RECENT DEVELOPMENTS

HOW AGENCIES SHOULD GIVE MEANING TO THE STATUTES THEY ADMINISTER: A RESPONSE TO MASHAW AND STRAUSS

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In an Article published in this Review in 2005,[1] Jerry Mashaw observed that "virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation . . . ."[2] Mashaw referred to the Supreme Court's famous opinion in *Chevron*[3] and continued: "Surely, in a legal world where agencies are, by necessity, the primary official interpreters of federal statutes, and where that role has been judicially legitimated as presumptively controlling, attention to agencies' interpretive methodology seems more than warranted."[4] Mashaw cited a 1990 Article by Peter Strauss[5] as the only prior writing in which a scholar addressed the question of how agencies should interpret statutes.[6] Mashaw then proceeded to engage in what he characterized as a "preliminary inquiry into agency statutory interpretation."[7]

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1. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 503 (2005) (discussing the normative and positive dimensions of administrative agency interpretation of statutory language).
2. *Id.* at 501-02.
3. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) (setting forth the doctrine of administrative deference).
4. Mashaw, *supra* note 1, at 502-03.
5. *See* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322 (1990) (discussing the use of legislative history in agency interpretation).
6. *See* Mashaw, *supra* note 1, at 502 n.2 (noting that while several articles on their face suggest a discussion of administrative statutory interpretation, only Strauss analyzes agency use of legislative history).
7. *Id.* at 501.

I have long regarded Jerry Mashaw and Peter Strauss as the most important administrative law scholars of their (and my) generation.[8] In this case, however, I think both have gone astray in their initial efforts to understand and to explain the roles of agencies in the process of applying the two-step test the Court announced in *Chevron*. Strauss argues that legislative history should play a more important role in agency efforts to interpret statutes than in judicial efforts to perform the same task.[9] Mashaw characterizes the process of describing and explaining the agency process of statutory interpretation as "vast."[10] He describes ten competing interpretive approaches and tools that agencies might use[11] and concludes that the agency interpretive process is so variable and complicated that "the proper roles of administrators and courts in molding the law cannot be cogently specified."[12] Mashaw also sees such a divergence between judicial and administrative methods of interpreting statutes that "[f]ully legitimate judicial interpretation will conflict with fully legitimate agency interpretation."[13]

I disagree with Strauss with respect to the relative importance of legislative history to agencies and courts,[14] and I disagree with most of Mashaw's characterizations of the process through which agencies give meaning to the statutes they administer. At least at the highest level of generality, the proper roles of courts and agencies can be cogently specified in relatively simple terms that do not create any conflict between the roles

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8. I took a course entitled Legislative and Administrative Law from Mashaw in 1969, my first year as a law student and his first year as a professor at University of Virginia. I was Strauss's colleague at Columbia for about a decade. I have learned more about administrative law from them and from their writings than from any other source.

9. *See* Strauss, *supra* note 5, at 322 (arguing that even though the use of legislative history generally is used at the judicial level, the agency, being more involved in politics, should make greater use of legislative history).

10. Mashaw, *supra* note 1, at 503.

11. *Id.* at 504-24.

12. *Id.* at 524.

13. *Id.* at 504.

14. I agree with many of Strauss's arguments in support of the use of legislative history as an interpretive tool that potentially is useful to any institution—agency or court—but I disagree with his argument that "legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government . . . ." Strauss, *supra* note 5, at 329. Generally, agency lawyers care a lot about the views of those present members of the House and Senate who occupy positions in which they can help or hurt the agency, but they know little about the views of the typically past members who played major roles in enacting the statutes the agency implements. Similarly, the best compilations of legislative histories are not generally in agency libraries. Rather, they are usually in the possession of the major firms that practice before the agency. Firms use compilations of comprehensive legislative histories as one of the margins on which they compete, while most agencies lack the resources required to compile a comprehensive legislative history of a major statute. Mashaw found that "[l]egislative history is not as prominent [in agency decisionmaking] as one might expect." Mashaw, *supra* note 1, at 529. Moreover, any agency that relies on legislative history to a greater extent than a reviewing court is engaged in a self-defeating exercise in futility.

of courts and agencies. The roles of the two institutions differ only in ways that are complementary rather than conflicting.

Strauss and Mashaw go astray by taking their description of the agency decisionmaking process at issue too literally as “statutory interpretation.” Scholars and judges often use that term as a convenient shorthand reference to the process through which agencies give meaning to ambiguous provisions in the statutes they implement, but the term is seriously misleading in that context if taken literally. “Interpret” means “to explain or tell the meaning of” something—such as a statutory text.[15] That definition accurately describes the decisionmaking process that the Supreme Court instructed reviewing courts to use in applying step one of *Chevron*, but it is not an accurate description of the process the Court expects agencies to use in making decisions that courts review through application of step two of *Chevron.*

The logical starting point in any attempt to understand and explain the roles of courts and agencies in implementing *Chevron* is the opinion itself, beginning with the two-step test the Supreme Court instructed courts to use when reviewing an agency decision to give an agency-administered statute a particular meaning:

> When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that 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.[16]

The *Chevron* Court instructed reviewing courts to employ the “traditional tools of statutory construction” when applying step one, to decide whether Congress unambiguously resolved the question at issue.[17] In step one of *Chevron*, the Supreme Court instructed reviewing courts to engage in de novo review of agency interpretations, which is clearly an interpretative task.[18] However, in step two, the Court instructed reviewing

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15. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 611 (10th ed. 2002).

16. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

17. *See id.* at 843 n.9 (concluding that when Congress has spoken unambiguously on the precise question at issue, the meaning given by Congress must stand).

18. *See id.* (asserting that the “judiciary is the final authority on issues of statutory construction” and that it must reject agency interpretations of statutes that are contrary to

courts to uphold the agency construction if it is "permissible."[19] In subsequent passages, the Court equated "permissible" with "reasonable,"[20] recognized repeatedly that an agency engages in policymaking when it gives meaning to ambiguous language in a statute,[21] and recognized that reviewing courts must uphold such decisions as "permissible" or "reasonable" unless they are "arbitrary, capricious, or manifestly contrary to the statute."[22]

Step two of *Chevron* does not instruct or authorize agencies to "interpret" statutes in any way that fits within the dictionary definition of "interpret."[23] Rather, it recognizes that institutions may choose among competing constructions of a statutory provision that is within the range of meanings that the statutory language can support through a process of "interpretation" of the statute's text.[24] An institution can make that choice only by engaging in a policymaking process. For example, the *Chevron* Court reviewed the EPA decision to adopt a plant-wide definition of "source" as a policy decision.[25] Thus, it referred to the EPA's use of policy-based normative reasoning with obvious approval in support of its decision.[26] The Court concluded that the "EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act]."[27] The Court accepted the EPA's choice of a particular definition of "source" as a "judgment as how to best carry out the Act,"[28] and it recognized that the EPA must consider "the wisdom of its policy on a continuing basis."[29] The Court further characterized the dispute, with respect to the meaning, to give the ambiguous statutory term "source" as "center[ed] on the wisdom of the agency's policy"[30] and stated

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congressional intent).

19. *See id.* at 843 (stating that if Congress was silent or ambiguous on the issue, the reviewing court must defer to an agency's construction, if it is "permissible").

20. *See id.* at 844-45, 863, 865-66 (holding that the Environmental Protection Agency's (EPA) construction of the statute was a "reasonable" construction and constituted a "permissible" construction of the statute).

21. *See id.* at 843-45, 862-65 (finding that when Congress leaves a gap in the law, it is proper and necessary for an agency to engage in policymaking).

22. *Id.* at 844.

23. *See* MERRIAM-WEBSTER, *supra* note 15 and accompanying text (defining "interpret" to mean "to explain or tell the meaning of. . .").

24. *See Chevron*, 467 U.S. at 864 (noting that different interpretations may be adopted by an agency in different contexts, and that it was the court, not Congress or the agency, that interpreted the statute in an inflexible manner).

25. *Id.* at 853.

26. *See id.* at 853-58 (reviewing the evolution of the EPA's statutory interpretation).

27. *Id.* at 863.

28. *Id.* at 858.

29. *Id.* at 863-64.

30. *Id.* at 866.

that "policy arguments" against the EPA's definitional decision "are more properly addressed to legislators or administrators, not to judges."[31]

In short, the *Chevron* Court recognized that step two of *Chevron* requires a court to review an agency policy decision that gives meaning to an ambiguous statutory provision by using the approach the Court announced in its prior term in *State Farm*.[32] The Court in *State Farm* stated that to avoid a judicial characterization of a policy decision as arbitrary and capricious, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[33] Conversely:

> [A]n agency [decision is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[34]

Reviewing courts understand and apply *Chevron* in this manner. The D.C. Circuit's 2006 opinion in *Covad Communications v. FCC*[35] is one of many opinions that illustrates the judicial equation of *Chevron* step two and *State Farm*.[36] The question before the *Covad* court was the acceptability of the meaning the FCC gave to the statutory term "impair" in a rule. The court characterized its task as follows:

> Both the Supreme Court and our court have held that the 1996 Act's use of the term "impair" . . . is ambiguous and should be reviewed under *Chevron*'s second step . . . . Similarly, the Commission's reasonable interpretations of § 251(c) are entitled to deference . . . . Under the Administrative Procedure Act, we will uphold the Commission's policy choices unless they are arbitrary and capricious . . . . To survive review under this standard, the FCC "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[37]

The court went on to apply the *State Farm* test as its basis for upholding the FCC's "interpretation" of "impair" as reasonable.[38]

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31. *Id.* at 864.
32. Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
33. *Id.* at 43.
34. *Id.*
35. 450 F.3d 528 (D.C. Cir. 2006).
36. For discussion of some of the other circuit court opinions that equate *Chevron* step two and *State Farm*, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 172-74 (4th ed. 2002) [hereinafter PIERCE, ADMINISTRATIVE LAW TREATISE]. For discussion of some of the Supreme Court opinions that equate *Chevron* step two and *State Farm*, see RICHARD J. PIERCE, JR., 2007 CUMULATIVE SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 147-58 (2006).
37. *Covad Commc'ns Co.*, 450 F.3d at 537.
38. *Id.* at 537-48.

The proper roles for agencies in conforming to *Chevron* follow logically and inevitably from the Court's instructions to reviewing courts in *Chevron*. Because a reviewing court will apply step one of *Chevron* first, a prudent agency must apply step one itself. To maximize the chances of having its action upheld, the agency must do its best to determine whether Congress resolved the question before the agency. Although this process definitely is interpretive, it is one in which the agency has no practical choice but to attempt to anticipate and replicate the interpretive process a reviewing court will use. Additionally, the agency should use the same "traditional tools of statutory construction" that it expects a reviewing court to use. If the agency uses a different method of interpretation—for example, if it relies on legislative history to a greater extent than a reviewing court as Strauss urges[39]—it increases significantly the risk of judicial reversal without good reason.[40]

Depending on the manner in which the agency uses legislative history, an agency that gives legislative history more significance than a reviewing court will be reversed either through judicial application of *Chevron* step one or through application of the principle the Court announced in *Chenery*—an agency decision can be upheld only on the basis stated by the agency.[41] Thus, for instance, an agency that relies on legislative history to resolve an ambiguity in the statute's text—and thereby supports an agency conclusion that the statute has an unambiguous meaning—will be reversed through application of *Chenery* if the reviewing court is not willing to use the legislative history for that purpose. Moreover, a court will reverse an agency decision even though it would uphold the same agency action if the agency had used the same interpretive approach as the court to support a conclusion that the statute is ambiguous and then had used policy-based reasoning to explain why it chose to give the ambiguous statute the meaning it preferred.[42] Conversely, an agency that relies on legislative

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39. Strauss, *supra* note 5, at 322.

40. It is possible that the court and the agency might adopt the same interpretation of the statute even though the agency uses different interpretive tools and techniques than the court uses. In that situation, however, the agency decision to use tools and techniques different from those used by the court is irrelevant—it has no effect on the outcome of the dispute.

41. SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Therefore, an agency decision can be upheld only on the basis stated by the agency.

42. The Eleventh Circuit accurately explained the relationship between *Chevron* and *Chenery* in *Bank of America v. FDIC*. *See* 244 F.3d 1309, 1318-21 (11th Cir. 2001); *see also* PDK Labs. v. DEA, 362 F. 3d 786, 797-98 (D.C. Cir. 2004).

> In short, we do not agree that the meaning of §971(c)(1) is as plain as the DEA says it is. It may be that here, as in other cases, the strict dichotomy between clarity and ambiguity is artificial, that what we have is a continuum, a probability of meaning. In precisely those kinds of cases, it is incumbent upon the agency not to rest simply

history to create an ambiguity in an otherwise unambiguous statutory text will be reversed by a reviewing court through application of *Chevron* step one if the court is not willing to use legislative history for that purpose.[43] It follows that an agency must do its best to replicate the interpretive process courts use when attempting to anticipate judicial application of step one of *Chevron*.

Of course, an agency that attempts to anticipate and replicate the interpretive process a court will use in applying *Chevron* step one still runs a risk of reversal. The process of choosing the traditional tools of statutory interpretation to apply and further, applying those often conflicting tools in performing a particular interpretive task, is complicated and contentious.[44] Agencies will sometimes adopt interpretations that reviewing courts reject because the agency is unable to anticipate and replicate the interpretive process the reviewing court employs. Nonetheless, the agency's interpretive task is easy to describe. To the best of its ability, the agency should attempt to use exactly the same interpretive process a court would use—any intentional variation from that judicial interpretive process would be a self-defeating exercise in futility.

The agency's task in minimizing its risk of reversal through application of *Chevron* step two is totally different from its task in attempting to minimize its risk of reversal through application of step one. An agency's efforts to minimize the risk of judicial reversal through application of *Chevron* step two has little to do with statutory interpretation. Rather, the agency's task is to use a comprehensive and transparent policymaking process in which it identifies and explains each step in its decisionmaking process, relates each decision to the available data relevant to the decision, and explains why it rejected alternatives to, or criticisms of, the decisions it made.[45]

Depending on the context in which the agency makes the decision to give the ambiguous statutory term a particular meaning, the policymaking process that maximizes the likelihood of judicial approval through application of *Chevron* step two will require an agency to use tools made available by fields like economics, statistics, chemistry, toxicology,

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> on its parsing of the statutory language. It must bring its experience and expertise to bear in light of competing interests at stake. *See Chevron* . . . . When it does so it is entitled to deference, so long as its reading of the statute is reasonable. But it has not done so here and at this stage it is not for the court "to choose between competing meanings."

Id. (internal citation omitted).

43. 244 F.3d at 1319 ("It is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation.").

44. For a discussion of this problem, see PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 36, at 182-88.

45. For a discussion of this decisionmaking process, see *id.* at 441-63.

epidemiology, meteorology, etc. There is only one link between this policymaking process and the process of statutory interpretation. In the course of explaining why it made the decisions it made, the agency must refer to decisional factors that the underlying statute makes permissible.[46] For that purpose, the agency must engage in statutory interpretation to the extent necessary to explain why it believes that a decisional factor it applies is statutorily permissible. In other words, a court will—and should—reverse an agency action if the agency relies on a decisional factor that is logically relevant to its decision in the abstract but one that Congress has forbidden the agency to consider. Thus, for instance, an agency cannot reject an alternative to the action it takes based on its belief that the alternative will impose intolerably high costs on the economy if Congress has forbidden the agency from considering costs in its decisionmaking process.[47] Here again, however, the agency must do its best to anticipate and to replicate the interpretive process a reviewing court will use to minimize the agency's risk of judicial reversal of its action. A court will reverse an agency if the agency relies on a decisional factor the court determines to be impermissible.[48]

I disagree with Strauss and Mashaw at the most fundamental level. Unlike Strauss and Mashaw, I do not believe that agencies are "the primary official interpreters of federal statutes."[49] Rather, all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one. Further, I do not believe that agencies should use methods of statutory interpretation that differ from the methods courts use.[50] Accordingly, I do not see the conflicts between legitimate agency interpretations and legitimate court interpretations that trouble Mashaw.[51] It is certainly true that agencies have the power to give meaning to ambiguous provisions in the statutes they administer, subject only to the deferential form of judicial review described in *Chevron* step

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46. *See* Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (stating that "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .").

47. *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 464-65 (2001) ("[E]conomic considerations [may] play no part in the promulgation of ambient air quality standards under Section 109 of the CAA [Clean Air Act].") (internal quotation marks omitted).

48. *See, e.g.*, Pub. Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987) (rejecting an agency's determination that a *de minimis* exception applies to disputes governed by the Delaney Amendment based on court's determination that Congress did not authorize the agency to apply a *de minimis* exception).

49. *See* Mashaw, *supra* note 1, at 502-03; Strauss, *supra* note 5, at 333 (expressing the general acceptance of agency judgments about statutory meaning).

50. *See* Mashaw, *supra* note 1, at 504; Strauss, *supra* note 5, at 322.

51. *See* Mashaw, *supra* note 1, at 504 (voicing the author's concern over the possibility that legitimate judicial interpretation could conflict with legitimate agency interpretation).

two and *State Farm*.[52] When agencies undertake that important task, however, they are not involved in the process of statutory interpretation. Instead, they are engaged in a policymaking process, the end result of which is to choose which of several linguistically plausible meanings to give ambiguous language to further the purposes of the statute the agency is implementing.

52. *See supra* notes 19-38, 45-48 and accompanying text.