower court cases from the time *Seminole Rock* was decided, and then it was transformed into *Auer*, and trying to trace that history. And I think, when you spend that time looking through all of those cases, you discover some interesting things, and, in particular, you discover an interesting thing about the evolution of some of these doctrines.

Each of the three doctrines, I'll just remind everybody, has sort of really early roots. In particular, *Skidmore*, and then the case that I, as a former Justice Stevens clerk, often associate with *Chevron* as the ancestor to that, the case of *NLRB v. Hearst*, were both decided in 1944. *Seminole Rock* was decided in 1945, and, of course, this was a really formative period in the time of administrative law. We have the APA being passed in 1946, and, importantly, agencies looked very, very different, as Justice Willett started us off. They looked very different than they look

today. So the context and what was going on at that time turns out to be very important.

We look at these three doctrines, and you find an interesting historical story to be told for all three of them. For the purposes of this panel, and for time, I'm going to focus on *Chevron* and *Auer*, and the sort of history that I think they share.

As Professor Merrill and my good friend, Kathryn Watts, have explained in their terrific article that came out in the *Harvard Law Review* more than ten years ago now—which, by the way, Justice Stevens was very proud of; even though it told him he got *Chevron* wrong, he was still equally proud of Kathryn—they've explained that there was a very specific understanding, a convention, regarding when Congress intended to give an agency the power to act with a force of law when issuing regulations. It turns out that in our work on *Seminole Rock*, we also have some similarities.

We have *Seminole Rock* emerging from a time where agencies were more limited. We have, in particular in *Seminole Rock*, the Office of Price Administration (OPA), which was one of the few agencies that was given rule-making power. It was in a time of war, and it was doing price controls, which we do a lot of now—no. So it has a very unique sort of history, and, in addition, if you take a close reading—I would encourage all of you to go back and read *Seminole Rock*—it makes clear that the deference was only arrived at after the Court had done an independent judicial check on the language of the regulation and was satisfied that the interpretation was appropriate.

Part of this is, because there was so little rule-making at that time, in the '40s and into the early '50s, there were relatively few cases that raised *Seminole Rock* or even the question of the convention with respect to *Chevron*. But then, very interestingly, in the late '50s and '60s, there was great enthusiasm, a big push for rule-making, and, again, as Professor Merrill and Watts explored in their piece, we know that there was a collective memory loss regarding the original convention, with respect to laws that were giving agencies the power to act with a force of law.

Well, it turns out we have the same thing happen with *Seminole Rock*. *Seminole Rock* had very modest origins, and then,

around this same time when we have a push for rule-making. It is not surprising that once you start making more regulations, you have more agencies going in and asking for deference to their interpretation of regulations, and all of a sudden you lose the roots of *Seminole Rock*. So this is a really important, critical time in these deference doctrines, and for me, it makes a difference as to how I think about the issues today.

This matters because that sense that there might be something wrong or something amiss in applying these doctrines is confirmed when you think about their development, that is, questions that might be raised about the doctrines, the questions that the panelists today are going to raise, questions about separation of powers, delegations of Congress, the fundamental due process considerations. I think those all start to make more sense when you think about the gaping holes—and I think they're gaping. I think there are very big holes in how these doctrines developed over time.

So if you can't get from Point A in the mid 1940s, to Point B in 2014, I think it should not surprise us that there could be significant issues and questions that just were left unresolved or unaddressed, and, in fact, that's what we see right now, and especially in my work, with respect to *Seminole Rock*, you have all kinds of cases, and it's remarkable the difference between the language used in the late '40s and early '50s, and then you get to the late '60s, and you think, is this the same court? And in some instances, it's the same judge. No explanation.

For me, it seems only fair to suggest that the courts—I'm going to use this and I hope people get this reference; I now have figured out that I've aged out of cool in my classes, but that's okay. That's okay. I'm handling it. But, anyway, in the words of Ricky Ricardo, I think the Court has some explaining to do.

So, with that, I will turn it over to my fellow panelists. Thank you.

[Applause.]

CHARLES COOPER: Good afternoon, ladies and gentlemen. It's a real honor for me to be on this panel with three

very renowned administrative law professors, one of whom, at least, is a pretty stylish dancer, I see. I don't know about you guys. Probably not.

[Laughter.]

CHARLES COOPER: But, I have to confess I'm a little bit intimidated. I don't study administrative agencies day in and day out like my colleagues here. I sue them.

[Laughter and applause.]

CHARLES COOPER: And I like doing it. So it won't surprise you, probably, to hear that I think it is high time that *Chevron* was reconsidered, and that is exactly what is happening broadly now in forums like this one, and also in the United States Supreme Court, it appears. Chief Justice Roberts, in his dissent in the *City of Arlington v. FCC* case, recently lamented "the danger posed by the growing power of the administrative state."[2] The Chief Justice was referring to the danger to liberty that the separation of powers was designed to protect against. And he emphasized that, "The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[3]

Nor could the Framers have envisioned, surely, the wholesale divestiture of constitutional powers, both legislative and judicial, that has created the modern administrative state. I'd like to focus my comments on the *Arlington v. FCC* case. The Court in *Arlington* held that when a statute is ambiguous on whether a certain substantive issue has been committed to agency discretion, that is, whether the agency has authority from Congress to resolve the issue with the force of law, the courts must give *Chevron* deference to the agency's resolution of that ambiguity concerning the scope of the agency's own authority.

The Court divided on unusual lines, with Justice Scalia writing the majority opinion and Chief Justice Roberts writing a

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[2] City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

[3] *Id.* at 1878 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

dissent, in which Justices Alito and Kennedy joined. I think that Justice Scalia got it wrong, and that Chief Justice Roberts got it right.

My view on this follows from three premises, which I think follow from the constitutional separation of powers. First, the question whether Congress has committed—that is, has delegated—a particular substantive issue to agency discretion is a pure question of statutory interpretation. Second, construing a federal statute in a final, binding way is an exercise of exclusively judicial power. As Chief Justice Marshall famously put it, "it is emphatically the province and duty of the judicial department to say what the law is."[4]

Third, an administrative agency has no power, no judicial power, to construe a federal statute with a force that is binding on an Article III court. The Constitution does not grant such judicial power to administrative agencies, and such a judicial power cannot be delegated to an administrative agency by Congress or by the courts. Accordingly, a court is not required—indeed, it is not permitted—to defer to an agency's decision on whether the agency has statutory authority to decide a particular substantive issue under the statute it administers.

In reconsidering *Chevron*, it is first critical to understand precisely what kind of power, legislative or judicial, an administrative agency exercises when it decides particular substantive issues. The Supreme Court's *Chevron* decisions, including *Chevron* itself, are deeply muddled on that question, and the opinions in the *Arlington* case, both the majority and the dissent, are the latest examples of that confusing muddle.

Justice Scalia, in his majority opinion in *Arlington*, describes the *Chevron* rule as follows: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[5] Well, that certainly sounds like the agency is exercising judicial interpretive power. But elsewhere, Justice Scalia says that *Chevron* prevents judges from "'substituting their own interstitial lawmaking' for that of

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[4] Marbury v. Madison, 5 U.S. 137, 178 (1803).

[5] *Arlington*, 133 S. Ct. at 1868 (majority opinion).

the agency."[6] That, however, certainly sounds like the agency is exercising legislative power. Finally, Justice Scalia says that "the archetypal *Chevron* question" that agencies must routinely resolve is "how best to construe an ambiguous statutory term, in light of competing policy interests."[7] Well, construing ambiguous statutory terms sounds like a judicial function, but deciding between competing policy interests is certainly a legislative power. So, from this passage, it would appear that the agency is exercising a strange mix of both powers simultaneously.

The Chief Justice's dissenting opinion is similarly muddled in describing what kind of powers administrative agencies exercise. Chief Justice Roberts explains, for example, that under *Chevron*, "courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue."[8] Well, that certainly sounds like the agency is exercising a strictly judicial power conferred on it by Congress. Now, contrast that statement with the following: "[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity in question."[9] This statement makes it very clear that the agency is exercising legislative power, delegated to it by Congress. Finally, Chief Justice Roberts, very much like Justice Scalia, also suggests an agency is simultaneously exercising both legislative and judicial power. Here's one such statement, among many: "An agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power, from Congress to the Executive."[10]

I think it is constitutionally important to try to clear up this confusion. I believe that *Chevron*'s rule of judicial deference to agency decisions can be sustained, if at all, only if the decision-

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[6] *Id.* at 1873 (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).

[7] *Id.*

[8] *Id.* at 1877 (Roberts, C.J., dissenting).

[9] *Id.* at 1880.

[10] *Id.* at 1886.

making power exercised by the agencies is legislative in nature, rather than judicial, and I think this is so for a number of reasons.

First, the essential rationale under *Chevron* for the rule of deference to agency decisions is intelligible only if the agency is exercising legislative power delegated by Congress. Indeed, the *Chevron* Court itself explained agency power to decide particular substantive issues as necessitated by Congress' decision not to decide them itself—that is, Congress' decision not to make law. This is what *Chevron* said: "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."[11]

And the *Chevron* Court described the role of agencies as "reconciling conflicting policies" and "resolving the competing interests which Congress itself . . . did not resolve."[12] Finally, the *Chevron* court noted the necessity for agencies to be able to change their statutory interpretations. As the Court put it, "[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[13] These passages from *Chevron* describe how legislators make law. It is the antithesis of how judges interpret law, at least genuine judges.

There is an even more fundamental reason why an administrative agency can constitutionally exercise only legislative power, and not judicial power. It is a very hard question, I think, from an original meaning standpoint, whether Congress has authority under the Constitution to delegate its legislative power to an executive branch agency. On that subject, I refer you to a recent and provocative book by Professor Philip Hamburger, entitled *Is Administrative Law Unlawful?*.

But even if one assumes that Congress has constitutional authority to delegate a portion of its legislative power, at least that is a power that it has. Congress surely cannot delegate a

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[11] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[12] *Id.* at 865.

[13] *Id.* at 863.

power that it does not have, and it has no judicial power at all to delegate to the administrative agencies. It cannot exercise judicial power, nor can it delegate such power. Thus, notwithstanding the Court's frequent references, in *Chevron* and since, to congressional delegations of binding interpretive authority to agencies, there can be no such delegation because authority to make final, binding, statutory interpretations—that is, authority to say what the law is—is an exclusively judicial power.

And Congress surely cannot make the Supreme Court subordinate to administrative agencies in the judicial function of saying what the law is. Congress has express authority to create such inferior courts, as it may from time to time, ordain and establish, but even as to such inferior courts, Congress cannot imbue their statutory interpretations with an authoritative quality that is binding on the Supreme Court—that is, a quality that requires the Supreme Court to accord deference to any reasonable interpretation, even if it is not, in the words of *Chevron*, "the reading the [Supreme Court] would have reached."[14]

If that is true, then it would seem to follow that Congress cannot delegate to unelected bureaucrats, or even to the President, the judicial power to say what the law is. The agencies are truly supreme over the Supreme Court if, in fact, that judicial power can be delegated by Congress.

So what does all this mean, in the context of the *Arlington* case? Well, I think it means at least this. When it comes to resolving the purely legal question of whether Congress has delegated to the agency law-making power over a particular question, the agency's view on "what the law is" on that issue of statutory interpretation is not entitled to judicial deference, and, in fact, cannot constitutionally be accorded judicial deference by the Court.

I want to make one final point. I think that the *Arlington* decision has planted the seed of a revolutionary change in *Chevron*'s canonical, as Justice Scalia put it, two-step formulation, because I just don't see how step one can survive, in its current form anyway, the *Arlington* Court's holding that a court must defer under *Chevron* to an agency's interpretation of a statutory

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[14] *Id.* at 843 n.11.

ambiguity that concerns the scope of the agency's statutory authority. Remember that the question at step one is whether Congress' intent on the specific question at issue is clear and unambiguously expressed, and if the answer to that is no—that is, if the statute is ambiguous—then the agency, rather than the Court, is entitled to resolve the ambiguity. In other words, the existence of ambiguity in the statute is the source of the agency's authority to resolve the ambiguity. But the question whether the meaning of a statute is ambiguous is itself often ambiguous. Judges often disagree on this question, as the recent Obamacare cases dramatically illustrate. Federal reporters are filled with divided courts on *Chevron* step one. So it follows, it seems to me, from *Arlington* that an agency's determination that the statute's meaning is ambiguous is one to which courts must defer, even if they disagree, unless the agency's determination is unreasonable. In other words, it appears that *Arlington* has merged *Chevron*'s steps one and two.

So, with that, I'll turn it over to my other panel members. Thank you.

[Applause.]

JACK BEERMANNN: Great. Thank you. Thanks very much. It's really a pleasure to be here. I haven't been at a Federalist Society meeting in a long time. I think it was the early 1980s, when I was a student at University of Chicago Law School, and I remember Robert Bork was on one of the panels. It was the only time I had the privilege of meeting him, and he was amused at my nametag, on which I had written "Earl Warren."

[Laughter.]

JACK BEERMANN: So that's where I was. Now, listening to Chuck's presentation, I was wondering if maybe I was in the panel that I really wanted to go to at this time on separation of powers, but I guess it turns out that everything revolves around separation of powers.

I have written a little bit on what's wrong with *Chevron*. What's wrong with *Chevron* has always been pretty much wrong

with *Chevron*, although it's gotten worse as time has gone by. Attacking *Chevron* as a matter of legal craft is like shooting fish in a barrel. It's one of the easiest targets in the history of the world, because it's really very difficult to figure out what *Chevron* really is about. Is it about interpretation of statutes? Is it about policy decisions? Just what is it about? To think that we've had the case around for thirty years and we still can't figure it out, I think says a lot about what's wrong with *Chevron*.

I don't think what's wrong with *Chevron* is a separation of powers matter, and I'm going to get to that later, although I respect Chuck's views, and he's really expressed them very eloquently. I really don't think that there's a separation of powers issue going on here at all, but I'll explain that a little bit later.

Now, just to illustrate a little bit about how *Chevron* works, Gary Lawson and I are sharing an office this year, because we're in temporary offices because of a construction project. Some of you may know Gary. He was one of the founders of The Federalist Society, and Gary is one of the funniest people you'll ever hear speak. Any time you get a chance to hear Gary speak—and it's not too often because he doesn't like to travel—he always has a great way of approaching something. So I'm trying to channel him a little bit, and I'm thinking about what *Chevron* is like.

Think about it this way: it's Christmas morning, and you've given this great big toy, in a box, with 1,000 parts, to one of your children. And, of course, you've got to put it together. So you open it up and there's this book of instructions that was translated by someone who really wasn't a native English speaker, and the pictures are pretty much indecipherable, and there are 1,000 parts, and you're working on it, and you're grunting and groaning, and huffing and puffing, and sweating. And it's three hours later and it looks like maybe the thing is put together right, except that you have a whole handful of parts still in your hand. Chevron is like those instructions.

[Laughter.]

JACK BEERMANN: As a lawyer, you have to know the rudimentary thing about how to do this or you'll never get it even close to right. But you can't actually solve the problem of any case using *Chevron*, because *Chevron* basically means whatever the

particular court, or the particular judge, at the particular time, wants it to mean, and the great divide that occurred with *Chevron* happened between the first *Chevron* case and a very closely following case, and it had to do with a footnote that Justice Stevens put in the original *Chevron* case. I'll just try to explain that briefly.

The original *Chevron* said, basically, that if Congress had directly spoken to the precise issue in question, that was the end of the matter and everyone was bound by that. But, if Congress had not directly spoken, then it was ambiguous. We presumed there was a delegation. I don't need to tell you all this. And then you go on to step two, which is, is there a permissible construction? Justice Stevens wrote a footnote, I believe it's footnote number 9, which said that issues of statutory interpretation are for the courts to decide. Okay. So what was that whole step one about?

[Laughter.]

JACK BEERMANN: In a later case, the *Cardoza-Fonseca* case,[15] the Court elaborated that in deciding what a statute means, you use the traditional tools of statutory construction, and that means tools like canons of construction. My favorite is *noscitur a sociis*. And whatever you look at to determine statutory meaning, except that Justice Scalia would never look at legislative history, but every other tool of statutory interpretation is open.

Now, the Court didn't make it clear it if the traditional tools language in *Cardoza-Fonseca* was about *Chevron*'s step one or if it was about some pre-*Chevron* notion, as Chuck was talking about, where we have to figure out if the agency has been delegated authority, but it seems that, in later cases, the Court has said—and the lower courts have picked up on this—that in step one, in trying to figure out what the statute means, you can use all the traditional tools of statutory interpretation, and only when you can't answer the statutory question do you then get to step two.

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[15] I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987).

The question then becomes what did we gain by having *Chevron*, then? I think maybe billable hours for attorneys, arguing about *Chevron*, is about the only thing that we gain.

[Laughter and applause.]

JACK BEERMANN: I wrote an article which was much too long, and it could have been even longer except that they now have word limits on law review articles in a lot of journals. I said that, basically, every moment that's spent arguing about whether *Chevron* applies, and, if so, how it applies, is wasted effort for the lawyers, and wasted effort for the judges. They should just talk about the case. What does the statute mean? What is our best sense of what Congress meant? And if Congress meant to delegate the decision-making authority to the agency, then is what the agency did within the scope of review that applies to that particular case? Is it arbitrary or capricious, or supported by substantial evidence, or correct if it's subject to de novo review, or whatever.

If you look at how *Chevron* has been handled by the courts, you get a pretty good idea that *Chevron* isn't really what decides any cases. There are two things I want to talk about here. In one of my two articles about *Chevron*, I counted up decisions. Who do you think on the Supreme Court defers to agencies the most? The most is Chief Justice Roberts. It used to be that Roberts and Alito were tied. Now, I'm not counting Justices Kagan and Sotomayor because they're too new. They're off the charts in terms of how much they defer, but it's not surprising because they're still deciding cases by the agencies controlled by the President that appointed them. And the sample is too small to draw any conclusions.

Who do you think defers the least? You can give the same answer that you just gave about who you thought defers the most. Justice Scalia defers the least. That's because Justice Scalia, applying the traditional tools of statutory interpretation, mainly the plain meaning rule, is more confident in his ability to read statutes than the other members of the Supreme Court are—and he said this. He has stated in print that under his approach to statutory interpretation he is more likely to find clear meaning

and thus more likely to decide cases in Chevron step one, which means he won't defer to agencies as frequently as other judges.[16]

In most of the cases the votes line up how you would expect them to line up, whether *Chevron* existed or not. That is, in the 5-4 cases where *Chevron* is applied, Justice Kennedy decides which side wins. Whichever side he's on, it's those four plus him, or the other four plus him. It's pretty rare that the lineup gets mixed around the way it got mixed around in the *City of Arlington* case. Usually, if it's a 7-2 decision, it's always two on the extreme, on one end or the other. The lineup of votes has nothing to do with how they think *Chevron* applies. It has to do with what they think of the merits of the case, usually along the liberal-conservative spectrum. That's how our judges decide cases when *Chevron* applies. So I think that's a good illustration, if you look at the actual cases, to say how content-less *Chevron* is.

Now, to another point. There's a little-known case that's come up to the Supreme Court you might have heard about, about whether people who purchase health insurance on federally run exchanges are eligible for subsidies.[17] It is before both the D.C. Circuit[18] and the Fourth Circuit.[19] In both of those cases, both sides, the challengers and the government, argued that the case should be decided under step one, based on clear statutory meaning. Of course, diametrically opposed clear statutory meaning. The D.C. Circuit decided that it was clear statutory meaning against the government's position in its panel decision.

The Fourth Circuit decided that, based on the entire structure of the statute, and the history and the purposes, all those traditional tools of statutory construction, that the statute was ambiguous. And then the Court decided that, in light of the

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[16] The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

[17] This is a reference to the issue that was ultimately decided in *King v. Burwell*, 135 S. Ct. 2480 (2015). Subsequent to the date of this panel, the Supreme Court decided that *Chevron* did not apply at all to this issue because Congress could not have intended to delegate to an agency the important question whether subsidies were available to those purchasing health insurance on federally run exchanges.

[18] Halbig v. Burwell, 758 F.3d 390, 394 (D.C. Cir. 2014).

[19] King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

purposes of the statute, the government's interpretation was—and now I'm going to quote the two words—"entirely sensible."[20] Not the "permissible construction" but "entirely sensible." And that says another thing about the way that our courts function, which is that they set up rules of decision and then they don't follow them. They say whatever they want, in any particular case, if it sounds good in the opinion.

So instead of applying the directly spoken to the precise question at issue version of step one, when it became better to say traditional tools of statutory construction, they said that. First they had permissible construction as the requirement of step two, now it's entirely sensible. It's whatever courts think is the reasonable way to do it in the particular case. In other words, you could take *Chevron* totally out of the mix, and it's just their traditional judicial opinion.

In thinking about the failure of *Chevron* over the thirty years, think about other legal standards that are designed as decision-making processes, rather than substantive rules. Think about, for example, how you decide whether there's an entitlement in a case involving a government benefit or government employment. You use the entitlement theory from the *Roth*[21] case, about whether there is a legitimate claim of entitlement. And consider equal protection doctrine, with the three tiers of scrutiny. Imagine if today, after all these years, we didn't know how to figure out if somebody had a property interest, or we couldn't even figure out what tier of scrutiny do we apply to what kind of case. Those rules work pretty well in that they frame the decision making process in a fairly predictable way.

Chevron doesn't frame anything. You even have one Justice on the Court that says there's only one step in *Chevron*, and that's Justice Scalia, and some scholars have said that's true, there's only one step in *Chevron*. So we don't even know how many steps there are. Some people say one. Some people say two. Some people say three. Some people say four. And if you don't know about four, I have an article where I explain what the fourth step is.

[Laughter.]

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[20] *Id.* at 375.

[21] Board of Regents v. Roth, 408 U.S. 564 (1972).

JACK BEERMANN: The last thing I'll say about this, before I go on to the *Arlington* case and the separation of powers is that, to me, the best illustration of the failure of *Chevron* is Justice Stevens' last *Chevron* opinion. I believe it was his last opinion. It was in *Negusie v. Holder*,[22] where the Supreme Court decided the case based on *Chevron*, and deferred, and Justice Stevens dissented, and he said, in effect, "This is an issue of statutory interpretation, for the courts to decide. It shouldn't be decided under *Chevron*." Okay. There we go again. What is it about? Is it about deference to policy? If it were about deference to policy, you'd think we'd be using the arbitrary, capricious standard. In fact, the Court has said more than once that step two of *Chevron* is the same thing as the arbitrary, capricious standard, but they're totally different, so what do they mean by that?

Okay. That's enough beating up on *Chevron*. Poor *Chevron*.

Now I want to talk about why I don't think that the *City of Arlington*[23] is really a chink in the armor of *Chevron*, or that it violates separation of powers. I just want to start with one question—Is there a right to judicial review of rules? Is there a constitutional right to judicial review of rules? Does it violate separation of powers when Congress makes an exemption from judicial review? Justice Scalia would actually lean the other way. He'd say, "Judicial review may violate separation of powers, because it takes away from the President's ability to faithfully execute the laws." And I think Gary Lawson also agrees with that.

There is no constitutional right to judicial review of agency action except when agency action is an adjudication of private rights, where there might be a problem with Article III. Let me repeat that. There is no constitutional right to judicial review of agency action, period. So, what that means is, if Congress said no judicial review at all of any of these rules, we wouldn't have to ask whether *Chevron* applies to jurisdictional rules or not. There just wouldn't be judicial review.

Now, when Congress passes a statute, delegating authority to an agency, I agree with Chuck. It cannot delegate judicial power,

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[22] 555 U.S. 511 (2009).

[23] City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

and it also cannot delegate legislative power. What it does is, it delegates power for the Executive Branch to execute the law. And this is what Justice Scalia said in the *Whitman v. American Trucking*[24] opinion. The Executive Branch can only execute the law. They can't legislate. Only Congress can legislate. They can't adjudicate. They can't use the judicial power of the United States. Only federal judges can do that.

But what they can do is they can execute the law, and they can use different kinds of procedures. Let me just give a simple example. Suppose you have to apply for a permit for grazing in some federal land, and there's a certain factual standard. You have to meet certain requirements and the land can't already be overgrazed. So now, you file your application and the agency isn't sure whether it should grant it or not, so they ask you in for a meeting, and they say, "Let's talk about this," because it would be the quintessential execution of the law to grant you or deny you your permit. So now they call you in for a meeting, and they invite someone from the enforcement office of the agency to sit on the other side of the room. You give your presentation about why you should get it, and they give their presentation about why you shouldn't get it. That's not adjudication. That's execution of the law. They happen to be using an adjudicatory form to do it.

Now, suppose the agency wants to let people know in advance, what does it mean to have the land overgrazed, because Congress said overgrazed? So now they put out a little statement that says, "Overgrazed means less than X, Y, Z density of growth." I don't know anything about grazing—

[Laughter.]

JACK BEERMANN: —but less than a certain density of plant life in the field. That is not legislation. That is that agency executing that law that Congress gave it the power to execute. I think that's what Justice Scalia meant when he said that there's no delegation of legislative power, at all, and Justice Stevens disagreed and said there is a delegation of legislative power. I happen to be with Justice Scalia on this one.

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[24] Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

So, let me just finish up by saying, what does that mean about *Chevron*? Okay. So now, the question in *Chevron*, and about the jurisdiction of an agency, in my view, every single question is jurisdictional, and that's why the Chief Justice was wrong and Justice Scalia was right in *City of Arlington*, because if an agency tries to enforce something against you, in order for them to do something to you, even if you can't get judicial review of the rule because Congress has said no judicial review of these rules, if the agency tries to issue an order against you, and do something to you, you can go to court and try to stop the agency from doing that to you. And in the course of that proceeding, your defense is that the agency didn't have authority to do this to you, because they haven't been delegated this power from Congress, either because Congress told them, statutorily, to do something different, or because Congress said, "You have to do it reasonably." In this case, they didn't do it reasonably.

So the question in all cases is ultra vires, that is, has Congress delegated the authority to the Executive Branch to do this to you? That's a jurisdictional question in every single case of administrative law, and that's why *City of Arlington* is correct.

[Applause.]

THOMAS W. MERRILL: Thanks very much. It's great to be back here again. I have been here since 1981, I think.

[Laughter.]

THOMAS MERRILL: Let me start with a brief biographical note. My first serious involvement with *Chevron* was when I was working in the government as Deputy Solicitor General. I was in charge of cases coming out of the Civil Division of the Justice Department, which represents the various federal agencies, and after about a year on the job, I told my friends that I was actually the Deputy Solicitor General for *Chevron*, because every single case that came up from the Civil Division involved some *Chevron* issue. The government was obviously thrilled with *Chevron* and was trying very much to make it as secure as possible, avoid any type of trimming back, so they were kind of worried about the

Supreme Court. We tried to keep these cases out of the Supreme Court because we were apprehensive, at that time, that maybe the Court would trim back on *Chevron*.

After I left the government, I started reflecting on my experience, and I quickly came to the conclusion—I was an academic again, so I was liberated from my client obligations—I concluded that *Chevron* was a bad idea. I actually wrote a little essay, that's buried in some magazine somewhere, called "Confessions of a *Chevron* Apostate," in which I said that although I'd been Deputy Solicitor General for *Chevron*, I no longer thought that *Chevron* should be good law.

I've written about eight articles on *Chevron*. It's kind of an embarrassing thing to disclose.

[Laughter.]

THOMAS MERRILL: We all have to do something for a living. I think the first two articles I wrote, in the early '90s, shortly after I finished being Deputy Solicitor General, essentially argued for the overruling of *Chevron*. I thought it was basically a very flawed doctrine, a bad idea. I guess if I had to summarize it, I would say that it's faux formalism. It sort of looks, on its face, like a formalistic doctrine—step one, step two, and so forth. You can organize opinions and briefs very nicely around *Chevron*. I think that's one of the secrets of its success.

But what are the steps? The first step is clear or not clear, and the second step is reasonable or not reasonable, and those are not rules. Those are the biggest, squishiest, fattest standards you can imagine. And by suggesting that the entire realm of judicial review of agency interpretation can be funneled into those two concepts, it produces enormous confusion and enormous disutility.

Now, I want to say something nice about *Chevron*, because no one else has said anything nice about *Chevron*. I do think that *Chevron* deserves credit for, I think, planting the idea in our jurisprudence that, in some situations, cases of statutory interpretation are actually cases about policy—they're not just cases about meaning or how to construe statutory enactment—and for suggesting that when, in fact, the case of interpretation becomes a case of policy, there are some strong reasons for preferring administrative or executive interpretation rather than

judicial interpretation, namely the greater accountability that agencies have through their responsiveness to both the Congress and the President, elected officials, and also their greater experience and expertise.

Now, that's not to say that *Chevron* does a very good job of telling us where the line is between interpretation and policy. It doesn't do a very good job of that at all, and that's generated enormous disputes, and so forth. But I did want to say one nice thing about *Chevron*.

Why do we have judicial review of agency action? We have a number of reasons for that. Maybe it's not required constitutionally, except in cases of private rights, but it serves a number of useful functions. One of them is to protect individuals against bureaucratic arbitrariness. That's pretty important. Another is to try to encourage agencies to be more accountable by explaining the reasons for their decisions. That's pretty important. Third, one of the most important functions of judicial review is to maintain and police the boundaries between the different governmental actors in our system.

Now, Jack is right that Congress doesn't have to create judicial review in order to help maintain and police boundaries, the outer limits of agency authority, and so forth. But the reality is that Congress has consistently done that, and I think they've done it precisely because they perceive that judicial review is helpful in making sure that agencies don't start running amok and engaging in regulation where Congress never contemplated that they actually have authority to regulate.

But it's not just a matter of delegation. It's not just a matter of the delegated authority of the agency. There's a bunch of other important boundaries. There's the Constitution, for example. We don't want agencies violating people's constitutional rights. There's the question of one agency usurping the authority of another agency or another entity of government. There's a very important question of federalism. We don't want federal agencies running roughshod over the traditional prerogatives of the state and local governments. All these boundaries are very important, and I think the function of judicial review, in critical respects, is to try to maintain stability in these boundaries.

The Court, in *Chevron*, didn't say anything about boundary maintenance, because I think they perceived the question in *Chevron*, which was the meaning of a stationary source of air pollution, was clearly within the ambit of the EPA's authority, so there wasn't any boundary maintenance issue to be resolved. Later decisions like *Arlington* have brought this question to the fore.

There are three ways, in principal, that you could engage in boundary maintenance through the lens of the *Chevron* doctrine—step one, step two, and what has come to be called step zero, or the preliminary threshold inquiry into whether or not the agency has been given sufficient authority to have its interpretations reviewed under *Chevron* as opposed to *Skidmore* or something else.

Now, the Court has sometimes used step one to engage in boundary maintenance. I would remind you of the case of *FDA v. Brown and Williamson Tobacco*,[25] where the question was whether or not the FDA had authority to regulate tobacco products. The Court purported to apply step one in answering that question. It wrote twenty-nine pages about all the testimony that various FDA commissioners had made over the years, and how Congress had responded by giving the Federal Trade Commission certain authority, and so forth. And after twenty-nine pages of this excruciating analysis, the Court said, "It's clear that Congress never gave the FDA authority to regulate tobacco products." So that has happened.

Another possibility is to regulate boundaries under step two, where you ask whether or not the agency's interpretation is reasonable. You could say that a boundary violating agency action is unreasonable, and Justice Scalia did that, just last term in a case involving the interpretation of the PSD provisions of the Clean Air Act, which I'm going to come back to.

A third option, which is basically the one that was rejected in *City of Arlington* is that courts could ask, before they get to *Chevron*, as part of step zero, if you will, is the issue before us one in which the agency has been given delegated authority to act with the force of law? Courts could decide using independent

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[25] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

judgment whether or not the agency is exceeding its various jurisdictional boundaries—legislative separation of powers, constitutional and federalism boundaries, at step zero. A version of this was enforced by Chief Justice Roberts in his dissent, but Justice Scalia, speaking for Justice Thomas and the three most liberal justices on the Court, disagreed and said, as some of the other panelists have described, that agencies, in cases of ambiguity, get to decide the scope of their own authority, a proposition I find utterly astonishing.

None of these three options, I think, are very satisfactory. To illustrate, let me talk briefly about an issue that I think that any reasonable person, a fair-minded person would have to acknowledge. It pertains to the questions of the legitimate boundaries of agency action. This is the question of whether the EPA has authority to adopt an aggressive and wide-ranging program to regulate greenhouse gases in order to combat climate change.

In fact, we do have some confrontations with this, under *Chevron*. The first one occurred in 2007, in a case called *Massachusetts v. EPA*,[26] in which the Supreme Court essentially addressed this issue under step one of *Chevron*. The question in that case was whether or not EPA was required to institute a rulemaking to decide whether or not to limit tailpipe emissions of motor vehicles in order to reduce greenhouse gases. There was an agonizing standing debate in the case, and so forth, but eventually the Court decided that Massachusetts had standing because a millimeter of land might have disappeared because of rising oceans, and it went on to rule that, in fact, EPA does have jurisdiction over global warming and greenhouse gases.

The reason it gave was, unfortunately, rather not untypical for a step one decision. It focused on one little provision of the Clean Air Act, which was a definition of the word "air pollutant," and it interpreted that one little provision under step one. The language says that "an air pollutant includes any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air." The Court said,

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[26] Massachusetts v. EPA, 549 U.S. 497 (2007).

"Well, you know, carbon dioxide and so forth enters the ambient air. It's a chemical. Therefore, greenhouse gases are air pollutants. Therefore, EPA has authority to regulate greenhouse gases. Therefore, EPA has to consider this rule-making petition to regulate tailpipe emissions, in order to limit climate change."

That was kind of ironic, in my view, because it was the kind of wooden literalism that liberals are constantly accusing some textualist conservative judges of engaging in—I think wrongly. I think textualism is much more sophisticated than that. But, in this case, a coalition of justices, led by Justice Stevens, and including the liberals and Justice Kennedy, in a weak moment, decided to engage in literalism in order to force the Bush administration to get on with it and start regulating climate change. That was the message being sent in that particular case. So here we have step one being used by a court to resolve a jurisdictional issue in favor of the agency. The Bush administration was arguing that it didn't want to regulate. The Supreme Court says, no, you have to regulate. So the jurisdictional issue was resolved under step one, in a fashion that I think was virtually mindless.

If anybody who knew the Clean Air Act would be consulted about whether or not greenhouse gases can be regulated meaningfully in the Clean Air Act, the answer would be this makes no sense whatsoever. There are all sorts of provisions in the Clean Air Act that would be nonsensical under that understanding, the most central is that the Clean Air Act requires the designation of certain critical pollutants that are regulated by ambient air quality standards, and when a pollutant is designated as such, it has to be reduced so that it has zero health and zero welfare effects. It's literally impossible to regulate greenhouses gases so it has zero health and welfare effects, because we have no authority over what most of the world does in the way of emitting greenhouse gases.

Okay. So that was step one. What about step two? The next confrontation with greenhouse gases occurred last year, in a case called *Utility Air Group*,[27] in which the Court considered regulations that EPA had promulgated under what are called the

[27] Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

Prevention of Significant Deterioration Provisions of the Clean Air Act, which is designed to prevent states from allowing their air quality to deteriorate down to the level of these national ambient air quality standards. EPA, in an exercise of extraordinary contortion, had interpreted the PSD provision to say that, well, greenhouse gases are pollutants, and the PSD regulations are triggered when any pollutant above a certain threshold is emitted, and, therefore, if somebody is emitting enough greenhouse gases, they have to comply with these new regulations under the PSD program, with respect to new sources.

The little problem that this presented was that the PSD provisions have numeric thresholds for how much pollution you have to emit in order to be subject to these regulations, and it's a little bit complicated, but it's basically 100 tons of pollutant a year. If you made every source that emitted 100 tons of pollution a year file a PSD permit and comply with regulations, every apartment house, every school, every restaurant, every dry cleaning shop in the United States would be subject to the PSD program. So recognizing this, EPA decided that it would change the 100-ton-per-year threshold, in the case of greenhouse gases, to 100,000 tons per year. So, with that little trick, EPA then promulgated these regulations.

Justice Scalia, writing for fives Justices, held that this was invalid. He said that, in fact, the definition of pollutant, for PSD purposes, has to mean everything but greenhouse gases. How he got around *Massachusetts v. EPA* is a little unclear, because *Massachusetts* had said that pollutant requires that you include greenhouse gases. But Justice Scalia said that a pollutant is ambiguous, EPA has interpreted it differently under different sections, so it must be ambiguous. He didn't say that step one was violated, obviously, because he said it was ambiguous, but he said it was unreasonable, and it was unreasonable primarily because you can't rewrite the statute. If you interpret the statute in such a way that you have to rewrite part of the statute to change 100 to mean 100,000, that's unreasonable. He got five votes for that. Actually, Alito and Thomas also concurred in that.

So you might think, this is a victory, right? Let's use step two to police the boundaries of agency action. Not quite so fast. The

opinion then goes on to discuss another aspect of the EPA regulation, which was that if the source emits over 100 tons of some other pollutant which is regulated, then it has to comply with greenhouse gas emission controls, and Justice Scalia apparently didn't have the votes or didn't want to invalidate that regulation as unreasonable. And it turns out that that second regulation covers ninety-seven percent of the relevant sources that the EPA wanted to regulate under PSD. So the victory on the first part of the case was symbolic, and the government regards this as a major victory.

What about using Chief Justice Roberts' proposal in *Arlington* to police the boundaries of agency action under step zero? Actually, I think this is the best of the three possibilities, but I'm not very optimistic either, here, if you think about, again, EPA and the Clean Air Act, and climate change. Chief Justice Roberts basically said that the way to try to do this under step zero is to require that you show that the particular issue in question is one as to which the agency has been given authority to act with the force of law. So you would not just look at a generic rule-making grant. You'd look at the specific section of the statute or the clause, and see whether or not there's a rule-making grant there, or an exception to rule-making power in that particular section.

The problem with this, in terms of the EPA and the Clean Air Act is that virtually every section of the Clean Air Act includes a rule-making grant to the EPA, so it doesn't really matter whether the EPA is trying to rewrite regulations under the stationary source provision, Section 111(d), or PSD or the non-attainment sections, or the mobile source provisions. They all have rule-making grants. They all authorize EPA to regulate with the force of law, as those grants are currently understood. So it may be that even if Chief Justice Roberts' approach is ultimately accepted, it wouldn't do much in the way of giving courts authority to police the boundaries of agency authority.

What's really needed is not *Chevron*, step one, two, or zero. What is needed is an inquiry, at the outside of the case, that asks, honestly, whether the entire statute, in the context of its historical enactment and development, is one in which Congress gave the agency authority to regulate the phenomenon in question. Courts should be engaging in independent judgment about this issue,

without trying to sandwich their inquiry into the shackles of *Chevron*.

Filtering the inquiry through *Chevron* has made it significantly more difficult to reach the honest answer about these questions, and, in this respect, I think *Chevron* is contributing to a distortion of the form of government given to us under the Constitution, and threatens to undermine the boundaries that have been so carefully nurtured for most of our history.

Thank you.

[Applause.]

JUSTICE DON WILLETT: Well, this has been a very genteel and well-mannered panel. Does anybody want to cause a ruckus or take any gloves off before we go to the audience for Q&A? Chuck, you're always game for that, right? Nobody has any kind of rebuttal or impertinent questions for your fellow panelists?

CHARLES COOPER: I'm not going to take the gloves off here, but I am going to make an observation about Professor Beermann's very forceful and elegant discussion explaining how the executive agencies, the administrative agencies, exercise only executive authority. No matter how much the function that they're engaged in may quack like a legislative function, or may quack like an adjudicative or judicial function, it's nonetheless an executive function. It puts me in mind of Justice Scalia's observation in footnote four in the *Arlington* case, where he criticizes Chief Justice Roberts' observation, much like mine, that the administrative agencies are exercising legislative and judicial power. And he says—this is from footnote 4—"[T]he dissent overstates when it claims that agencies exercise legislative power and judicial power. . . . [Agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed under our constitutional structure, they must be exercises of—the 'executive Power.'"[28]

Well, that assertion is very unsatisfying to me. Yes, it is true, I think, under our structure of government, that executive officers

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[28] City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013).

and the President can exercise only executive powers, but I don't think that fact means that any power they exercise is, therefore, an executive power, no matter what it really is when you analyze it in terms of its actual function. Again, I think Chief Justice Roberts was right that separation of powers restrictions do apply here.

And I guess I want to conclude by asking a question, and that is, what do my fellow panelists think about *Chevron* step one, in light of the *Arlington* decision? How will Justice Scalia, in the future, as he approaches step one, using the ordinary tools of judicial construction, as he says, attempt to decide correctly, whether or not the provision at issue is ambiguous, in light of *Arlington*'s decision that says the question of ambiguity, if it is itself ambiguous, then we must defer to the agency itself. Isn't step one, now, collapsed?

THOMAS MERRILL: I agree with that, basically. I would put it in terms of the Administrative Procedure Act, actually. A lot of people have pointed out that the Administrative Procedure Act requires courts to decide all relevant questions of law, and then they say, "Well, if that's the law of the land, where do we get *Chevron*?" Now, there is an answer to that, which is that you can reconcile *Chevron* with the APA by saying that *Chevron* rests on a determination that Congress has implicitly, at least, delegated to the agency the power to resolve ambiguities under this particular statute, and so the Court, by deferring to the agency, is, in fact, following the law. It's interpreting the law and following the law that Congress has laid down.

The problem is you can't extend that argument to the question of whether or not the agency's acting within the scope of its jurisdiction, because the whole premise of reconciling *Chevron* with the requirement that, of course, decide questions of law is that the agency has been delegated authority to decide these questions of law, but that question can't be answered by the agency. It has to be decided by the Court, and the APA actually explicitly says that questions of whether the agency is acting within the scope of its jurisdiction are for the Court to decide. It says that, in so many words, not quoted anywhere by Justice Scalia in *Arlington*.

JUSTICE DON WILLETT: Does anyone else want to chime in? Okay. There's a staggeringly long line at the microphone. There you go.

ATTENDEE: Can I ask the panel whether they think that it's just a coincidence that *Chevron* is a Clean Air Act case? I'm inferring from Professor Merrill's remarks that he does not think that's a coincidence. And I want to frame it a little more and say why I ask that. Two reasons. One, we had the two competing justifications for deference, one of which is the implicit delegation and the other agency expertise. It seems like the latter has gone more and more by the wayside over the decades.

But if you go back and reread *Chevron*, it is impossible to escape the impression that part of what the Court is doing there is saying, "We're lawyers. We're not scientists." That seems now to have fallen by the wayside, and, actually, in the EPA rules, which Professor Merrill alluded to, that will be subject to a great, big, nasty *Chevron* fight eventually to in the courts. The EPA is demanding deference for legislative history, and things that look nothing like its technical ambit, that it has zero specialty in.

And then the other question I want to ask is, very briefly, the part of the formulation that always drops out is under-theorized, as far as I've been able to tell has no definitive academic or court statements on what it means is a statute that it has been entrusted to administer, whether it's your statute to talk about in the first place. Again, EPA is making certain claims that it now has deference to interpret energy acts that have nothing to do with EPA, and are not entrusted to it, at all.

So, does the panel see that there's any possibility in, thirty years later, or thirty-three years later, however long it takes us to actually get there in the courts, that these power plant rules may lead to not just dinking around with the Clean Air Act, but another whack at sort of the roots of *Chevron*?

JUSTICE DON WILLETT: Who wants to tackle that?

CHARLES COOPER: That sounds like a question for Professor Merrill.

[Laughter.]

THOMAS MERRILL: Okay. All right. No, I don't think it's a coincidence that the environmental area was where this doctrine emerged. Actually, one of these eight articles I wrote is a kind of a history of how the *Chevron* doctrine came to be, and I went back and read the notes from the Supreme Court's deliberations about the *Chevron* doctrine, and Justice Blackmun kept rather meticulous notes, and they're in the Library of Congress. Anybody can go look at them.

It was quite interesting to read the notes about the conference in the *Chevron* case. I don't think anybody understood anything about what was going on in that case. They made all sorts of nonsensical statements about what various lower court decisions had decided about stationary source regulation under non-attainment, and under PSD, and so on and so forth. Finally, Justice Stevens, who was then, I think, second most junior justice, spoke, and he gave a slightly more cogent explanation of the issues, but then he said, "I'm just really confused."

[Laughter.]

THOMAS MERRILL: And he said, "When I'm confused, I go with the agency." And then he got the assignment to write the opinion from Justice White, and the rest is history. So I don't think it's a coincidence. I think that there is something about hyper-technical, you know, difficult to comprehend, statutory interpretation questions that is likely to incline the courts to want to turn this over to somebody that's a little bit more capable of answering these questions in a coherent way. EPA is sort of ground zero for that. There are a bunch of other agencies, like the Federal Reserve Board, and so forth, that also decide things that are highly technical and beyond the ken of most judges.

That's a very realist explanation for when judges defer and when they don't, but I think there's a lot of merit to it.

JUSTICE DON WILLETT: Anyone else? Mr. Hayes, from the Lone Star State.

ATTENDEE: Yes, sir. Thank you. This question comes, in part, from many, many years spent in the trenches, dealing with administrative agencies, day to day, practicing law, and it strikes me that, to some extent, the elephant in the room may be—and I would like to hear the comment as to whether you think it is or

not—what might be called the myth of administrative expertise, that has been alluded to here. Certainly, in my experience, I often find that the agencies either don't have the expertise, either technically or from a legal standpoint, or if it is buried someplace in the large bureaucracy, it's not brought to bear on the particular rule or question that's addressed, and that, indeed, we frequently neglect the fact that there are many institutional factors driving these very large and often sprawling bureaucracies, that denigrate from any expertise that might be there. I find that aspect of these discussions seems to be neglected in favor of, for instance, I think, very good thoughts on the separation of powers issues and other issues. Thank you.

JACK BEERMANN: I'll take a quick stab at that. There are questions where the agencies seem to have a lot of expertise and questions where they don't. For example, in this issue about the subsidies under the Federal Health Care Exchanges, everyone believes the agency when they say that the whole system is going to fall apart if they don't have the subsidies for the federal plans. So that's not much of an expertise issue, and it's one of those sort of delicious, law-school-type statutory construction problems.

The question under the Clean Air Act that was at issue in *Chevron* is clearly a matter for agency expertise, and the question is comparative expertise, that is, that you get a question which is right in the agency's wheelhouse and unless you think the agency is always engaged in raw politics and you shouldn't defer to them at all, if it's right in the agency's wheelhouse, then who's going to know better, the Court or the agency? Chances are, in many situations, not all but in many situations, the agency is going to know better. And, on the top of it, it's not like the courts are applying expertise and legal reasoning, or some sort of thing, when they decide these cases. They're deciding it based on where, on the political spectrum, the particular case falls. I mean, it's not a surprise when the 5-4 cases occur.

Going back to my umpiring, I found it insulting to say that the Supreme Court behaves like umpires, when Chief Justice Roberts said that, because if we walked on the field and people knew how we were going to decide in advance of the game, we wouldn't be allowed to umpire.

[Laughter.]

AMY WILDERMUTH: I'm going to add just a little bit to that, and I know, drawing on *Seminole Rock* is a little different. But it seems to me that you do see, in the context of deference doctrines, if you look historically, again, looking at very modest roots, and you think about expertise as driving some of those decisions, which it seems very clear that they were limited in that way. It is also clear that we have a very big expansion of those deference doctrines, and part of what has changed is moving away from thinking about when the agency is truly acting in an area where it really does have special expertise, versus some other justification for their actions.

JUSTICE DON WILLETT: This will be our final question. Gala time is almost upon us, and some of us need more time than others to get gussied up and prepare. I've got to tie that tie.

[Laughter.]

ATTENDEE: Do you have a bow tie? It takes a while to read the directions.

I'm Mike Daugherty. Many of you might know that I'm embroiled with the *LabMD v. FTC* case. I'm the CEO of LabMD. My question is, really—and I'll backfill it a little bit after asking—what's it going to take? What are the circumstances it's going to take to get rid of *Chevron*? Because, I will tell you, in my experience as a layperson as a CEO, and as an American, is I had certain expectations of how this country was run, what my rights were, and the power that the agencies have are dumbfounding to every other business professional that I've talked to, that I've gone through this meat grinder on.

It is a mountain of power that you've cost millions of dollars and years to climb, that most people won't do. So you never get to the courts for them, to actually get rid of this craziness that shocks people. The fact that I wasn't allowed to come to some of my hearings, the fact that the games the FTC plays when the oversight committee finally started an investigation, and the legislative affair offices doubling down, with Senators jumping. It is appalling behavior, in the specifics.

So what's it going to take to get someone to climb up that mountain enough to actually get this thing turned over, at least, and the details get put on the public?

JUSTICE DON WILLETT: Appalling and craziness. Does that overstate it, or is that a G-rated description?

JACK BEERMANN: The interesting thing, of course, is if you remember back in history, in 1980, there were rumblings about the non-delegation doctrine. Of course, you know, if you take my approach to *Arlington*, if there's a more sort of robust either review of delegations or a more robust non-delegation doctrine, you don't really have this problem so much, because the agencies wouldn't have so much discretion, so there wouldn't be so much to defer to. In 1980, it seemed like sort of more stringent judicial review of what statutes said, in order to make sure there wasn't too much of a delegation, seemed like a good idea. Suddenly, in 1984, it seemed like deference was a good idea. What changed between 1980 and 1984?

[Laughter.]

JACK BEERMANN: I think there was a deregulatory President who came into power in 1981, and suddenly deference to agencies seemed like a good idea. Well, after six years of the Obama administration, maybe it doesn't seem like such a great idea anymore. It may seem like a good idea in a couple of years, but I sort of doubt it, based on the demographics of the Electoral College.

So, really, I know that my colleague, Gary Lawson, said that even at the beginning there were some people among The Federalist Society that were concerned about *Chevron*, that it was too deferential to agencies. I agree that it's fundamentally wrong for courts to be that deferential to what agencies are doing, and the biggest reason I think it's fundamentally wrong is because the APA says that they're supposed to engage in judicial review under the arbitrary, capricious standard, and they should be. It encourages lazy behavior by agencies, who can ignore what Congress says, because they figure they might get away with it, and it encourages laziness and sloppy behavior by judges, and at

the lower court level, they can just rid of cases. It's a little bit like the administrative law equivalent of non-exhaustion of your habeas remedies, on the criminal side. It's a way to get rid of a lot of cases without having to really engage in the hard questions about what does the statute really mean.

So I tend to agree with you, even though I don't share, I think, your approach to how much regulation we ought to have. I think whether it's a deregulatory regime or a regulatory regime, it never seemed right to me.

THOMAS MERRILL: One thing that's struck me lately is, we've been talking about questions of law and who should be deciding questions of law, but I think for a lot of people, that's less important than getting the facts correct. You can go way back to the early twentieth century, and federal judges decided that reviewing fact-finding by agencies was something that they were too busy to do, and so they developed this kind of substantial evidence standard of review of fact-finding by agencies, which essentially meant that anything that the agency did got rubber-stamped as long as they had some smidgeon of evidence in support of what they were doing. And only later with *Chevron*, we started debating about whether or not courts should defer to agencies on questions of law.

But I think for many people, the greater injustice is the agency's manipulation of the facts, and the fact that you can't really go to federal court—one thing courts are good at is fact-finding. I'm not so sure they're good at policymaking, but they're pretty good at fact-finding. And I think the hands-off approach to that may have contributed a lot to frustration.

JUSTICE DON WILLETT: And a final word? No? All right. I want to thank our panel. This has been lively. Thank you.

[Applause.]