### *CHEVRON* UNDER SIEGE

### Edwin E. Huddleson

58 University of Louisville L.Rev. 17 (2019)

### 

**Abstract.** Objections to regulatory overreach have triggered widespread criticism of *Chevron U.S.A.*, *Inc. v. NRDC*, *Inc.*, 467 U.S. 837 (1984), which directs courts to defer to an implementing agency’s permissible interpretation of an ambiguous statute. Yet the major criticisms of *Chevron* are overstated and needlessly destructive of Executive Branch agency power.

The central objection to *Chevron*, voiced by several Justices, is that courts should insist that they (and not agencies) should be the ones to “say what the law is” (*Marbury v. Madison*). But statutes often deliberately vest agencies (not courts) with discretion to choose the best means of effectuating statutory purposes. The original Article III criticism of *Chevron’s* regime by Justice Gorsuch – that *Chevron* and *Brand X* allow agencies to “overrule” courts – is mistaken. *Home Concrete* holds the opposite. The vogue of extreme textualism in statutory interpretation -- with its disdain for legislative history and *Chevron* agency views – is flawed conceptually, based on unsupported assertions denigrating all legislative history, and marked by overstated constitutional claims. The origins, claims, shifting rationales and shortcomings of the new textualism are set out. Other attacks on *Chevron* -- citing nondelegation doctrine, the Court’s recent decisions on cost consideration, and the “major question” doctrine – are equally unpersuasive.

The opinion in *Chevron* sets out, and applies, the common law on court review of agency statutory interpretations. The statutory provisions and legislative history of APA §706 support that common law approach. *Contrast Vermont Yankee*. The Court can modestly tweak *Chevron’s* common law standards, as it has done in the past (*see Rust v. Sullivan*), to address reasonable concerns: A significant aspect of this approach is that reviewing courts should assess the “reasonableness” of agency statutory interpretations in light of the court’s own independent assessment of statutory meaning. This will link *Chevron’s* two steps to ensure that they are not viewed as separate watertight compartments, specifying either no deference or excessive deference to agency views.

Overregulation should be addressed by more direct means than gutting *Chevron*. The White House and Congress have proposed a wide range of reforms – including President Trump’s “two-for-one” deregulatory order – to address overregulation. But the leading proposals in the 115th Congress were flawed. Those sweeping measures would have stripped major rule-making authority from federal agencies. That approach might not be effective, even if any President were to agree to it, given agencies’ power to utilize case-by-case adjudications (as opposed to rule-making) to announce generally applicable rules. Other approaches are preferable, including improving the Trump Administration’s regulatory budget approach, as RAND and the Brookings Institute suggest, and requiring periodic pruning of old regulations.

The importance of *Chevron’s* regime for effective Executive Branch power is illustrated by several major pending administrative law cases. These include litigation on Net Neutrality, DACA, and the Trump Administration’s replacement for the Obama Clean Power Plan. The shortsightedness of *Chevron*’s politically conservative critics is apparent when outcomes are compared under *Chevron* vs textualism vs the major question doctrine.

*Net Neutrality*. The Trump FCC’s new “net neutrality” rules are a poster child for the Administration’s deregulatory efforts. They should pass muster under *Chevron*. But these new rules might well be invalidated, as beyond the agency’s statutory power, if the “major question” doctrine were the law of the land. Textualism’s insistence on a single “best” statutory interpretation also might doom the FCC’s new rules, since the courts earlier approved the very different, older net neutrality rules promulgated by the Obama Administration.

*DACA*. The outcome of the politically-fraught DACA cases should be a remand without *vacatur* of Trump’s flawed order winding down the Obama DACA program. This would allow the Department of Homeland Security to meaningfully consider (as the APA requires) the several different kinds of DACA reliance interests at stake (held by the military, cities, businesses, and health-care providers, as well as Dreamers).

*Obama Clean Power Plan (CPP)/Trump Affordable Clean Energy rule (ACE).* Under *Chevron*, EPA enjoys substantial discretion in determining how to implement the statutory goals of the Clean Air Act. Thoroughly misguided is the Trump Administration’s apparent drive to insist that there is one and only one valid way to interpret the scope of the EPA’s authority (under section 111 of the Clean Air Act) to regulate CO-2 and other greenhouse gas emissions. Trump’s new ACE may or may not survive judicial scrutiny, under the principle that over-enthusiastic deregulation inconsistent with controlling statutory goals is not allowed, But the statute does not tie EPA’s hands or block other additional action by EPA in the future.

The odds are that *Chevron* will survive in the future because it is flexible, because it reflects the wisdom of the common law, and because it “more accurately reflects the reality of government, and thus more adequately serves its needs.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521 (1989).