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## The Upsides and Downsides of Ending *Chevron* Deference

by Steve R. Johnson, Kristin E. Hickman, Joseph B. Judkins, and Donald B. Susswein

In this installment of the Star Forum, experts discuss the following question:

What would be the upsides and downsides of ending *Chevron* deference?

*Tax Notes* would like to thank Patrick J. Smith, a partner at Ivins, Phillips & Barker Chtd., who practices corporate tax and tax controversy law in the firm's Washington office, for providing this Star Forum question.

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In 2016 and again in 2017, the House passed the Separation of Powers Restoration Act (SOPRA). Similar legislation has been introduced in the Senate. If enacted, SOPRA would overthrow the *Chevron* and *Auer/Seminole Rock* doctrines. I

doubt that SOPRA will be enacted, at least soon and in its current form.

Nonetheless, as I have argued at greater length elsewhere, *Chevron* is dying as a meaningful rule of law, indeed may already be dead. (See 2015 *Pepp. L. Rev.* 19.) I expect that, rather than expressly abrogating *Chevron*, the courts will continue to cite it ritually but that it will be shorn of outcome-determinative significance.

When *Mayo* erected *Chevron* in place of *National Muffler*, some taxpayers' representatives feared that it would be much harder to challenge tax regulations and rulings. That fear was misplaced. (Prior analysis: *Tax Notes*, July 24, 2006, p. 351.) If the demise of *Chevron* leads some representatives to

hope that it will be easier to challenge tax regulations and rulings, that hope will prove similarly misplaced. I say this for the following reasons.

*Chevron* is often thought of as a pro-agency rule. Yet, in terms of decisions reached in actual cases, the spirit in which a rule is applied is far more significant than the verbal formulation of the rule. In its early years, *Chevron* was applied with an agency-indulgent spirit. That is not true now.

The transformation of *Chevron* has had four aspects. First, exceptions — situations in which *Chevron* does not apply — have been created in nontax cases such as *Mead*, *Gonzales*, *Brown & Williamson*, and *Massachusetts v. EPA*, and in tax cases such as *Home Concrete* and *King v. Burwell*.

Second, the *Chevron* step one inquiry has become more rigorous. In part, that is because the courts are looking through a wider lens at sources that may resolve seeming statutory ambiguities. In part, too, it is because the courts (in nontax cases such as *Utility Air* and tax cases such as *Brohl*, *Loving*, and *Ridgely*) are applying with greater rigor the principle that agencies have no authority beyond that delegated to them by the legislature.

Third, the *Chevron* step two inquiry has become more rigorous. It used to be thought that step two was largely an empty formality, that an agency position would be invalidated at step one or not at all. More recently, courts have been holding against agencies at step two, as either principal or alternative grounds for decision, such as in the tax case *Dominion Resources* and the nontax cases *Goldstein*, *Northpoint Technology*, and *Abbott Laboratories*.

Fourth, in cases such as *Judulang* and *Michigan v. EPA*, Administrative Procedure Act (APA) "arbitrary and capricious" analysis has been incorporated into *Chevron* analysis. That opens important avenues of attack on Treasury regulations and sub-regulation IRS positions, as the government discovered to its woe in *Altera* and other cases.

Has the IRS won cases even under the newer, stricter *Chevron*, and will it continue to do so? Of course, but the case is no longer a weighty thumb on the scale in favor of the IRS. *Chevron* used to be described as "super deferential." It is now largely nondeferential.

What then are the implications for future action? First, does it matter if *Chevron's* demise comes as a whimper (through reinterpretation) or as a bang (by enactment of SOPRA by Congress or express abrogation by the Court)? Yes, it matters. For one thing,

enactment of SOPRA would raise interesting constitutional questions, which are beyond the scope of this article. Moreover, death by formal action would be more certain than death by reinterpretation. We have seen doctrines reported as dead (such as *Skidmore*, the rule of lenity, and the canon that tax statutes are construed strictly against the government) later return to life. The spirit of application of *Chevron* changed once (away from deference). In years to come, if the doctrine is not formally interred, could the pendulum swing back?

Second, because *Chevron* no longer gives the IRS much advantage, its demise should not — objectively speaking — necessitate significant changes in how Treasury and the IRS issue guidance. Still, I hope that there will be an impact subjectively. One gets the impression (from cases like *Home Concrete* and *Altera*) that Treasury and the IRS are overly confident about the extent of deference tax regulations receive. That may contribute to sloppiness in meeting APA requirements. Here, two wrongs would make a right: If the government wrongly perceives that it is losing something big in *Chevron*, Treasury and the IRS might be motivated to clean up their act by ditching wrong perceptions of the APA.



**Kristin E. Hickman —  
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The *Chevron* doctrine — mandating judicial deference to reasonable agency interpretations of ambiguous statutory language — has always been controversial. Lately, the doctrine has come under a new wave of criticism as well as legislative ef-

forts to do away with it.

*Chevron* jurisprudence offers plenty of fodder for criticism. *Chevron*'s two steps seem precise: First look for statutory clarity, but if the statute is ambiguous, defer if the agency's interpretation is reasonable. But the justices of the Supreme Court have never reached true consensus regarding *Chevron*'s operation or scope. And judges, practitioners, and scholars have always disagreed over what each of *Chevron*'s two steps entails and how they work together.

The result is an uneven jurisprudence that baffles many observers. In some applications of the *Chevron* standard, judges have gone to great lengths and employed a wide array of interpretive tools to find statutory clarity and reject contrary agency interpretations. In other cases, judges have been less

thorough, finding ambiguity simply because the statute did not directly and explicitly address the question at issue — an approach that would seem to move most cases directly to the more deferential evaluation of reasonableness. Judges who pursue their own statutory inquiry are often faulted for being insufficiently deferential. Judges who too readily find ambiguity and defer are accused of shirking their responsibilities.

But all standards of review are malleable and susceptible to charges of judicial manipulation. Meanwhile, the *Chevron* doctrine serves an essential purpose.

Sometimes statutory questions simply lack clear answers no matter how attentive a court is to statutory text, history, and purpose. Such was the case in *Chevron* itself, with the Supreme Court declaring the text “not dispositive” and “overlapping,” and the legislative history “unilluminating.” The tax laws are replete with questions for which common law reasoning and traditional tools of statutory interpretation offer little guidance. In those cases, courts have nothing to do beyond either choosing their own policy preferences or assessing whether the agency's choices seem reasonable. Many judges are uncomfortable, and rightly so, with the former option. The late Justice Antonin Scalia, for many years one of the *Chevron* doctrine's leading proponents, believed in a strong judicial inquiry into statutory meaning that includes all of text, history, and even some amount of policy evaluation. But he acknowledged that judges can be 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. *Chevron* allows judges to be transparent in admitting when they find statutes sufficiently ambiguous that deference to the agency makes sense. The absence of *Chevron* would not eliminate statutory ambiguity or judicial inclinations to defer to agencies' attempts to fill those gaps. Perhaps eliminating *Chevron* deference would prompt judges to put more effort into independent statutory analysis than they might otherwise have been inclined to pursue. And perhaps, in that way, dispensing with it would affect only a few cases at the margins. For those cases in which traditional statutory interpretation fails to yield clear answers, however, eliminating *Chevron* deference would simply encourage judges to obfuscate their deference with sophistry.

The only real solution to the “problem” of *Chevron* deference is for Congress to resolve statutory questions itself rather than delegating discretionary authority to agencies to fill those gaps for it. Until

Congress takes back that responsibility (which seems unlikely) or instructs and persuades judges to embrace a more explicit policymaking role (equally unlikely, and perhaps constitutionally questionable), judicial deference is here to stay.

Thoughts expressed in this essay are elaborated at greater length in the author and Nicholas R. Bednar's coming September article, "Chevron's Inevitability," 85 *Geo. Wash. L. Rev.*



**Joseph B. Judkins —  
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The *Chevron* framework offers the allure of simplicity and certainty. That's probably its greatest plus. It purports to give courts a straightforward way to resolve some disputes about the validity of some agency regulations. Saunter through a two-step analysis

and voila, you've gotten to the bottom of the issue. But that simplicity breaks down on closer inspection. *Chevron's* problems are many, but let's examine two. First, as a constitutional matter, *Chevron* undermines the separation of powers by vesting sweeping power in the executive branch. An agency can make the law (through regulation), enforce it, and then determine what the law means in a way that stifles judicial review.<sup>1</sup> Second, as a practical matter, *Chevron* is hard to apply. Start with step one, and consider *King v. Burwell*.<sup>2</sup> The Supreme Court said there was no implicit delegation of authority to the IRS to decide whether tax credits under the Affordable Care Act were available on federal exchanges (places where folks can shop for health insurance). Why? Because Congress wouldn't give the IRS the power to decide a matter of such "deep economic and political significance."<sup>3</sup> Lots of questions spring to mind. How deep? At what point does an issue cross the line from kinda-sorta significant to deeply significant? How do you know? Is this a threshold question that you have to answer in every case before you get to the two-step test? Or is it like pornography, and you just know it when you see it? And how many economically and politically insignificant things does Congress do? (Don't answer that last one.)

<sup>1</sup>See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-1150 (2016) (Gorsuch, J., concurring).

<sup>2</sup>135 S. Ct. 2480 (2015).

<sup>3</sup>*Id.* at 2483.

So what's going on here? Essentially, the Court recognized that the statute was ambiguous, but rather than moving through the two-step analysis, it cast *Chevron* aside and concluded that "this is not a case for the IRS" and that it was the Court's job to interpret the statute.<sup>4</sup> But since when wasn't that the Court's job? This highlights the key problem of *Chevron*: that it is itself contrary to statute. Under the Administrative Procedure Act (APA), courts are supposed to "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>5</sup> So in 1946 Congress said the courts were to interpret statutes in reviewing agency action, but by 2015, that rule has become an exception, and it's up to agencies to determine the correct reading of statutes. That's more than a little odd.<sup>6</sup>

The familiar rejoinder is that old chestnut that agencies are subject-matter experts, so courts should defer to their informed judgments regarding issues of fact and of law. Start with fact, and take an EPA regulation on water pollution. Sure, if you're a biochemist at the EPA, you're going to know more than your run-of-the-mill federal judge about the effect of water pollution on marine wildlife. But private parties — environmental groups or regulated companies, depending on the political bent of the EPA that issued the regulation — may dispute those facts. And if the rulemaking record is well developed, the judge is in a good position to determine whether the agency's factual findings are arbitrary or solidly grounded. Courts face harder questions, with less clear standards to apply, all the time.<sup>7</sup> What about deference to matters of law? A lot of tax regulations are premised on the interpretation of statutory text. It's questionable whether the IRS is better positioned than a federal judge to determine the meaning of a statute after a full vetting of the law in an adversarial context, where there's a strong incentive for the parties to learn and communicate as much as possible about the text, context, structure, and history of the statute, and where the judge is performing a role that is his bread and butter.

<sup>4</sup>*Id.*

<sup>5</sup>5 U.S.C. section 706.

<sup>6</sup>For a thorough discussion of this and *Chevron's* other problems, see Jack M. Beerman, "End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled," 42 *Conn. L. Rev.* 779 (2010). See also Patrick J. Smith, "*Chevron's* Conflict With the Administrative Procedure Act," 32 *Va. Tax Rev.* 813 (2013).

<sup>7</sup>Neither complexity nor the involvement of a coordinate branch can allow the judiciary to abdicate its "responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)).

Further, if that judge is wrong, other judges will say so on appeal. And if they're wrong, Congress can step in and set things straight through legislation. So a big upside of eliminating *Chevron* is reinforcing the separation of powers.

Does that mean that courts should ignore an agency's views about the meaning of a statute? Not at all. Those views may very well be spot on. Indeed, many tax regulations are helpful and provide much-needed certainty. So eliminating *Chevron* deference wouldn't mean eliminating careful consideration of an agency's position, which in any given case may be thoroughly reasoned and fully aligned with the statute and congressional intent. But if Congress is to be believed, making those calls is a matter for the courts. And if *Chevron* dies, maybe we'll return to the framework that has been in place in the APA for more than 70 years, in which the courts — not the agencies — interpret the law and say what the statute means. After all, that's their job.



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This author appreciates the helpful technical insights of Michael Cole, senior manager, RSM US LLP.

For most practitioners, the degree of deference given to regulations is of no importance. When giving transactional advice, many advisers seem

to take the view that revenue rulings — and even private letter rulings — have the force and effect of law. That is because they are effectively advising their clients about the positions the IRS will likely take in a hypothetical audit, not whether those positions would be sustained in hypothetical litigation. In that context, a change in the standard for testing Treasury regulations would be irrelevant. The IRS would obviously take the view that its own regulations are valid.

Moreover, after a transaction is completed and a return position must be taken, the requirement to disclose a filing position contrary to a regulation on a Form 8275-R "Regulation Disclosure Statement," will often discourage clients from taking such a position, even if they believe that the regulation in question would be unlikely to withstand a judicial challenge.

Moving to the courts, it is questionable whether the words or phrases used to articulate the standard of review (for example, rationality, reasonableness, balancing tests, etc.) are much more than shibbo-

leths that must be repeated by the judges before making, in any particular case, what is really a very context-sensitive determination. Accordingly, if the standards are to be rewritten to effectuate change, more mechanical guidance should be provided about specific situations when the presumption of validity should be more seriously questioned.

For example, any regulation issued more than, say, three years after the enactment of the relevant statute might be denied the presumption of validity and treated as only slightly more authoritative than a revenue ruling.

Another idea would be to deny the presumption of validity to any regulation that, if proposed as statutory law, would likely have been scored as raising a substantial amount of revenue. The theory for that "reverse presumption" is that, particularly since 1981 when tax rates were indexed to eliminate the automatic, across-the-board tax revenue increases produced by inflation, Congress has generally been hungry to find politically acceptable "loophole closers" that raise even modest amounts of revenue, to enable it to pay for new spending, or other tax provisions that cost revenue. Accordingly, if Treasury has an idea for a revenue-raising regulation, perhaps it should first propose the idea as legislation so that its revenue effects can be officially estimated. If it raises substantial revenue, and Congress does not embrace it as a piece of legislation, that is a good sign that the idea is not consistent with the intent of the current Congress, and is very likely inconsistent with the intent of the Congress that enacted the underlying statute, if it is a statute of relatively recent vintage. Accordingly, it may be entitled to very limited deference. If the idea raises substantial revenue, is advanced but rejected by Congress as a statutory revenue raiser, and would, as a regulation, be purporting to interpret legislation enacted many years in the past, the regulation should arguably be accorded even less deference.

Lest that seem overly restrictive, let us not forget that the IRS possesses almost unlimited power to require disclosure of positions it believes to be questionable. The IRS could provide, for example, that a Form 8275-R must still be filed, indicating a position contrary to a regulation, even if the regulation is not entitled to any presumption of validity. That is not currently required, generally, in the case of positions contrary to mere revenue rulings.

Finally, although this may sound overly optimistic, there could be side benefits from giving as little deference as possible to regulations. Eliminating the expectation that any ambiguities or problems with a statute could be fixed by regulations might motivate Congress to write better statutes (and pre-enactment committee reports) in the first place. Ideally, an end to broad regulatory deference would

lead to tax statutes that are more precise and thought out, with fewer areas of ambiguity. Less would be delegated or otherwise open to questions of regulatory deference because more would be resolved in the legislative process.

It is true, of course, that professional staff members often make many of the ultimate determinations involved in fine-tuning legislation. Hopefully, they do so with the view that they are acting as agents or surrogates of the members of Congress they work for, and not as principals. In any event, with all its faults, the process by which a bill becomes a law — at least under regular order and perhaps with a more extended period between the filing of a committee report and consideration of the bill on the House or Senate floor — seems to be more open and amenable to constructive dialogue and discussion of the merits of particular policies or proposals, as compared with the regulatory process in which Treasury, essentially unilaterally, proposes, reviews public comments on, and finalizes regulations. While that approach may be appropriate for regulatory rules when the need for tax certainty is arguably more important than the correctness of the answer itself (such as whether a debt instrument has been substantially modified), it may be a more authoritarian or autocratic process than seems desirable for major changes in policy. ■