JUSTICE STEVENS AND THE ARC OF PRECEDENT

JUDGE DAVID J. BARRON[*]

In my office, I have a bobble-head doll of Justice Stevens. In one hand, he holds a golf club. Or, at least, he used to before my children—early in their young lives—became fascinated with this miniature version of the Justice. In his other hand, he holds an open volume of the U.S. Reports. The volume is opened to a case—and likely the most cited one Justice Stevens ever wrote: *Chevron v. National Resources Defense Council*.[1] I thought about that case, and Justice Stevens' relationship to it, as I read his wonderful address to this law school that is published in this volume of the law review. I thought about *Chevron* because so many of the themes that his essay touches upon—none of which advert directly to *Chevron*, or even to administrative law more generally—seem to intersect in one way or another with that case, the Justice's relationship to it, and recent commentary about it.

As Justice Stevens notes in his remarks, Justice Rutledge was a great influence in his life. Rutledge was a former law school dean and, prior to his appointment to the Supreme Court, a noted New Dealer. He attracted notice from the president who appointed him, Franklin Roosevelt, in consequence of speeches that he gave across the country that strongly supported the president's New Deal philosophy. In those speeches, Rutledge challenged the legal positions of those who opposed that philosophy on constitutional grounds.

Rutledge was, in many respects, a student and a proponent of the legal realist philosophy that swept through American legal thought in the first decades of the twentieth century. In this respect, it is fitting that Justice Stevens would author *Chevron*. That decision is, in many ways, a product of the jurisprudential philosophy that guided Rutledge and those of his generation.

Chevron reflects skepticism about the capacity of judges, relying on traditional tools of legal interpretation, to make effective social policy. A similar instinct underlay the hostility reflected in James Landis' classic legal realist work, *The Administrative Process*.[2] There, Landis, himself a New

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* Judge, United States Court of Appeals for the First Circuit, and the Honorable S. William Green Visiting Professor of Public Law, 2017-2018, Harvard Law School.

1. 467 U.S. 837 (1984).
2. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS, (Yale University Press 1938).

Dealer and former SEC Chairman, argued aggressively against the notion that economic policy should be made by judges enforcing their own views in the name of simply engaging in traditional common law development. Rather, Landis saw the virtue of enabling expert agencies to address the myriad difficult and unforeseeable social problems that legislators might wish to address, but whose details would inevitably escape them.

One sees that same theme—albeit updated for the age of statutes—quite present in *Chevron*. Justice Stevens explains that a critical issue of economic policy was at stake in that case: how much cost should a company bear in implementing a congressional command to take care to help make the air clean? The legislation, in Justice Stevens' view, in the end was silent on that question—at least in the relevant respect. The law made clear that companies were responsible for pollution emanating from a "stationary source." But what was that? A single smokestack? The plant itself?

In Justice Stevens' view, there was no use pretending that there was a legal answer to that question supplied by the statute when there was not. For that reason, he thought it made sense to assume that Congress had—Landis-like—intended to leave such a decision to those regulatory experts that had been legislatively empowered to administer the statutory provisions at issue.

Put otherwise, just as Landis cautioned judges to be modest in their capacities to resolve difficult matters by relying on their tried and true methods of legal decision-making, so, too, did Justice Stevens in *Chevron*. Judges should be aware of what they do not know. In consequence, they should be on the lookout for signs from Congress to defer judgment on policy questions that had been assigned to others to make.

In that sense, Justice Stevens was not so much saying that others should say what the law is. He was just concluding that what the law said might be merely that there was a policy judgment for someone else to make. In that regard, *Chevron* is like *Erie*.[3] and the whole line of legal realist decisions cautioning judges against assuming there is some "brooding omnipresence in the sky"[4] to which they have special access that can supply the answer to all questions. Rather, sometimes there is only a statute that tells a federal judge—either expressly or by implication—to leave the decision to someone else to make.

But there is another aspect of the philosophy of Rutledge-like-minded lawyers, judges, and legal thinkers that is also reflected in Justice Stevens' address. Alongside this skepticism about the judicial capacity to make social

3. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
4. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

policy through the use of traditional legal methods was a deep belief in the important role that judges must play in protecting individual liberty and expounding the Constitution and, more generally, in fulfilling their constitutional obligation to say what the law is.

Justice Rutledge, after all, was not just a New Dealer who counseled judicial deference. He was responsible for some of the important civil libertarian opinions of his generation. In particular, he wrote powerful dissents concerning the rights of enemy captives during World War II.[5] Justice Rutledge's legal realist inclinations—and his attraction to the New Deal legal philosophy of the day—in no way led him to conclude that judges should abdicate their constitutionally assigned role.

Justice Stevens followed in this same tradition in his own judicial career. As a young law clerk, shortly after his own military service, he worked closely with Justice Rutledge on one of the dissents that called for protecting the rights of enemy captives. Over a half-century later, Justice Stevens wrote majority opinions that, in many ways, extended the logic of Justice Rutledge's dissents in those World War II-era cases. I am thinking here mostly of his decisions in *Rasul*,[6] and *Hamdan*.[7] But I am also thinking about his joining the dissent by Justice Scalia—another *Chevron* enthusiast—in *Hamdi*.[8]

In those cases, Justice Stevens reaffirmed the role of the judiciary as a law decider. In so doing, Justice Stevens in no way contradicted his decision in *Chevron*. As his decision in *Chevron* makes clear, where there is a clear legal command, the judge must follow it. It is just that sometimes that command's clear message is for the judge to get out of the way.

That Justice Stevens' corpus encompasses both lines of decision should be a reminder that, at least, the author of *Chevron* did not have a cramped view of the judiciary's role, under Article III, to decide what the law is. His notion of the proper occasions for judicial deference may differ from that of other judges. But differences about when the judicial role is limited, and when it is not, long pre-dated *Chevron*. And those differences will persist. Neither *Chevron's* critics nor its partisans are immune from the critique that they have adopted positons that abdicate the judicial role in contexts in which others believe its exercise is constitutionally obligatory.

I also thought about this last point—and *Chevron*, again—as I reflected

5. *See* Ahrens v. Clark, 335 U.S. 188, 193 (1948) (Rutledge, J., dissenting); In re Yamashita, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting).

6. Rasul v. Bush, 542 U.S. 466 (2004).

7. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

8. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

on another theme that is very much present in Justice Stevens' address: the arc of precedent on the Supreme Court. Justice Stevens, even though now nearly a decade removed from his tenure on the Court, remains very much a student of it, as he has been since he first clerked there for Justice Rutledge. Just to make the point, I recall some years ago, while Justice Stevens was then working on a book reflecting on his time on the Court, my speaking with by then, the retired Justice to update him on some developments in my own legal career. Before I could get a word out, he asked me about one of his favorite legal puzzles—the mysteries of the Supreme Court's jurisprudence concerning the Eleventh Amendment, which his book addressed. One of the more important Eleventh Amendment cases was decided while I was on the Court, serving as the Justice's clerk. The case was *Seminole Tribe*.[9]

In that case, the Court had decided that Congress could not abrogate Eleventh Amendment immunity through an exercise of its Article I lawmaking powers. Justice Stevens wrote a very strong dissent critiquing that decision. And he began his decision this way: "This case is about power—the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right."[10]

Justice Stevens remains, as his address reveals, just as interested in the work of the Court as he always been. It is an institution that he loves and that he has done much to nurture over his long career. But, Justice Stevens is also keenly interested in how his own decisions on the Court have fared and will fare. His extended published remarks of the ways in which his early decisions on sentencing have been received over time offers a wonderful illustration of how doctrines can develop and how positions that once seemed to be outliers can, in the end, become central to American law.

It is this observation that takes me back to *Chevron*. That case seemed firmly ensconced as a precedent in the years following its appearance. Judge Patricia Wald famously wrote that *Chevron* had become so dominant a case that it was effectively a password for agency lawyers—say the word, and your view would find favor in court.[11]

But that is no longer so clearly the case. Critiques of *Chevron* that once were the province only of legal academics have migrated into case law. There is now lower court analysis questioning the legal foundations of

9. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

10. *Id.* at 76 (Stevens, J., dissenting).

11. *See* PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 620 (9th ed. 1995).

Chevron. And this questioning is cast not merely as concerning the proper scope of *Chevron*. The criticism is instead cast as a challenge to the constitutional basis for the idea that judges should cede control to agencies over interpretations of statutes. On the strongest version of the criticism, judges undermine the separation of powers, and thus act unconstitutionally, in deferring to agency statutory interpretations in the way *Chevron* requires.

But there is also a more modest way in which *Chevron* has been challenged. All manner of questions have been raised about just when *Chevron* deference would be appropriate. Should it apply to all agency decisions? Is it appropriate when decisions are made in a decentralized manner, rather than from Washington? Is it appropriate for major questions? Does it have any purchase when an agency fails to act through notice and comment rulemaking? Does it apply to an agency's interpretation of the scope its own jurisdiction?[12] Answering any of these questions in the negative chips away at *Chevron's* domain.

And so, I could not help but think in reading Justice Stevens' address—in which he describes the way an opinion of his about sentencing had gone from outlier dissent to guiding doctrine—what he would make of these recent challenges to the precedent with which he is most associated: *Chevron*. I do not know the answer, but I can hazard a guess that, the realist that Justice Stevens is, *Chevron* was never in his view the caricatured paean to judicial abdication that it is sometimes made out to be.

In *Chevron* itself, Justice Stevens hardly stated that judges must stand back and allow regulators to work their will at the first wisp of uncertainty about what Congress may have intended. He reached the decision to delegate only after ensuring that the agency's interpretation was "based on a permissible construction of the statute."[13] The opinion takes a deep dive into the relevant statutory scheme, considering its text, history, and purpose in extensive detail. This was no small task, as the text of the Clean Air Act is far from simple, its history is a winding tale of revisions and compromises, and, as a policy matter, it intends to accommodate numerous objectives.

Only after detailed analysis did Justice Stevens conclude by deferring: "We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in

12. *See*, *e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (decentralized agency decision-making without notice and comment); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (set out the Major Questions Doctrine); City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) (examined the scope of an agency's own jurisdiction).

13. Chevron v. National Resources Defense Council, 467 U.S. 837, 843 (1984).

reducing air pollution with economic growth."[14] But a focus on *Chevron's* bottom line alone masks the amount of judicial interpretation of the statute in which Justice Stevens engaged and which critics of the decision (and, I suppose, supporters too) often overlook. Under *Chevron*, before deferring, the Court first found both that the statute was ambiguous and that Congress intended to delegate the relevant decision to the agency.

No sooner had *Chevron* been decided that Justice Stevens weighed in on a case called *Cardoza-Fonseca*, to make clear that at "step one" of *Chevron* courts employ "traditional tools of statutory construction" to determine whether an ambiguity is present.[15] And, in applying those tools, he wrote an opinion for the Court that disagreed with the Board of Immigration Appeals about the meaning of a statutory provision. *Cardoza-Fonseca* thus illustrates something that has been clear from *Chevron's* infancy: Justice Stevens has never viewed the case as a blank check to agency statutory interpretations.

Justice Stevens abdicated the judicial role even in cases in which he has called for deference. In a 1994 case concerning deference to the FCC under the Communications Act of 1934, Justice Stevens, in dissent, criticized the majority for abandoning deference "in favor of a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions."[16] Yet the deference that Justice Stevens called for was far from mechanical. In an echo of his *Chevron* opinion, Justice Stevens carefully considered the Communications Act's text, discussed its purpose in detail, and traced a series of earlier FCC orders over many years. And in his final paragraph, he cites *Chevron* itself as justification for his conclusion that the court "should sustain [the FCC's] eminently sound, experience-tested, and uncommonly well-explained judgment."[17]

There should be little surprise that Justices Stevens had a nuanced view of the circumstances in which judges should defer to agency decisions. Justice Stevens' opinions are notably non-doctrinaire. He has been famously skeptical of elaborate judicial doctrinal constructs that are rigid and insensitive to the particular facts at hand. But, when it comes to *Chevron*, I think his nuanced understanding of the doctrine of deference that he birthed suggests that there is little risk that, in the end, he will find himself reversed,

14. *Id.* at 866.
15. I.N.S. v. Cardoza-Fronseca, 480 U.S. 421, 446 (1987).
16. MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 235 (1994) (Stevens, J., dissenting).
17. *Id.* at 245.

no matter what future *Chevron* faces. For, Justice Stevens, as I have understood his take on deference to agencies in hard cases, has never been all that far from where the New Deal generation had left things. Well before *Chevron*, there was *Hearst* and *Packard* and *Skidmore* and a range of cases and doctrines that made clear a realist truth—there will always be gaps and ambiguities in the recesses of complex statutes.[18] And there will often be agencies empowered to administer those same statues. It would be surprising if the best answer to the statutes' proper administration is necessarily one that—by constitutional command—affords an agency no discretion to make it.

Justice Stevens ends his contribution to this symposium by quoting one historian's characterization of the founding generation: "It is richly ironic that one of the few original intentions that [the revolutionary generation] all shared was opposition to any judicial doctrine of 'original intent.' To be sure, they all wished to be remembered, but they did not want to be embalmed."[19]

Justice Stevens, now over three decades removed from writing *Chevron*, is himself a founding father of sorts: of a canonical doctrine that is one of the most cited Supreme Court decisions ever and has been called the *Marbury*[20] of the administrative state.[21] But whatever his intentions were in writing *Chevron*, I doubt he intended for his own attempt to make sense of the tangled doctrines of administrative deference to be the last word. It is thus fitting that the Justice Stevens doll on my shelf is holding an open rather than a closed book. And it is thus perhaps fitting as well that his golf club is missing. New generations have a way of changing what interests them.

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18. *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See also* Jeffrey A. Pojanowski, *After Deference*, 81 MO. L. REV. (forthcoming 2017).

19. Justice John Paul Stevens (Ret.), *Some Thoughts About a Former Colleague*, 94 WASH. U. L. REV. 1391, 1400 (2017).

20. Marbury v. Madison, 5 U.S. 137 (1803).

21. *See, e.g.*, Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2074-75 (1990).