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To Defer or Not to Defer: Why Chief Justice Roberts Got It Right in *City of Arlington v. FCC*

Agron Etemi*

I. INTRODUCTION

As we approach the thirtieth anniversary of the landmark decision of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[1] we are reminded of its continued vitality in modern administrative law, as well as the polarizing effect it has on judges, commentators, and practitioners alike. While most applaud the *Chevron* decision for introducing simplicity to the deference rules, others have called for terminating the doctrine altogether.[2] Not startling, then, is the Supreme Court's recent decision in *City of Arlington v. FCC*,[3] which presented a fractured decision concerning the applicability of the *Chevron* framework.

In *City of Arlington*, the Court confronted the issue of whether to defer to the Federal Communication Commission's ("FCC") interpretation of a statutory ambiguity concerning the "scope of [the

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1. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that courts must defer to an agency's reasonable interpretation of an ambiguous provision of a statute that the agency administers).

2. *See, e.g.*,Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 797–98 (2010).

3. City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

FCC's] regulatory authority (that is, its jurisdiction)[.]"[4] On the briefs, much of the fight appeared to focus on the distinction between an agency interpretation of jurisdictional and nonjurisdictional statutory provisions. Justice Scalia, for the majority, concluded that the distinction was meaningless because "every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."[5] Moreover, he opined that the general conferral of rulemaking and adjudicative authority to the FCC warranted the conclusion that Congress delegated interpretive authority to the FCC to resolve the particular ambiguity in question. Having concluded so, the Court held that deference was due to the FCC's interpretation under *Chevron* Step Two because the FCC's interpretation was not unreasonable (or, to put it differently, it was not outside the bounds of its statutory authority).[6]

Chief Justice Roberts saw it differently. Although Chief Justice Roberts agreed that the jurisdictional-nonjurisdictional distinction was a red herring, he disagreed with the majority's assumption that the delegation of general rulemaking authority over a statute provided the FCC with authority to interpret any statutory ambiguity.[7] Rather, citing his concerns over the vast growth of the administrative state, Chief Justice Roberts opined that the Court has a duty to first determine whether Congress intended the agency to have interpretive authority over the particular provision before affording it the ultimate weapon — *Chevron* deference.[8]

This Essay has three primary tasks. The first, which is the subject of Part II, is to synthesize cogently the law regarding judicial deference to agency interpretations of statutory ambiguities. The second task, which is the subject of Part III, is to provide an analysis of each of the opinions in the City of Arlington decision. Finally, in Part IV, I conclude that Chief Justice Roberts' dissenting opinion offers a more realistic approach than that offered by the majority that is also consistent with the Court's precedent, and more faithful to the separation of powers doctrine.

4. *Id.* at 1866.
5. *Id.* at 1870.
6. *Id.* at 1873.
7. *Id.* at 1883–84 (Roberts, C.J., dissenting).
8. *City of Arlington*, 133 S. Ct. at 1880.

II. JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS: IN A NUTSHELL

Before I discuss the *City of Arlington* decision, I shall first take a short journey through the judicial decisions that have critically shaped the deference framework. Our first stop: *Skidmore v. Swift & Co.*[9]

In *Skidmore*, the issue before the Court was whether the time that fire-fighting employees of a packing plant spent on call for fire alarms constituted "working time" for which the employees were owed overtime pay under the Fair Labor Standards Act ("FLSA").[10] The Administrator of the Department of Labor announced his interpretations in the form of "interpretive bulletins," applying the statute in various scenarios and advocating a case-by-case approach to interpretation.[11] Though none of those bulletins addressed the particular circumstances at bar, the Administrator applied the rulings in an amicus brief to conclude that only some of the time in question was compensable.[12] The Court responded as follows:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control*.[13]

This nuanced approach came to be known as "*Skidmore* deference." Under *Skidmore* deference, the court does not automatically defer to the agency's reasonable interpretation. Rather, the court considers several contextual factors, including the statutory text, legislative history, and the agency's interpretation of the relevant statutory provision. Thus, *Skidmore* has been characterized as prescribing deference along a sliding scale, with the degree of deference varying according to the reviewing court's evaluation of the *Skidmore* factors.[14]

Forty years later, the Court decided *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., wherein it redefined the framework for

9. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
10. *Id.* at 137–38.
11. *Id.* at 138.
12. *Id.* at 139.
13. *Id.* at 140 (emphasis added).
14. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 855–58 (2001).

determining when reviewing courts should defer to interpretations of statutes by administrative agencies.[15] The Clean Air Act set forth certain requirements for States that had not achieved the national air quality standards previously established by the Environmental Protection Agency ("EPA").[16] The Clean Air Act required these "nonattainment" states to establish a permit program regulating "new or modified major stationary sources" of air pollution.[17] The EPA promulgated a rule that allowed a State to adopt a *plantwide* definition of the term "stationary source."[18] The promulgation of this rule was critical because the plantwide definition allowed an individual who built or modified equipment in a plant to avoid the permitting process by offsetting any increase in pollution caused by the equipment with reductions of emissions elsewhere in the plant.[19] Exhibiting *Skidmore*'s rationale, the U.S. Court of Appeals for the District of Columbia Circuit invalidated the rule because it was inconsistent with Congress's purpose to improve air quality.[20] The Supreme Court reversed.

In the process of reversing the D.C. Circuit's ruling, the *Chevron* Court crafted a two-step process requiring courts to defer to any reasonable interpretation by an agency charged with administration of a statute, provided there is no contrary Congressional answer.[21] The so-called "*Chevron* Two-Step" is encapsulated in the Court's opinion as follows:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[22]

15. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
16. *Id.* at 839–40.
17. *Id.* at 840 (quoting Clean Air Act, 42 U.S.C. § 7502(b)(5) (1982) (internal quotation marks omitted)).
18. *Id.*
19. *Id.*
20. *Chevron*, 467 U.S. at 842.
21. *Id.* at 842–43.
22. *Id.* (footnotes omitted).

The Court justified this new general rule of deference by positing that Congress had *implicitly* delegated interpretative authority to all agencies charged with enforcing federal law.[23] This implicit delegation theory provides a background rule against which Congress may confidently legislate. Thus, when it legislates, Congress can safely assume that any ambiguities it creates will be resolved by the agency charged with administering the statute. Nevertheless, the theory lacks any solid basis in actual congressional intent.[24] Moreover, even Justice Scalia, a staunch *Chevron* supporter, admits that the test is based on "a fictional, presumed [congressional] intent[.]"[25]

Fast-forward to 1990, when the Court decided *Adams Fruit Co. v. Barrett*.[26] In *Adams Fruit*, migrant farmworkers employed by Adams Fruit Company brought suit for personal injuries suffered in an automobile accident while they traveled to work in Adams Fruit Company's van.[27] As a result of their injuries, the workers received benefits pursuant to Florida workers' compensation law.[28] Thereafter, they filed suit against Adams Fruit Company in federal court, alleging that their injuries were attributable in part to Adams Fruit Company's intentional violations of the Migrant and Seasonal Agriculture Worker Protection Act ("AWPA").[29] Adams Fruit Company argued that Florida law provides that its workers' compensation remedy "'shall be exclusive and in place of all other liability of such employer to . . . the employee,'" and that the workers' receipt of those benefits "precluded them from recovering damages under AWPA for the same injuries."[30] Notably, the Department of Labor's ("DOL") position was that "'[w]here a State workers' compensation law is applicable and coverage is provided for a

23. *Id.* at 844.

24. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 468 (1987) (positing that the implicit delegation theory underlying the *Chevron* decision does not accurately reflect congressional intent).

25. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

> If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.

Id.

26. Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).

27. *Id.* at 640.

28. *Id.* at 640–41.

29. *Id.* at 640 (citing Migrant and Seasonal Agriculture Worker Protection Act, 29 U.S.C. § 1841(b)(1)(A) (1982)).

30. *Id.* at 641 (omission in original) (quoting FLA. STAT. § 440.11 (1989)) .

migrant or seasonal agricultural worker by the employer, the workers' compensation benefits *are* the exclusive remedy for loss under this Act in the case of bodily injury or death.'"[31] Accordingly, Adams Fruit Company argued that the interpretation was entitled to *Chevron* deference. The Court disagreed.

In finding in favor of the workers, the Court determined that Congress did not delegate interpretive authority to the DOL regarding the AWPA's *enforcement provisions*, even though the Court found that there was an express delegation to the DOL regarding the promulgation of *standards* implementing AWPA's *motor vehicle provisions*.[32] Thus, although the DOL had interpretive authority when promulgating regulations regarding the motor vehicle provisions, it could "'not bootstrap itself into an area in which it ha[d] no jurisdiction.'"[33]

Thereafter, in 2001, the Court decided one of the arguably more important cases in administrative law—*United States v. Mead Corp.*[34]—in which the Court appeared to take the shape of a judicial DeLorean sent back in time to revive the *Skidmore* decision. In *Mead*, the Court, in reviewing a "ruling letter" issued by the U.S. Customs Service, held that:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.[35]

According to *Mead*, therefore, *Chevron* applies when Congress delegates authority "to make rules carrying the force of law" and *the agency has acted pursuant to that authority when interpreting the statute*.[36] The Court noted that when Congress provides for a "relatively formal administrative procedure" that fosters "fairness and deliberation[,]" such as notice-and-comment rulemaking or formal

31. *Adams Fruit*, 494 U.S. at 649 (alteration in original) (emphasis added) (quoting 29 C.F.R. § 500.122(b) (1989)).
32. *Id.* at 650.
33. *Id.* (quoting Fed. Mar. Comm'n v. Seatrane Lines, Inc., 411 U.S. 726, 745 (1973)).
34. United States v. Mead Corp., 533 U.S. 218 (2001).
35. *Id.* at 226–27.
36. *Id.*

adjudication, presuming such legislative intent is reasonable.[37] Additionally, *Mead* confirmed that where *Chevron* deference is inapplicable, *Skidmore* deference applies.[38]

III. THE *CITY OF ARLINGTON* DECISION

The facts of the *City of Arlington* decision are straightforward. The dispute revolved around whether Section 201(b) of the Telecommunications Act of 1996 (the "Act"), which empowers the FCC to "'prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions[,]'" constituted a delegation of interpretive authority to the FCC to resolve an ambiguity that existed within another section of the Act, namely Section 332(c)(7)(B)(ii).[39] That Section required "state or local governments to act on wireless siting applications '"within a *reasonable period of time* after the request is duly filed.'"[40] Several wireless companies had complained that there were long delays before zoning authorities took action on siting applications, and thus petitioned the FCC to clarify the meaning of "reasonable period of time."[41]

The FCC issued a declaratory ruling determining that a "'reasonable period of time' . . . is presumptively . . . 90 days to process a collocation application[42] . . . and 150 days to process all other applications."[43] State and local governments opposed the declaratory ruling on the ground that the FCC lacked authority to interpret "reasonable period of time," arguing that there existed other provisions in the Act that evinced a congressional intent to withhold interpretive authority over Section 332(c)(7)(B)(ii).[44] On appeal, the U.S. Court of Appeals for the Fifth Circuit upheld the interpretation on the ground that, pursuant to *Chevron*, the FCC's interpretation was a permissible construction of an ambiguous provision over which it had interpretative authority.[45] On appeal to the Supreme Court, the issue was whether the FCC's interpretation of a statutory ambiguity concerning its statutory authority was entitled to *Chevron* deference.[46]

37. *Id.* at 230.
38. *Id.* at 234–38.
39. City of Arlington v. FCC, 133 S. Ct. 1863, 1866 (2013) (alteration in original) (quoting Telecommunications Act of 1996, 47 U.S.C. § 201(b) (2006)).
40. *Id.* (emphasis added) (quoting 47 U.S.C. § 332(c)(7)(B)(ii)).
41. *Id.* at 1867.
42. In the telecommunications industry, this is an application to place a new antenna on an existing tower. *Id.*
43. *Id.*
44. *City of Arlington*, 133 S. Ct. at 1867.
45. *Id.*
46. *Id.* at 1866.

A. The Majority Decision: Justice Scalia

Justice Scalia penned the majority decision, and concluded that the FCC's interpretation was entitled to *Chevron* deference.[47] He was unconvinced that there was a difference between an agency's interpretation of ambiguities concerning its jurisdiction, and an agency's interpretation of nonjurisdictional ambiguities.[48] Rather, he opined that "when confronted with an agency's interpretation of a statute it administers [the issue is always] *whether the agency has stayed within the bounds of its statutory authority*."[49] For Justice Scalia, this was a well-established proposition. Moreover, Justice Scalia was satisfied that Congress had unambiguously vested the FCC with general rulemaking and adjudicative authority, and that the interpretation at issue was made pursuant to the exercise of that authority.[50] Thus, he accorded the FCC's interpretation *Chevron* deference and affirmed the Fifth Circuit's judgment.

B. The Concurrence: Justice Breyer

Justice Breyer concurred in part, providing a lucid analysis of the legal issue presented. On the issue of deference, Justice Breyer opined that "the existence of [a] statutory ambiguity is *sometimes not enough* to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because [the] cases make clear that other, sometimes *context-specific, factors* will on occasion prove relevant."[51] Specifically, he referred to the following factors: "'the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.'"[52] Thus, unlike Justice Scalia, Justice Breyer does not consider the general conferral of rulemaking or adjudicative authority the be-all-end-all on the deference issue. Nevertheless, on the basis of the application of these factors, he concluded that the Act's "reasonableness" provision left a deference-

47. *See id.* at 1873. Justices Thomas, Ginsburg, Sotomayor, and Kagan joined the opinion.

48. *Id.* at 1868–69.

49. *City of Arlington*, 133 S. Ct. at 1868 (emphasis omitted).

50. *Id.* at 1874.

51. *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment) (emphasis added).

52. *Id.* (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

warranting gap, and that the FCC's interpretation of the language was permissible.[53]

C. The Dissent: Chief Justice Roberts

Chief Justice Roberts, who was joined by Justices Alito and Kennedy, dissented in a separation-of-powers-informed thrill ride. His concern lays primarily with the majority's conclusion that a general conferral of rulemaking authority over the Act provides the FCC with interpretive authority over any ambiguity in the Act, even ambiguities concerning the scope of the agency's authority.[54] Rather, he believes that a general conferral of such authority is insufficient to warrant *Chevron* deference. Citing to the *Adams Fruit* decision, he posited that an "agency interpretation warrants . . . deference only if Congress has delegated authority to definitively interpret *a particular ambiguity in a particular manner*."[55] That question, he continued, "must be determined by the court on its own before *Chevron* can apply. . . . [W]e do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide."[56]

There is a strong separation of powers theme to the dissent. According to the Chief Justice, given the vast power wielded by the administrative state, the courts must be vigilant to ensure that the executive department is not employing lawmaking authority that it was never granted.[57] Thus, the courts should police the boundaries, ensuring that Congress in fact intended to delegate interpretive authority to an agency over a particular ambiguity. After all, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[58] Thus, a court abdicates its duty when it defers to an agency's interpretation of whether Congress delegated authority to the agency to interpret a particular ambiguity in the statute. Chief Justice Roberts would have vacated and remanded the matter because the Fifth Circuit failed to determine whether Congress in fact delegated interpretative authority to the FCC over Section 332(c)(7)(B)(ii).[59]

53. *Id.* at 1877.
54. *City of Arlington*, 133 S. Ct. at 1883 (Roberts, C.J., dissenting).
55. *Id.* (emphasis added).
56. *Id.* (citations omitted).
57. *Id.* at 1880.
58. *Id.* at 1880 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
59. *City of Arlington*, 133 S. Ct. at 1886.

IV. WHY CHIEF JUSTICE ROBERTS GOT IT RIGHT

Chief Justice Roberts got it right for three reasons. First, his view finds strong support in the Court's precedent regarding the deference rules. Specifically, Chief Justice Roberts finds support from the decisions of *Chevron*, *Mead*, and *Adams Fruit*. All of these decisions recognize that *Chevron* deference depends upon a congressional delegation of interpretive authority, implicit or explicit, to an agency over a *particular* ambiguity. More specifically, these decisions acknowledge that the rule of deference elucidated in *Chevron* is based upon, and *limited* by, Congress' delegation of interpretive authority. Further, these decisions make clear that, in order to warrant *Chevron* deference, the interpretation must be made pursuant to the exercise of authority carrying the force of law. Justice Scalia does little in his opinion to diminish the impact that these cases have on his argument.

Second, Chief Justice Roberts's view conforms to separation of powers principles and ensures that the Court will police the boundaries between the executive and legislative departments. Chief Justice Roberts is concerned with the vast power wielded by administrative agencies. He describes *Chevron* as "a powerful weapon in an agency's regulatory arsenal."[60] Thus, he sees the issue as whether the weaponry of executive agencies "should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power." Therefore, prior to affording the *Chevron* weapon to an agency, Chief Justice Roberts would first confirm whether Congress intended the agency to receive such artillery in the first place. This approach not only serves to limit executive aggrandizement of legislative power, but also secures the Court's role "to say what the law is."[61]

Finally, Chief Justice Roberts's view provides for a more sound and realistic approach to the delegation question. His approach disposes of the fictional presumed intent underlying implicit delegations. That is, he concludes that a general conferral to an agency to administer a statute through rulemaking or adjudication is insufficient to warrant *Chevron* deference. Simply presuming that Congress intends the agency to interpret every statutory ambiguity on a presumed intent is unrealistic and imprecise.[62] Specifically, Chief Justice Roberts emphasizes that "[c]ongressional delegations to agencies are often ambiguous—

60. *Id.* at 1879.
61. *Marbury*, 5 U.S. (1 Cranch) at 177.
62. *See* Sunstein, *supra* note 24, at 465–69.

expressing 'a mood rather than a message.'"[63] Accordingly, his approach requires that a court determine first whether Congress delegated interpretive authority to the agency over a *particular* issue. This would be done on a case-by-case basis, the idea of which is abhorrent to Justice Scalia. Justice Scalia argues that Chief Justice Roberts "offers no standards at all to guide this open-ended hunt for congressional intent . . . . [He] would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test . . . ."[64] Justice Scalia misses the point, however, because the courts are well equipped to discern legislative intent through the various tools of statutory construction. Notably, as Chief Justice Marshall succinctly put it, "[w]here the mind labours to discover the design of the legislature, it seizes *every thing* from which aid can be derived[.]"[65] Consequently, given the overarching importance of preserving the integrity of the separation of powers doctrine, the federal courts should engage in a more technical inquiry to determine whether the legislature intended to give an agency interpretive authority over a particular statutory provision.

V. CONCLUSION

Accordingly, as we approach the thirtieth anniversary of the *Chevron* decision, the *City of Arlington* case offers an opportunity to reflect upon the vitality of the implicit delegation theory, the growth of the administrative state, and the separation of powers doctrine. As set forth above, Chief Justice Roberts's dissent in *City of Arlington* provides a forceful analysis of the delegation issue, and essentially proposes displacing the theory of fictional presumed legislative intent with a more realistic approach to resolving the delegation question. His approach, while perhaps more laborious, is strongly supported by the Court's precedent and is faithful to the doctrine of separation of powers.

63. *City of Arlington*, 133 S. Ct. at 1879 (quoting Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1311 (1962)).

64. *Id.* at 1874 (majority opinion).

65. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (emphasis added).