The Death of *Chevron*: Is It Really a Big Deal?

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Objectives

- Provide a brief overview of *Chevron* deference and the *Loper Bright Enterprises* case.
- Briefly discuss states that have already implemented changes relating to deference prior to the *Loper Bright Enterprises* case.
- Discuss possible future impacts of the Loper Bright Enterprises on state licensing boards and regulatory bodies.

What is *Chevron* Deference?

- Holding in *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
  - If there is ambiguity in a statute (Congress has not clearly addressed question), then when reviewing court reviews federal agency action, the court asks:
    - Is the agency's interpretation reasonable?
    - If so, court will give that interpretation deference.
  - At issue in the case was an EPA regulation that was promulgated by agency. Underlying statute had no specific language regarding "bubble concept".
    - Regulation allowed states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" and was based on permissible construction of the term "stationary source" in Clean Air Act Amendments.
    - Scientific questions at issue here . . . Does that matter?
  - *Chevron* is the result of a request for review of an EPA decision utilizing the regulations. Second Circuit Court of Appeals granted the petition and vacated the regulations. *Chevron* reverses the Second Circuit and reinstates the regulations as utilizing a permissible statutory interpretation.

Chevron Loses Popularity (1)

- Chevron was decided during the Reagan administration and lauded at that time. But then…
- Separation of Powers concerns?
  - Constitutional principle that is concerned with keeping the powers of the branches (executive, legislative, and judicial) separated so that no one branch becomes too powerful.
  - System of "checks and balances."
  - Chevron gives too much power, perhaps, to federal government "bureaucrats"?
  - *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
    - "It is emphatically the province and duty of the judicial department to say what the law is."

Chevron Loses Popularity (2)

- Not applied uniformly—some judges see ambiguity everywhere, others do not.
- Inconsistent and confusing: When does it apply? How?
  - Inconsistent messages regarding statutes with criminal applications.
  - Always had exception for questions of "deep 'economic and political significance'" and, per the dissent, deny deference if there was no reason to prefer agency interpretation.
  - Results in unpredictable decisions?
- There is no deference in the plain language of the federal APA, § 706, specifically.
  - This is a judicial invention or legal "fiction."

Battle of the Viewpoints

- Now two schools of thought when there is ambiguity in a statute that Congress has not addressed:
  - (1) This is a question that must be addressed using statutory construction and judges are experts in statutory construction. (Ambiguity is unintentional.)
  - versus
  - (2) This is a question that must be addressed using the technical and scientific knowledge of the agency and judges are not experts in those things. (Some ambiguity is intentional.)
  - Are both possibly correct, depending on the question/type of ambiguity?
- Can rephrase as: Who do you trust?

Holding in *Loper Bright Enterprises*

- Under the federal APA, courts may not defer to an agency's interpretation of the law simply because a statute is ambiguous.
- Agency interpretation is now merely persuasive authority.
  - Treated like other non-precedent arguments.
- In short: We are judges and we know how to interpret statutes better than anyone else.
- *Chevron* has been crumbling and lower courts still have to follow it. (But we haven't used it since 2016).
- Stare decisis is not an inexorable command. No requirement to "persist in the *Chevron* project."
  - "For its entire existence, *Chevron* has been a 'rule in search of a justification.'"
- Also, maybe Loper provides a framework re: how to successfully overrule other SCOTUS precedent that we no longer like.

Judicial Humility

- "The humility required of judges to recognize that our decisions must yield to the laws adopted by the people's elected representatives." Gorsuch, J., concurring.
  - But the law here is ambiguous. So what law is being yielded to?
- "In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law." Kagan, J., dissenting.
  - "A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power."
  - "[A]bove all else, stare decisis is a 'doctrine of judicial modesty.'"

Congress/Legislature Action

- Chevron incorporates presumed legislative intent.
  - Congress gave authority to agency to carry out statutes and Congress is presumed to have wanted the agency to fill in ambiguity as long as it is reasonable.
- Roberts and Co. says that we do not know that and Congress could have said that if it wanted to. It did not and had 40 years to do so.
- Dissent says the fact that Congress did not address this via legislation in 40 years means that Congress must have wanted *Chevron* to stand.
- Highlights issues with legislative intent?
  - How many regulatory law nerds are in Congress?

Selected *Chevron* Questions

- The FDA regulates "biological product[s]," including "proteins," when does an alpha amino acid polymer qualify as such a "protein"?
- Under the EPA, the Fish and Wildlife Service must designate endangered "vertebrate fish or wildlife" species, including "distinct population segment[s]" of those species. What makes one population segment "distinct" from another?
- Under the Medicare program, reimbursements to hospitals are adjusted to reflect "differences in hospital wage levels" across "geographic area[s]." How should HHS measure a "geographic area?" By city? By county? By metropolitan area?

Federal APA: 5 U.S.C. 706, Scope of Review

§706. Scope of review.

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. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393 .)

Nevada APA

NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) **Confined to the record.**

⇨ In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

(Added to NRS by 1989, 1650; A 2015, 710)

Other State APAs

Idaho 67-5277. Judicial review of issues of fact. Judicial review shall be conducted by the court without a jury. Unless otherwise provided by statute, judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code.

History: [67-5277, added 1992, ch. 263, sec. 49, p. 813.]

Oregon 183.482. Jurisdiction for review of contested cases; procedure; scope of court authority.

(7) Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion. In the case of disputed allegations of irregularities in procedure before the agency not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact upon them. The court shall remand the order for further agency action if the court finds that either the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure, including a failure by the presiding officer to comply with the requirements of ORS 183.417 (8).

[1975 c.759 §15; 1977 c.798 §4; 1979 c.593 §24; 1985 c.757 §2; 1989 c.453 §1; 1991 c.331 §44; 2007 c.659 §§2,5]

Arizona Law 12-910: Scope of Review (Changed in 2018)

E. After reviewing the administrative record and supplementing evidence presented at the evidentiary hearing, the court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion. IN A PROCEEDING BROUGHT BY OR AGAINST THE REGULATED PARTY, THE COURT SHALL DECIDE ALL QUESTIONS OF LAW, INCLUDING THE INTERPRETATION OF A CONSTITUTIONAL OR STATUTORY PROVISION OR A RULE ADOPTED BY AN AGENCY, WITHOUT DEFERENCE TO ANY PREVIOUS DETERMINATION THAT MAY HAVE BEEN MADE ON THE QUESTION BY THE AGENCY. NOTWITHSTANDING ANY OTHER LAW, THIS SUBSECTION APPLIES IN ANY ACTION FOR JUDICIAL REVIEW OF ANY AGENCY ACTION THAT IS AUTHORIZED BY LAW.

F. NOTWITHSTANDING SUBSECTION E OF THIS SECTION, IF THE ACTION ARISES OUT OF TITLE 20, CHAPTER 15, ARTICLE 2, THE COURT SHALL AFFIRM THE AGENCY ACTION UNLESS AFTER REVIEWING THE ADMINISTRATIVE RECORD AND SUPPLEMENTING EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING THE COURT CONCLUDES THAT THE ACTION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS CONTRARY TO LAW, IS ARBITRARY AND CAPRICIOUS OR IS AN ABUSE OF DISCRETION.

G. THIS SECTION DOES NOT APPLY TO ANY AGENCY ACTION BY AN AGENCY THAT IS CREATED PURSUANT TO ARTICLE XV, CONSTITUTION OF ARIZONA.

Other States Without Deference

- Utah, Colorado, Kansas, Arkansas, Mississippi, Tennessee, Florida, Delaware, Ohio, Michigan, and Wisconsin.
- Some states removed deference via legislation (Arizona and Tennessee), constitutional amendment (Florida), and judicial action (Delaware and Michigan).
- Is a decision on the record only inherently deferential? (NRS 233B.135 requires this.)

Lots of Uncertainty

- 40 years of precedent is gone. (except it is not ??)
  - "[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful [including Chevron itself] are still subject to statutory stare decisis despite our change in interpretive methodology."
- Regulations at issue?
  - In Nevada, the Legislative Commission must affirmatively approve **all** regulations in order for them to be effective.
    - This is not the case for federal regulations, so court challenge may be only option for review of federal regulations. Under Congressional Review Act, Congress has 60 days to disapprove of final, filed regulations.
  - "A properly adopted substantive rule establishes a standard of conduct which has the force of law." State ex rel. *Nevada Tax Com'n v. Safeway Super Service Stations*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983). *See also Pacific Gas & Elec. Co. v. Federal Power Commission*, 506 F.2d 33, 38 (DC Cir. 1974).
- Changes to Petitions for Judicial Review (or not)?
  - Posture on appeal is to deem order valid until it is overturned.

Process to Challenge Regulations

- In both cases, regulations were made by federal agencies that the challengers didn't like.
- In Nevada, there is a process to challenge regulations, *see* NRS 233B.100 (allowing a person to petition for change to regulations), NRS 233B.105 (allowing a small business to object to regulations), NRS 233B.110 (allowing a person to seek a declaratory judgment in district court regarding regulation).
- NRS 233B.110 requires that the agency "pass" on the regulation before declaratory relief action is filed. Challenge may be based on violation of constitutional or statutory provisions (including process to make regulation not followed) or that regulation exceeds statutory authority of the agency. Agency also can petition for order to establish validity of regulation.
- There are similar provisions in the federal APA to challenge regulations, and those were utilized in *Loper Bright*.

State Agency v. Federal Agency

- Licensing Boards? Are they different?
  - More public protection at issue, so maybe we trust these agencies more?
- Scientific Knowledge/Technical Expertise v. "Bureaucrat"
  - Nevada State Board of Medical Examiners is made up of 11 members: 6 physicians, 3 public member, 1 physician assistant, and 1 practitioner of respiratory care.
  - Nevada Transportation Authority: 3 members, not owners/participants in transportation industry.

Bad Facts = Change in the Law?

- Fees Without Specificity:
  - Magnuson-Stevens Fishery Conservation and Management Act (MSA) regulates fishing industry to establish annual catch limits and protect fish from overfishing.
  - Foreign fishing vessels operating in exclusive economic zone must carry "observers" and pay the costs associated with the observers. Costs charged for observers not capped for these vessels. Sanction authorized if costs are not paid. Two companies challenged the rules at issue in this case.
- *Profits*:
  - Up to 20% hit on the profits after paying observer costs on a regular expedition and still must pay observer costs even if less fish or no fish caught.

Future Impact?

- Legislative focus?
  - Some states may remove *Chevron*.
  - Some states may specifically add *Chevron*.
    - Instead of presumed intent, could specifically add legislative intent one way or the other.
- Challenges on this in court actions.
  - Possibly include arguments about *Chevron* in petitions for judicial review.
- Federal agencies have less power.
  - May be good for Federal Trade Commission or Equal Employment Opportunity Commission actions against state agencies.

For More Information

- Video from Professor Seamon at the University of Idaho, College of Law (from more than 7 years ago!) predicting the end of Chevron:
  - https://www.facebook.com/watch/?v=10155860950930130
- Justice Gorsuch's mother was the administrator of the EPA when the *Chevron* case was decided. (She is named in the Second Circuit decision.)

Questions?