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The Virtues of Simplicity

I. AGREEMENTS AND CONCERNS

Simplicity has vices as well as virtues. If the law consists of simple rules, it may badly misfire as compared with a more flexible, less rule-bound approach. But in many areas, simple rules are best. When courts are setting out doctrines to govern scope of review of executive action, they usually do well to favor simplicity. Complexity can have unfortunate systemic effects, and those effects cannot easily be justified by the effort to ensure greater accuracy. A clear formula, informing courts and litigants about the proper approach, reduces the risk of interminable debates over threshold issues. Sophisticated multifactor tests might well disserve the legal system, simply because they create undue complexity.[1]

Peter Strauss is wise as well as learned, and it is unwise and hazardous to disagree with him; I am most grateful for his generous and illuminating remarks on the question of judicial deference to executive interpretations of law. If we disagree about the answer to that question, it is largely because I give greater emphasis to the virtues of simplicity and seek a simple framework with which to approach the deference question. But let us begin with some common ground.

Professor Strauss and I both approve of the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[2] We agree that the Court's analysis in that case depended on a judgment that Congress had assigned, or delegated, law-interpreting power to the Environmental Protection Agency (EPA). We also agree that it is for courts, not the executive, to decide whether

1. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

2. 467 U.S. 837 (1984).

the law contains any such assignment. Both of us emphasize that when an agency has chosen an impermissible reading of a statutory term, it has acted unlawfully. We agree that even for questions of jurisdiction, an agency may well have considerable room to maneuver.

At the same time, Professor Strauss offers two objections to my approach. First, he contends that that approach would give too much power to the executive, because I call for judicial deference to "casual agency decisions" and would "aid the recent inclination of several Justices to reduce further the constraints on executive action." Professor Strauss does not believe that deference is appropriate for agency decisions that are not a product of public consultation and participation. (Throughout I use the term "agency" and "executive" interchangeably. It is true that some agencies, including several discussed here, are independent regulatory commissions, whose heads are not at-will employees of the President; but such commissions are subject to multiple forms of presidential control, and so I do not give them separate treatment.)

Second, Professor Strauss believes that for major questions, involving a "large enough surprise," independent judicial judgment, rather than deference, is due. Here he refers, with approval, to a nondelegation concern—one that would forbid agencies from producing significant surprises, or large-scale departures from what the enacting Congress likely expected, on the ground that Congress should not be taken to have delegated agencies the authority to produce such surprises or departures.

If these objections are accepted, the law-interpreting power of the executive would be limited in two ways. First, the executive would not receive deference when its decisions were not preceded by the kinds of procedural safeguards that promote public consultation and participation. Second, agencies would not receive deference with respect to interpretations that produce major (and surprising?) changes in the status quo. Professor Strauss has certainly offered plausible arguments on behalf of these limitations, and his arguments have clear foundations in current law.[3] My main concern is that they threaten to make the scope-of-review question too unruly, and to do so without producing any sufficient compensating gain. Let me take up these possibilities in reverse order.

3. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

II. WHAT'S MAJOR?

Suppose that a statute is ambiguous and that the executive interprets it in a way that might surprise the enacting Congress. The EPA might conclude that the word "source" includes plants, not particular smokestacks, or that DDT poses an unreasonable risk,[4] or that greenhouse gases count as air pollutants;[5] the Department of the Interior might adopt a broad or narrow interpretation of what it means to "harm" an endangered species;[6] the Food and Drug Administration (FDA) might decide to regulate tobacco as a "drug."[7] Are these decisions major and surprising from the standpoint of the enacting Congress? At first glance, they certainly are. But the agency's plant-wide definition of "source" was the issue in *Chevron* itself, and I do not believe that Professor Strauss means to say that *Chevron* was wrong on its facts. The initial problem, then, is that no simple principles can distinguish major questions from minor ones, and the absence of such principles suggests that any exception for "major questions" threatens to confuse and to unsettle the deference question in numerous cases. When an agency is interpreting or reinterpreting an ambiguous provision, its action can often be characterized as "major." Indeed, that is why the question is being litigated.

Perhaps Professor Strauss wants to reduce this problem by emphasizing that an agency's decision should be deprived of *Chevron* deference only if that decision would count not merely as major but also as an unquestionable "surprise" to the enacting Congress. He might be saying that under such circumstances, the agency's decision contradicts the clear meaning of the governing statute (and thereby fails to pass what is sometimes referred to as *Chevron* Step One). If so, he may be right; it is always possible to object that the agency has violated the relevant source of law. As I read him, however, Professor Strauss means to go further and to suggest a serious limitation on the scope of *Chevron*. The problem with any such limitation is that the executive is not generally bound by Congress's original expectations about the likely applications of an ambiguous term. Statutory language is meant to extend over significant periods of time and to adapt to new factual understandings. Perhaps the Eightieth Congress, which passed the Federal Insecticide, Fungicide, and

4. *See* Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594-95 (D.C. Cir. 1971).

5. *See* J. Christopher Baird, Note, *Trapped in the Greenhouse?: Regulating Carbon Dioxide After* FDA v. Brown & Williamson Tobacco Corp., 54 DUKE L.J. 147 (2004); Nicholle Winters, Note, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct That It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996 (2004).

6. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

7. *Brown & Williamson*, 529 U.S. 120.

Rodenticide Act (FIFRA) in 1947,[8] did not believe that DDT caused serious risks, but as new facts emerged two decades later, the EPA could certainly so find.[9] Perhaps the Ninety-first Congress did not believe, when it passed the Clean Air Amendments of 1970,[10] that lead posed the kinds of risks that would justify a national ambient air quality standard, but the statutory language is what matters, not Congress's expectations about its reach.[11]

Perhaps Professor Strauss means, most narrowly, that nondelegation concerns suggest that when the executive interprets an ambiguous term in a way that produces a massive and surprising departure from original congressional expectations, the standard kind of *Chevron* deference is unavailable. This argument is not without appeal; it may well be jarring to think that the executive may, as part of ordinary rulemaking, produce significant departures from congressional expectations. But on reflection, there is a good argument that this should not be jarring at all, at least if the executive is interpreting an ambiguous provision. If Congress has delegated rulemaking authority to the agency, and if the agency is dealing with ambiguous terms, then Congress should be taken to have granted the executive the authority to surprise the enacting legislature; return to *Chevron* itself. Because agencies are expert and accountable, their interpretations of genuine ambiguities deserve deference (so long as they are reasonable). If the EPA seeks to regulate greenhouse gases under ambiguous provisions, it is entitled to do so, even if the enacting Congress would be quite surprised by this massive and perhaps even startling turn of events. Recall that if Congress is both surprised and alarmed, it can enact legislation that overturns the executive's interpretation.

III. PROCEDURES AND DEFERENCE

It is easy to understand Professor Strauss's emphasis on the value of procedural formalities and hence his suggestion that if the executive's

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8. Ch. 125, 61 Stat. 163 (codified as amended at 7 U.S.C. §§ 136-136y (2000)).

9. *Cf. Envtl. Def. Fund v. Ruckelshaus*, 439 F.2d 584 (holding that the EPA was required to conduct public hearings on the dangers of DDT). In that case, the court required, and did not merely permit, the EPA to pursue regulation of DDT; and the question whether such regulation was permissible at all was resolved, a fortiori, in the affirmative. It was clear to all that the EPA could regulate DDT if it chose to do so, even if regulation of DDT would have stunned the enacting Congress.

10. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7407-7642 (2000)).

11. *Cf.* Natural Res. Def. Council, Inc. v. Train, 545 F.2d 320 (2d Cir. 1976) (holding that the EPA was required to list lead as a pollutant). Here as well, the court's conclusion that the EPA was required to regulate lead makes it clear that the EPA could have done so if it chose—even if the enacting Congress would have been most surprised to find that lead was being listed, and treated, as a subject of a national ambient-air-quality standard.

interpretation has been adopted without any kind of public participation and consultation, then it does not deserve deference. Indeed, the *Mead* Court appears to have thought along similar lines.[12] On this view, procedural formality guards against agency unreasonableness and gives the agency an incentive to increase public participation. For these reasons, it might be thought that courts should defer only to decisions that follow formal procedures. Under Professor Strauss's view, the executive has a choice. It can issue an interpretation without procedural safeguards and face more independent judicial scrutiny, or it can ensure public participation and receive deference. I am not certain that Professor Strauss is wrong to say that *Chevron* deference ought not to apply to decisions not preceded by public consultation of one or another kind. But there are two problems with that conclusion.

The first problem is that I am not sure whether Professor Strauss means to endorse current law, or instead to suggest a friendly but important amendment. Under current law, it is not the case that *Chevron* deference does not apply when agencies have not used formal procedures. When such procedures are absent, here is existing law in a nutshell: *Chevron* deference does not apply, except when it does. Lest you think that I am joking, here is the Court's explanation of why, and when, *Chevron* applies to agency decisions not preceded by formal procedures:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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 all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[13]

Does Professor Strauss mean to endorse this kind of "test"? I hope not. The problem is that the Court has left litigants and lower courts quite at sea—unable to know, in advance, whether the agency decision falls within *Chevron* or instead faces the more independent review suggested by *Mead*.[14] Because the law is so unruly, a great deal of litigation must be devoted to the threshold inquiry. But perhaps Professor Strauss would prefer a friendly but significant amendment to current law, in the form of a simpler rule to distinguish between *Mead* cases and *Chevron* cases. Perhaps he believes that the Court ought to say that *Chevron* applies *only* when the executive has used a statutorily specified

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12. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

13. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

14. *See* Bressman, *supra* note 1.

process for consulting the public. If so, my concern about complexity and unruliness will be alleviated. But there is a second problem. To see why, let us consider an example.

Suppose that the Equal Employment Opportunity Commission (EEOC) gives a broad reading to some statutory term of art—say, "major life activities."[15] Suppose that the EEOC concludes that "running" and "typing" count as major life activities, so that those who are unable to run, or to type, count as disabled if they are substantially limited in one or the other of these activities. Suppose finally that the EEOC does not reach that conclusion after any kind of formal proceeding—perhaps because it lacks the authority to conduct such proceedings (or to issue legislative rules), or perhaps because it believes that the proceeding would be excessively time-consuming. Should the Court deny *Chevron* deference to the agency?

I do not claim that this is an easy question. It is possible to say, as Professor Strauss does, that the Court should instead give the agency's conclusion the lower level of weight signaled by *Mead*. But it is also possible to say that if the court feels free to choose its own interpretation of the (by hypothesis) ambiguous terms, it will ultimately be making a decision of policy—one that is best made by the EEOC, not by judges. I am stipulating that the phrase "major life activities" is ambiguous as applied to "running" and "typing," and that reasonable people could resolve the ambiguity either way. If so, the EEOC's judgment inevitably depends on an assessment of questions of fact and value. Perhaps the judgment would be better if it followed formal procedures.[16] But as between a (reasonable) judicial judgment about what count as "major life activities," and a (reasonable) judgment from the executive, it seems best to follow the latter—at least if we emphasize that in hard cases, the judgment of the court may well depend not on access to some brooding omnipresence in the sky, or on a reading of the divine or natural law of disability, but on whether that court consists of Republican or Democratic appointees.[17]

In sum, I fear that the system that Professor Strauss favors might introduce undue complexity while also giving undue policymaking discretion to federal judges. But suppose that he is right and that I am wrong. If so, is there a method for accommodating my concerns? Here is one possibility, which I offer by way of conclusion.

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15. On the general issue, see *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that carpal tunnel syndrome does not always substantially limit "major life activities."

16. To justify this conclusion, we would want to know a lot more about the actual consequences of such procedures.

17. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).

In many cases, the choice between *Mead* and *Chevron*, however confusing and even heated, will not ultimately matter. Some of the time, the executive will lose even if *Chevron* provides the governing standard. Some of the time, the executive will win even if *Mead* provides the governing standard. In either event, courts can save themselves a lot of difficulty by declining to resolve the threshold question and announcing that the agency loses, or wins, whatever that scope of review. They might say, "We may assume, without deciding, that *Chevron* provides the governing standard. Even if this is so, the agency's interpretation is unlawful, because it is inconsistent with clear congressional instructions." Alternatively, they might say, "We may assume, without deciding, that *Mead* provides the governing standard. Even if this is so, the agency's interpretation is lawful, because it is plainly consistent with congressional instructions." Perhaps Professor Strauss, and other skeptics about broad readings of *Chevron*, might be willing to accept this effort to eliminate unnecessary disputes about scope of review—and to promote the virtues of simplicity.

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