

Chevron Deference Conflicts with the Administrative Procedure Act

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"It is emphatically the province and duty of the Judicial Department to say what the law is."

Marbury v. Madison, 5 U.S. 137, 177-78 (1803) (per Marshall, C.J.)

Judicial deference to agency interpretations of statutes and regulations is nothing new—but a trend toward more critical review is emerging. In the October 2014 term of the United States Supreme Court alone, three serious concerns about deferential review were recognized:

- First, in [King v. Burwell](#), the Court refused to defer to the Internal Revenue Service's interpretations of the Affordable Care Act—because Congress did not expressly delegate interpretive power regarding this question of "deep economic and political significance" to the IRS, and because the IRS has no special competence in health care issues.
- Second, in [Perez v. Mortgage Bankers Ass'n](#), members of the Court expressed grave concerns about deference to an agency's interpretation of vague and ambiguous regulations—especially when the agency itself was responsible for the ambiguities.
- Finally, Justice Thomas wrote a compelling concurring opinion in [Michigan v. EPA](#), in which he stressed that the Court's continued allegiance to "*Chevron* deference"—under which courts defer to agencies' interpretations of the statutes they are charged to administer—raises "serious" constitutional questions under the "separation of powers" doctrine.

These rumblings suggest growing discomfort with deferential review—and justify increased vigilance by parties and advocates who seek relief from expanding presidential authority. Indeed, the Founders' system of checks and balances among three branches of government is increasingly undermined by the rise of a fourth branch, an "administrative state" of "sprawling departments and agencies that govern with increasing autonomy and decreasing transparency."¹ As Chief Justice Roberts recently observed, "the danger posed by the growing power of the administrative state cannot be dismissed."²

Presidents have long relied upon administrative agencies to implement progressive regulatory programs in areas such as antitrust and securities regulation. For instance, federal agencies were at the forefront of advancing President Franklin Roosevelt's New Deal.³ The Administrative

Procedure Act (APA) was the product of a hard-fought political battle over the place of the agencies in the government and the future of New Deal policies.⁴ How regulations would be reviewed by the courts and how statutory programs might be maintained and enhanced, or challenged and diminished, were critical issues.

Given their long-term control over judicial appointments, New Deal proponents generally favored a constraining APA, enforced by non-deferential judicial review, as a method for protecting New Deal policies against ideological opponents' attempts to adopt new policies. The New Deal proponents generally prevailed in this struggle.⁵ As a result, the text of the APA plainly provides that "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."⁶

Additionally the statute provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*."⁷ Accordingly, the text of the APA does not reserve any authority for the agencies to interpret the law, much less any true "lawmaking" power. The APA's commands "seem to be relatively clear statements by Congress intended to assign resolution of legal issues to reviewing courts, not to administrative agencies."⁸ Moreover, many courts, including the Supreme Court, have stressed that the language of the APA was forged from years of study and debate, and hence, its language should not be "lightly disregarded."⁹

To the extent legislative history is appropriate to consider when the APA's text is plain and unambiguous, the statute's legislative history leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained just before the bill was passed, the provision "requires courts to determine independently all relevant questions of law, *including the interpretation of constitutional or statutory provisions*."¹⁰

Despite the APA's textual commands, the Supreme Court nevertheless indulges deferential judicial review of agency interpretations of statutes and regulations. One of the most notable and frequently used forms of deference was recognized in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, wherein the justices authorized deference to agencies' interpretations of laws they are charged to administer. Other holdings allow deference to agencies' interpretations of their own regulations—even if they are vague or ambiguous,¹¹ and "extreme deference" or "super deference" to agencies' scientific conclusions in the course of rulemaking.¹²

Although the paths to each of these deferential perspectives differed, the origins of *Chevron* deference are illustrative. In *Chevron*, the Court signaled its intent to depart from the APA's language when it *paraphrased*—rather than quoted—the APA's standard of review. The Court stated that when Congress explicitly leaves a statutory gap for the agency to fill, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."¹³ The *Chevron* Court's paraphrase differs dramatically from the actual

text of the APA, which provides that the reviewing court should overturn agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁴

Contrary to the *Chevron* Court’s narrow paraphrase, nothing in the APA’s text or legislative history justifies constricting review only to variances with the statute under review. Such reasoning “might be appropriate with regard to a common law standard but seems beyond the proper judicial role in a statutory matter.”¹⁵ As a result, *Chevron* gives little indication that its holding is based on the APA’s actual statutory language.¹⁶ Indeed, it has been noted that the *Chevron* Court “famously” does not even cite the APA in its decision.¹⁷

Although *Chevron*’s reasoning stresses the expertise of agencies as a basis for deference, the APA plainly delegates final interpretive authority to the courts. Since there is no statutory basis for superseding or diminishing the judicial role in the interpretive process, there is no justification for using deferential review to bypass the judiciary’s primary responsibility.

It is time—indeed past time—for the Supreme Court to exercise its singular constitutional authority to declare “what the law is”—and to curb the increasingly intrusive and overreaching authority seized by the Executive Branch. The American people, from whom all authority is derived, are entitled to be *governed* by a democratically responsive system, not merely *administered* by an unelected bureaucracy.

Notes

1. Jonathan Turley, [The Rise of the Fourth Branch of Government](#), Wash. Post. (May 24, 2013).
2. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (per Roberts, C.J., dissenting).
3. See Jack M. Beermann, [End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled](#), 42 Conn. L. Rev. 789-90 (2010).
4. *Id.* at 789.
5. See George B. Shepherd, [Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics](#), 90 NW. U. L. Rev. 1557, 1581–82 (1996); McNollgast, [The Political Origins of the Administrative Procedure Act](#), 15 J. L. Econ. & Org. 180, 200, 206 (1999).
6. 5 U.S.C. § 706 (2006) (emphasis added).
7. *Id.* at § 706(2) (emphasis added).
8. Beermann, *supra* note 3 at 788 (2010) (reviewing literature); Lisa Schultz Bressman, [Chevron’s Mistake](#), 58 Duke L.J. 549, 554, 562 (2009); Antonin Scalia, [Judicial Deference to Administrative Interpretations of Law](#), 1989 Duke L.J. 511, 517.
9. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523, 547–48 (1978) (noting that the APA was a legislative enactment that settled “long-continued and hard-fought” contentions); *In re Lueders*, 111 F.3d 1569, 1576 (Fed. Cir. 1997)

(tracing the legislative history leading up to enactment of the APA); *see generally*, Beerman, *supra* note 3 at 788-789.

10. John E. Duffy, [Administrative Common Law in Judicial Review](#), 77 Tex. L. Rev. 113, 193-94 (1998) (emphasis added); *see also* McNollgast, *supra* note 5, at 200 (“[C]ourts, not agencies, are the locus of both constitutional and statutory interpretation.”); Beerman, *supra* note 3 at 789.
11. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
12. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983).
13. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (emphasis added).
14. 5 U.S.C. § 706(1)(A) (2006) (emphasis added).
15. Beerman, *supra* note 3 at 791.
16. *See* Patrick Smith, [Chevron’s Conflict with the Administrative Procedure Act](#), 32 Va. Tax. Rev. 813 (2013).
17. *See* Aaron Saiger, [Chevron and Deference in State Administrative Law](#), 83 Fordham L. Rev. 555 (2014); *see also* Thomas J. Miles & Cass R. Sunstein, [Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron](#), 173 U. Chi. L. Rev. 823, 865 (2006).

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