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The Proposed Separation of Powers Restoration Act Goes Too Far

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133 S.Ct. 1863, 1875 (2013) (Breyer, J., concurring); see also Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 541–45 (2014) (synthesizing several Breyer opinions). Meanwhile, courts continue to ponder without clear resolution whether they should consider legislative history or substantive canons of construction at *Chevron* step one or step two.

Nevertheless, at least in theory, *Chevron* is not incompatible with de novo review, with a reviewing court turning to deference only if statutory meaning cannot be readily determined. The *Chevron* Court expressly called for “employing traditional tools of statutory construction” to ascertain congressional intent regarding statutory meaning, 467 U.S. 837, 843 n.9 (1984). Arguably, therefore, a reviewing court should only turn to deference and the reasonableness inquiry described as *Chevron* step two if the statute in question is not susceptible to interpretation using those traditional methods. And many opinions applying *Chevron* take precisely that approach. See, e.g., *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

It is fair to observe that judges sometimes do not take a very thorough approach to evaluating statutory meaning in approaching a *Chevron* analysis. For just one recent example, consider *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), in which six justices in concurring and dissenting opinions criticized the plurality for moving straight to the reasonableness inquiry of *Chevron* step two simply because a snippet of statutory text seemed facially inconsistent.

But sometimes, too, statutory questions legitimately lack clear answers no matter how attentive a court is to text, history, and purpose. At that point of statutory ambiguity, courts have naught else to do *beyond* either nakedly choosing their own policy preferences or assessing whether the agency’s choice seems reasonable. Many judges are uncomfortable, and rightly so, with the former option. Indeed, the late Justice Scalia’s description of *Chevron* review in *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, is entirely consistent with this

view—contending that *Chevron*’s inquiry into statutory meaning should include all of text, history, and even some amount of policy evaluation, but acknowledging that sometimes judges are wise to acquiesce to the judgment of administrative agencies. The difficulty is and always has been, whether under *Chevron* or otherwise, ascertaining when and under what circumstances such judicial acquiescence is appropriate.

Undoubtedly, the Supreme Court could do much more than it has to reconcile *Chevron* review with the text of APA § 706. Given *Chevron*’s malleability, such reconciliation seems at least theoretically plausible, whether or not APA § 706 more explicitly calls for de novo review of legal questions. Until Congress starts writing clearer statutes (which seems difficult if not impossible) or instructs and convinces courts to make their own policy choices in the face of statutory ambiguity (which seems highly unlikely), judicial deference is here to stay. The proposed Separation of Powers Restoration Act will accomplish little if anything, so why bother?



The Proposed Separation of Powers Restoration Act Goes Too Far

By Jack M. Beermann*

If passed, the Separation of Powers Restoration Act would require federal courts conducting judicial review of agency action to decide “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.” Although I have long been highly critical of *Chevron*, see, e.g., 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.* 9 (2010), and also have misgivings about *Auer* deference, I fear that the proposed Act goes too far in completely eliminating deference to agency legal determinations.

In testimony before the Regulatory Reform, Commercial and Antitrust Law subcommittee of the House Committee on the Judiciary, from which these comments are drawn, I have advocated for a more moderate solution that would encourage courts to apply the factors articulated in

Skidmore v. Swift & Co., 323 U.S. 134 (1944), to determine how much, if any, deference should be afforded to agency legal determinations. Pursuant to *Skidmore*, agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds).

Before returning to the substance of my proposal, it is appropriate to point out that the characterization of deference to agency legal determinations as a violation of separation of

* Professor of Law, Boston University School of Law. Much of this article is drawn from Professor Beermann’s recent testimony before the House Committee on Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law (May 17, 2016).

powers is misguided. While it may appear that judicial deference to agency legal decisions is inconsistent with fundamental notions of the judicial role, as embodied in *Marbury v. Madison*'s famous statement that "it is emphatically the province and duty of the judicial department to say what the law is," 5 U.S. 137, 177 (1803), judicial deference to agency legal determinations in most contexts involving judicial review does not implicate separation of powers for the simple reason that there is no constitutional entitlement to judicial review. Congress could constitutionally eliminate judicial review of rulemaking and many adjudicatory decisions, except in those situations in which judicial review is required to satisfy Article III concerns over agency adjudication of private rights.

In light of the long tradition of judicial consideration of agency views when reviewing agency legal determinations, The Separation of Powers Restoration Act is too blunt. It would not recognize situations in which Congress intends that reviewing courts defer to agency legal determinations, for example in highly technical or sensitive areas in which Congress expects agencies to clarify statutory ambiguities or when Congress sometimes explicitly indicates that an agency should define a statutory term. Because there are contexts in which Congress has traditionally favored judicial deference to agency legal determinations, the proposal would force Congress to make explicit exceptions to its

application or it would frustrate Congress's intent in such contexts.

Thus, while the proposal is a laudable effort to dispel some of the negative consequences and confusion caused by the *Chevron* doctrine, insofar as it would disable reviewing courts from taking into account the views of an administering agency on questions of statutory interpretation and make it difficult for Congress to allow deference to administering agencies when appropriate, it may go too far.

In my view, it would be appropriate for Congress to craft legislation in reaction to all of the problems *Chevron* deference has caused without totally ruling out judicial deference to agency views on legal conclusions. My suggestion is to add the following language to APA § 706, after subsection 2(F):

Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would apply the pre-APA *Skidmore* factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.

The "due regard" language would allow courts to calibrate the degree of deference to the particular situation. There might be contexts in

which minimal to no deference is appropriate; for example, where Congress has expressed strong policy preferences but in accidentally ambiguous language. There may also be statutory gaps that Congress would expect agencies to fill in accord with Congress's intent rather than by agency policy views. There may be other contexts, however, in which the language, structure, and purposes of a statute indicate that Congress expects reviewing courts to defer to persuasive agency reasoning concerning the proper construction of a statute or statutory gaps that Congress would have wanted an agency to fill in line with consistent administrative policy.

Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*. The *Skidmore* factors are good indications that the agency has applied its expertise to the matter and acted with due regard to Congress's intent underlying the statute being construed.

In conclusion, while there is no doubt that reform to *Chevron* and *Auer* is needed, the proposed Separation of Powers Restoration Act goes too far in eliminating judicial consideration of agency views when reviewing agency legal determinations. A more moderate reform, perhaps in the form of revising the *Skidmore* factors, would be preferable.

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