

Loper Bright and the End of Chevron

Jack M. Beermann

Philip S. Beck Professor of Law
Boston University School of Law

The Roberts Court



Chevron Deference:

- Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984): created the two step standard of review for agency interpretations of their statutes:
 - 1. if statute is clear, apply that understanding.
 - 2. if the statute is silent on the issue or ambiguous, defer to reasonable or permissible interpretation.

Traditional Tools of Statutory Construction



My View:

CONNECTICUT LAW REVIEW

VOLUME 42

FEBRUARY 2010

NUMBER 3

Article

End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled

JACK M. BEERMANN

In Chevron U.S.A., Inc. v. NRDC, decided in 1984, the U.S. Supreme Court announced a startling new approach to judicial review of statutory interpretation by administrative agencies, which requires courts to defer to agency interpretations of ambiguous statutes. Although it was perhaps hoped that Chevron would simplify judicial review and increase deference to agency interpretation, the opposite has occurred. Chevron has

Meaning of Chevron



Origins of Chevron

- 1980 The Benzene Case: If the Government were correct . . . the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the [nondelegation doctrine"]
- Justice Rehnquist urged the Court to revive the nondelegation doctrine: "it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. "

Origins of Chevron

- 1984: Chevron.
- Court deferred to Reagan administration deregulation. Democrats hated it, thought it was contrary to separation of powers. Republicans loved it, said elections should matter, agencies are more accountable than Federal Courts.

Attack on Chevron

- After 2009: Obama Administration.
- Democrats loved it, enabled effective regulation. Republicans hated it, said it was contrary to separation of powers and allowed unaccountable bureaucrats thwart the will of Congress.

Slow death of Chevron

- Supreme Court stopped applying it.
- Lower courts applied it sporadically but were bound by Supreme Court precedent.

Loper Bright

- Overruled Chevron:
- Reasons
 - 1. Contrary to the APA:
 - To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an [agency action](#)
 - 2. Mentioned unworkability briefly.
 - 3. Constitutional Doubts.

Traditional Tools of Statutory Construction



Loper Bright

- Justice Gorsuch's concurrence:
- Argues for a weak version of stare decisis. Judge's job is to find the correct answer, not to blindly follow precedent.
- This is a premodern view of law, where the correct answers are out there waiting to be discovered by better legal reasoning and it signals a willingness to ignore precedent.

Loper Bright

- Dissent: Main point was that experts should be making the sort of policy judgments inherent in the construction of regulatory statutes.
- In my view this one of Chevron's biggest problems, that in most cases of judicial review, the Court's focus should be on whether the agency's action makes sense in light of the statute; picky issues of statutory meaning were beside the main point.

Arbitrary, Capricious is still deferential

FCC v. Prometheus Radio Project, 141 S. Ct. 1150 (2021)

- **Holding:** The Federal Communications Commission's 2017 decision to repeal or modify three of its media ownership rules was not arbitrary or capricious for purposes of the Administrative Procedure Act.
- Rejected Third Circuit's relatively stringent review which questioned the reliability of the studies the agency relied on.

Revival of Skidmore Deference

As the Loper Bright Court put it, in Skidmore “the Court explained that the ‘interpretations and opinions’ of the relevant agency, ‘made in pursuance of official duty’ and ‘based upon . . . specialized experience,’ ‘constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,’ even on legal questions

Revival of Skidmore Deference

- When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, “fix[ing] the boundaries of [the] delegated authority,” H. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in “‘reasoned decisionmaking’ ” within those boundaries, . . . By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

Revival of Skidmore Deference

- Does reviving Skidmore snatch defeat from the jaws of victory?

Major Questions Doctrine

- The Court had already made Chevron less important by creating the Major Questions Doctrine, MQD, which denied agencies power over important matters unless statutory language was clear. When the statute is clear, Chevron is irrelevant.

The Future without Chevron

- Will the demise of Chevron free federal judges to decimate federal regulation as some have already charged? Were Democrats right to lump Loper Bright into the current Supreme Court's anti-regulatory project?
- Nine remanded cases will be good indication: various circuits, government won all nine pre-Loper Bright. Wrinkle: Immigration and benefits cases.
- There is reason to view Loper Bright as much less important than other developments, primarily the MQD.

The Future without Chevron

- Fifth Circuit Mayfield decision; *Mayfield v. Department of Labor*, 117 F.4th 611 (5th Circuit)
- Challenge to DOL's minimum salary requirement for FLSA "executive, administrative or professional" employees. No mention of minimum salary in the statute. (*"as such terms are defined and delimited from time to time by regulations of the Secretary"*) Can minimum salary be justified under that power?
- Court rejected MQD—not major enough?

The Future without Chevron

- Fifth Circuit Mayfield decision; *Mayfield v. Department of Labor*, 117 F.4th 611 (5th Circuit)
- Loper Bright “means that we must “independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.” *Id.* at 2268.”
- The Court finds that the best reading of the text supports DOL’s position that it can impose a minimum salary requirement to classify someone as an exempt executive.

The Future without Chevron

- Fifth Circuit Mayfield decision; *Mayfield v. Department of Labor*, 117 F.4th 611 (5th Circuit)
- Questions whether *Skidmore* is consistent with *Loper Bright*'s admonition to find the "best" reading of the statute. But also says:
- "if *Skidmore* deference does any work, it applies here. DOL has consistently issued minimum salary rules for over eighty years. . . . DOL's position that it has the authority to promulgate such a rule has been consistent. Furthermore, it began doing so immediately after the FLSA was passed. And for those who subscribe to legislative acquiescence, Congress has amended the FLSA numerous times without modifying, foreclosing, or otherwise questioning the Minimum Salary Rule.

Traditional Tools of Statutory Construction



The Future without Chevron

- Thus, I think the biggest question going forward is whether the lower courts and ultimately the Supreme Court, will continue to defer under the Skidmore factors even after condemning deference in *Loper Bright*.
- With President Trump coming back into office, perhaps we will see the conservatives on the Court find a new reason to embrace deference.
- More seriously, less deference may tend to moderate the government lurching from one extreme to another, judicial review tends to keep things closer to the middle.

Advice to Legislators

- For you as legislators, as always:
- the more specific you are the better
- but also when you mean to delegate discretion to an agency or a court, the more explicit the better.