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Jettisoning Chevron

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Jettisoning Chevron

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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.** 779 (2010), available at [SSRN](#).



Linda Jellum

As one academic, among many, who has made my scholarly reputation based in part on the landmark case of *Chevron U.S.A., Inc. v. Nat. Resources Defense Council*, 467 U.S. 837 (1984), I noted with some concern Professor Jack Beermann's latest work entitled: *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why it Can and Should be Overruled*. Overrule *Chevron*? End the experiment? Say it ain't so! Hadn't *Chevron* offered "a wonderful new world ... full of promise for administrative-law professors in need of tenure articles....?" *National Cable & Telecommuns. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

I approached his article with some trepidation but also with great interest. Why would anyone want to overrule *Chevron*? Professor Beermann succinctly answers this question in his abstract: "*Chevron* has complicated judicial review and, at best, it is uncertain whether it has resulted in increased deference to agency interpretation. In fact, for numerous reasons, *Chevron* has been a failure on any reasonable measure and should be overruled." Intrigued, I forged ahead.

His article begins by identifying a number of reasons why the *Chevron* doctrine has failed. Specifically, (1) the *Chevron* doctrine violates 5 U.S.C. § 706, the statute that generally governs judicial review of administrative decisions and requires that courts review questions of law *de novo*, (2) the *Chevron* doctrine was based on faulty presumptions regarding congressional intent to delegate by ambiguity and regarding political accountability, (3) the *Chevron* doctrine is highly unpredictable, (4) the *Chevron* doctrine has not lead to increased deference to agency interpretations, (5) the *Chevron* doctrine is often not cited by the Supreme Court in cases in which it should apply, (6) the *Chevron* doctrine has increased litigation costs, and (7) the *Chevron* doctrine encourages agencies and judges to act irresponsibly. Perhaps most importantly, however, Professor Beermann notes that the *Chevron* doctrine is simply unclear in application. First, it is unclear *whether Chevron* applies: Professor Cass Sunstein famously labeled the question of whether *Chevron* applies as *Chevron* step zero. Second, it is unclear *how Chevron* applies; in other words, is step one just a textual analysis or is it a full statutory interpretation analysis and does step two apply differently depending on whether Congress was explicit or implicit when it delegated? Third, it is unclear *why Chevron* applies given that the doctrine was contrary to the established distribution of interpretive power among the three branches. Finally, it is unclear *when Chevron* applies; in other words, does the doctrine apply to agency policy decisions or just to agency statutory interpretations?

While *Chevron* initially promised simplicity, it has delivered only chaos. Indeed, the Justices have developed

four variants of *Chevron*: (1) the “original directly spoken” variant, (2) the “traditional tools” variant, (3) the “plain meaning” variant, and (4) the “extraordinary cases” variant. The number and diversity of the variants epitomizes all that is wrong with *Chevron*; hence, Professor Beermann concludes that the case should be overruled and the doctrine replaced with a more consistent and simple one.

After describing *Chevron*’s failings, Professor Beermann very briefly explains why overruling *Chevron* would not violate the Supreme Court’s *stare decisis* principles. In short, overruling *Chevron* would be permissible under *Pearson v. Callahan*, 129 S. Ct. 808, 811 (2009), in which the Supreme Court explained when overruling a case would be consistent with *stare decisis* principles. At bottom, overruling *Chevron* would not affect settled expectations because the doctrine’s application has been so unsettled. Additionally, it is a judge-made doctrine that time and experience have proved unworkable.

In the final section of his article, Professor Beermann offers two alternatives: reforming or replacing *Chevron*. Both alternatives would be more consistent with the APA’s assignment to the courts to review questions of law de novo and questions of policy under arbitrary review.

Alternative one: if *Chevron* were not jettisoned, Professor Beermann begs that it at least be reformed. Specifically, he argues that the narrow, step one variants be rejected. Courts should be free to interpret statutory language using all the traditional tools of interpretation. Such a change would return interpretive power to the judiciary. Second, he recommends that step two be limited to occasions when Congress explicitly delegated a range of choices to the agency and be expanded to include arbitrary and capricious review. Supporting this additional step, he says that it is possible for an interpretation to be a reasonable interpretation of the statute, but still be arbitrary and capricious choice. Third, he suggests that *Chevron* step zero die a quick and painless (painful?) death. This step simply complicates the analysis unnecessarily; rather, *Chevron* should apply universally, whenever Congress specifically delegated interpretive authority to the agency.

Alternative two: Instead, if *Chevron* were jettisoned, Professor Beermann recommends returning to pre-*Chevron* practice. Under this practice, assuming an agency had the power to make legislative rules, the reviewing court would determine whether the agency had interpreted the statute reasonably by paying close attention to the language of the statute, its purpose, and its history. In addition, the court would consider the wisdom of the agency’s policy choice under the arbitrary, capricious standard. Pre-*Chevron*, judges were the final arbitrators of statutory meaning, while agencies played an advisory role.

Regardless of whether you agree with Professor Beermann’s provocative demand to “End the Failed *Chevron* Experiment Now,” he has written a persuasive article that identifies and explains the problems with continuing with *Chevron* in its current form, whatever variant that might be. He has identified two alternatives, either of which would vastly simplify judicial review of agency interpretations of statutes. In short, while I expect many law professors might decry the loss of *Chevron*, this article suggests we would be crying alone.

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