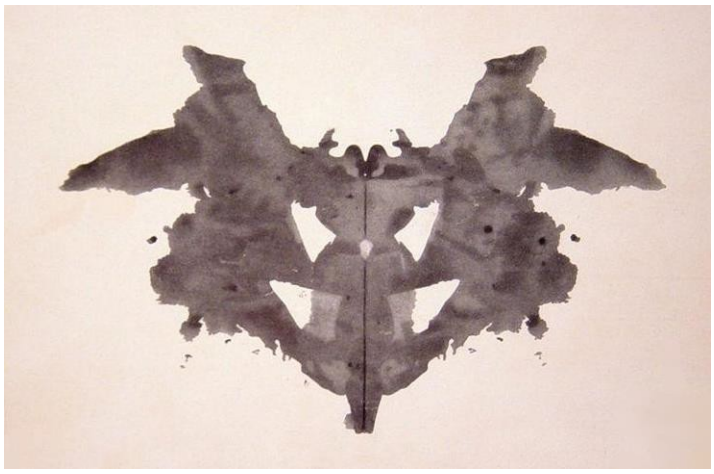
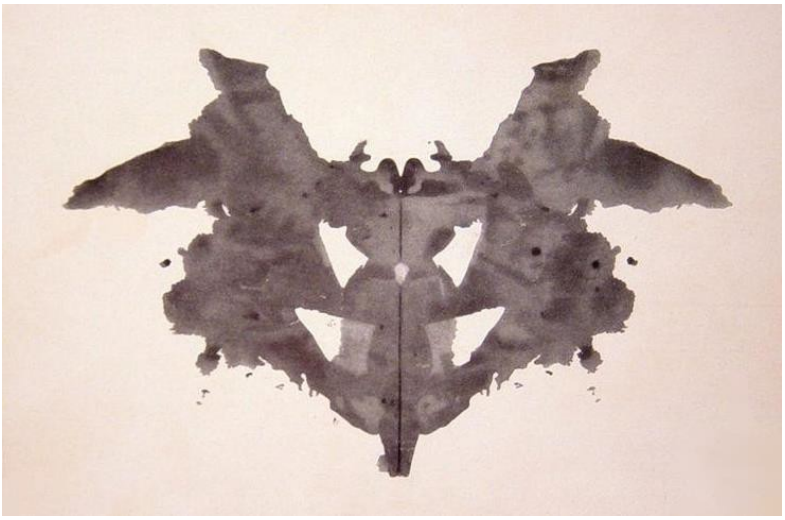


Jack M. Beermann♦

I agree with Alan Morrison that, in some circumstances, courts should defer to legal determinations made by administrative agencies. I disagree, however, with Alan's view that *Chevron* provides a suitable framework for such deference. It really boils down to my disagreement with the first sentence of Alan's article: "In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court unanimously adopted an approach to interpreting federal statutes under which the courts are required to give substantial deference to the interpretations by the administrative agencies that enforce them."[1] In fact, the Supreme Court adopted nothing in *Chevron* related to statutory interpretation or anything else, except, perhaps, this:

♦ Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. This article is dedicated to the memory of ☥, who inspired the title. For convenience, this article may be cited as *Chevron* is a Rorschach Test Ink Blot, 32 J.L. & Pol. 309 (2017).

[1] Alan Morrison, Chevron *Deference: Mend It, Don't End It*, 32 J.L. & POL. 295 (2017).



(In case this image is unfamiliar, it is the first ink blot in the series used in the Rorschach test.)

Chevron has no discernible content. It is open to whatever interpretation the reader would like to give it. Allow me to elaborate.

First of all, as I have explained elsewhere,[2] the *Chevron* opinion itself is opaque on key issues concerning deference to administrative agencies, and over the decades these issues have not been clarified. It is impossible to discern from the opinion whether the Court's new framework is about review of agency statutory interpretation or agency policy decisions. Some language in the opinion points in the direction of agency statutory interpretation. Immediately before setting out what has become the *Chevron* two-step procedure, the Court stated: "When a court reviews an agency's construction of the statute . . . ."[3] This indicates that the *Chevron* test is about statutory construction. However, in a footnote appended to the same paragraph, the Court seemed to take it back, stating that "[t]he judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction,

[2] *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. 779 (2010); Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731–51 (2014).

[3] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 842 (1984).

ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect."[4]

Later passages in the opinion leave the impression that *Chevron* is about deference to agency policy determinations. Quoting *Morton v. Ruiz*, the *Chevron* Court stated: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[5] More fundamentally, the Court linked the extreme deference often associated with *Chevron* to judicial review of agency policy decisions:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .[6]

In yet another passage, the Court mixed law and policy, underscoring the uncertainty it had created about the subject of the decision: "we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make."[7] Later cases applying *Chevron* have not clarified whether its doctrine is about judicial review of statutory interpretation or agency policy decisions.

There are at least two additional fundamental problems with the *Chevron* opinion, both of which are related to its unclarity concerning whether it is about review of policy or statutory construction. First, the Court did not cite or apply the statutory provision that governs judicial review of rules made under the Clean Air Act, 42 U.S.C. § 7607(d).[8] Related to this, because

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[4] *Id.* at 843 n.9.

[5] *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[6] *Id.* at 866.

[7] *Id.* at 845.

[8] Judicial review of EPA rules under the Clean Air Act is governed by 42 U.S.C. § 7607(d) and not by APA § 706. Section 7607(d)'s "arbitrary, capricious" standard contains the same language as APA § 706(2)(A), but §7607(d) does not contain the APA's specification that "the reviewing court shall decide

Chevron was not decided under the APA, the decision was not precedent for construing the APA, especially since APA § 706 contains the words "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"[9] when the Clean Air Act provision governing *Chevron* did not contain those words.[10] Even if *Chevron*, whatever it decided, correctly construed the Clean Air Act, it did not construe the APA's judicial review section on review of statutory provisions.

Second, insofar as *Chevron* involved review of agency policy, the Court did not explain why it was not applying the analysis elaborated in *Overton Park* for review of agency policy decisions under the arbitrary, capricious standard. The Court's statement that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy . . . the challenge must fail"[11] seems inconsistent with *Overton Park*'s (and later cases') understanding that reviewing courts have the power, after a "narrow" but "searching and careful review," to set aside agency action found to be the product of "a clear error of judgment."[12]

The lack of an explanation for when *Chevron* applies rather than arbitrary, capricious review, has left courts and parties completely at sea over which framework applies to which situation. Even the Supreme Court, in more recent opinions has been unable to supply a satisfactory demarcation. In one decision, in response to the government's argument that *Chevron* and not *Overton Park* supplied the correct decision framework, the Court stated simply that it did not matter because "our analysis would be the same."[13] Anyone who has read decisions under the two frameworks knows that this is not true. If, as Alan suggests, we retain the *Chevron* framework, we retain an indiscernible boundary between *Chevron* review and arbitrary, capricious review.

Let's suppose, however, that we ignore all of the incoherence and unclarity of the *Chevron* opinion and pretend that *Chevron* did set forth the framework that is usually attributed to it. This framework is generally characterized as follows: there are two steps to judicial review of agency

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all relevant questions of law [and] interpret constitutional and statutory provisions."

[9] 5 U.S.C. § 706.

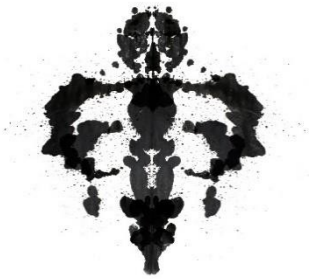
[10] *See* 42 U.S.C. § 4706(d).

[11] *Chevron*, 467 U.S. at 866.

[12] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[13] Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011).

interpretation of statutes administered by the agency; under step one the reviewing court enforces Congress's clear intent;[14] but if the court finds the statute ambiguous then, under step two, the reviewing court defers to any reasonable or permissible interpretation.[15] In my view, even taking this as a statement of the *Chevron* standard, to the reviewing courts charged with applying it, it appears more like this:



This is because the test as applied is no more certain or determinate than the original incoherent *Chevron* opinion. What, for example, does it mean for Congress's intent to be clear? Clarity, it turns out, is in the eyes of the beholder, and reviewing courts often split over whether a statute is clear or ambiguous. Judges do not apply anything remotely approaching a scientific method. The best description I have ever heard of judicial decisionmaking is "informed gestalt."

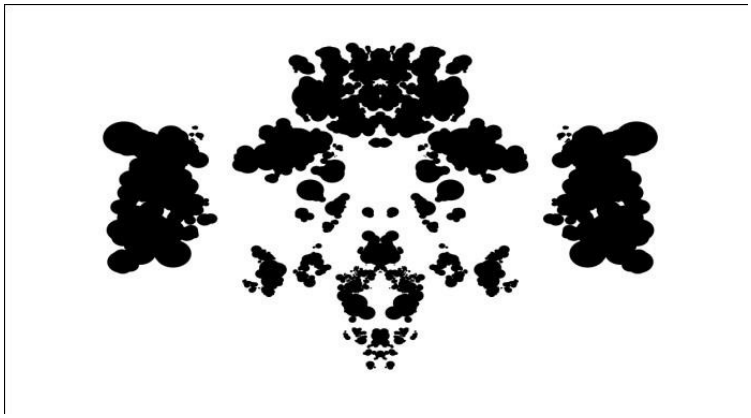
Moving along to *Chevron*'s second step, what is a "reasonable" or "permissible" construction?[16] No opinion by any court in the more than thirty years since *Chevron* was decided has succeeded in formulating a coherent or determinate definition of these terms in this context. It's pretty clear that when a case is decided in *Chevron* step two, the result is almost always victory for the agency, but the meaning of the standard remains unclear.

In earlier work, I demonstrated that at the Supreme Court, most cases applying *Chevron* are actually decided according to the familiar liberal/conservative divide.[17] The standard of review does not seem to have

[14] *See Chevron*, 467 U.S. at 842–43.
[15] *See id.* at 843.
[16] *See id.*
[17] *See* Beermann, *End the Failed* Chevron *Experiment Now*: *How* Chevron *Has Failed and Why It Can and Should be Overruled*, *supra* note 2, at 838–39.

much effect on the decisions. Liberals defer when an agency makes a liberal decision and conservatives defer when an agency makes a conservative decision.[18]

Normally, when a majority disagrees with the agency's decision, it finds that the statute is clear and overrules the agency in step one. Dissents in such cases usually argue that the statute was ambiguous and that therefore the reviewing court should have deferred. In fact, at the Supreme Court, if the Court cites *Chevron*, it rules against the agency more often than it rules in favor of the agency. So much for "*Chevron* deference." In my view, the correct name is either "*Chevron* anti-deference" or "*Chevron*



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Sometimes, the disagreement over ambiguity results from disagreement over what tools of construction reviewing courts should apply at *Chevron* step one. In the *Chevron* opinion, the Supreme Court implied, with the words "directly spoken to the precise question at issue" that only the most explicit answer to the particular question would keep the case in step one.[19] But in that pesky footnote 9, the Court implied that in step one reviewing courts should "employ[] traditional tools of statutory construction" to determine clear congressional intent, opening the door to the numerous statutory construction methodologies that continue to divide courts throughout the common law world, including the federal courts of the United States.[20]

One answer that is sometimes given to critiques of *Chevron* is that while it might be incoherent or indeterminate at the Supreme Court, it has greatly simplified judicial review of agency legal determinations at the lower

[18] *Id.*
[19] *See Chevron*, 467 U.S. at 842.
[20] *Id.* at 843.

federal courts, and that is a good thing. Basically, we are told that the Supreme Court is sui generis, that it is an inherently political institution, but lower courts do a much better job of applying the framework in a neutral, apolitical way. Oh but if that were true. My impression—admittedly not supported by statistical research—is that the lower courts are increasingly emulating the Supreme Court, using *Chevron* either to dodge difficult issues or impose their own views of wise policy under step one. There is a general sense shared by many that the Courts of Appeals have become just as political as the Supreme Court. Opaque and manipulable doctrines like *Chevron* facilitate political decisionmaking by courts and increase judicial ability to conceal the true bases of decision.

I agree with Alan that the Separation of Powers Restoration Act of 2016 (Restoration Act) is misguided, but for reasons somewhat different from Alan's.[21] I agree completely with Alan that because the Restoration Act addresses deference only to decisions of law, reviewing courts would be left free to defer simply by putting the case into the arbitrary, capricious category, although such deference would not be as extreme as most cases decided under *Chevron* step 2. But my biggest problem with the bill is more direct, namely that Congress sometimes wants courts to defer to agency legal conclusions, and this bill would make it much more difficult for Congress to ensure that courts do so.

Chevron is based on the falsehood that through statutory ambiguity Congress indicates an intent to delegate interpretive authority to agencies. No one really believes this. But there are other, more reliable, indications of intent to delegate interpretive authority, and the Restoration Act would undercut Congress's intent, in numerous statutes already on the books and in possible future statutes, that reviewing courts should defer to agency legal determinations. In some statutes, Congress explicitly delegates power to agencies to make legal determinations, for example by using the phrase "as defined by" or similar language. A Westlaw search of the USCA database for "'as defined by' +s secretary administrator" conducted on September 22, 2016, produced 320 results, and a glance at several of the results revealed that these statutes are instances in which Congress has delegated definitional authority to an agency. This type of language was understood to require strong deference to agency determinations even before *Chevron*, and the

[21] *See* Morrison, *supra* note 1, at 295. Similar legislation passed the House of Representatives as part of the Regulatory Accountability Act of 2017 and is awaiting action in the Senate. *See* H.R. 5, 115th Cong. §§ 201–02 (1st Sess. 2017).

Restoration Act would change that even though there is no indication that Congress considered these statutes in the Restoration Act's drafting process.

The Restoration Act would also impose unnecessary costs on the legislative process. The Act purports to preclude deference unless another provision of law makes "specific reference to this section."[22] Requiring Congress to expressly exempt such statutes from the operation of the Act would be time-consuming, and any student of the legislative process knows that Congress will fail to do so even in instances in which it thought, based on the statute's language, that reviewing courts would defer. It would frustrate Congress's intent if all delegations of authority were read narrowly, even when Congress intends a broad delegation of authority to an agency.

The Restoration Act could also undermine important federal policies. When Congress grants authority to make legal determinations to agencies, it may do so for good policy reasons. Statutes passed by Congress often address serious social problems, and Congress may intend agencies to have broad authority to address them, including judicial deference to agency legal determinations. For example, narrowly construing agency authority to combat significant problems such as communicable diseases or chemical contamination could have serious negative social effects. The Restoration Act's broad brush, coupled with judicial hostility to or misunderstanding of the policies that support a regulatory program, could result in exacerbation of serious problems.

There are additional, although less serious or fundamental, problems with the Restoration Act. First is a technical problem passage of the Act would cause. The language of the Act says that it applies "[n]otwithstanding any other provision of law . . . in any action for judicial review of agency action authorized under any provision of law."[23] This means that the reviewing courts would have to consider APA § 706 even when, by statute, agency action is not subject to review under the APA. Many statutes, including the Clean Air Act under which *Chevron* itself was decided, contain their own judicial review provisions, and until now, parties and reviewing courts have no reason to consider the APA when agency action under such statutes is subjected to judicial review. The Restoration Act would add an additional layer of complexity to an already difficult process.

Another problem with the Restoration Act is its title. Contrary to some views, *Chevron* and reform of *Chevron* has little if anything to do with separation of powers for the simple reason that there is no constitutional

[22] H.R. 76, 115th Cong. § 2 (2017).
[23] H.R. 76, 115th Cong. § 2 (2017).

right to judicial review of agency rules. The APA already contemplates that some agency action is not subject to judicial review and the Supreme Court has never suggested that exemptions from judicial review are unconstitutional, except in the narrow situation of agency adjudication of private rights, where judicial review may be necessary to preserve the authority of Article III courts. (In fact, the Act's requirement that any exception to it make "specific reference to this section" makes little sense given that Congress can completely eliminate judicial review of agency action without referring to the Act.) The language of the Restoration Act would not override exemptions from judicial review or create a right to judicial review where one does not currently exist, which means that in some circumstances, there will be no judicial scrutiny of agency legal determinations. Unless there is a constitutional right to judicial review of agency rules, the Restoration Act has little if any connection to the separation of powers.

As a political matter, as Alan notes, the Restoration Act was approved by the House with only one Democratic vote.[24] I agree with him that this is curious, since, as he says, "*Chevron* is not a Democratic or Republican doctrine, but one that advantages Presidents of all parties."[25] As he also notes, *Chevron* initially approved a Republican-led effort to ease regulatory burdens.[26] But I don't agree with Alan that *Chevron* is completely neutral. It is true that Republican support for eliminating deference to agency legal determinations may reflect Republican pessimism over the party's chances in future presidential elections, but in general, the arc of history seems to lean toward more regulation. In recent decades, Republican control of Congress and even the presidency has not resulted in a significant reduction in regulation. As new problems arise and knowledge increases, federal agencies tend to increase the level of regulation. Stringent judicial review may be Republicans' last great hope to stem the tide.

For these and additional reasons that I have expressed in earlier work, I do not agree that *Chevron* is worth saving. It does not contain even the skeleton of a workable approach to deference to agency legal determinations. If we were to strip away the last 30 years of developments, the complications that have arisen over proper application of step one and step two, not to mention step zero under *Mead*[27] which I have not addressed in this essay, would simply arise again. In my view, it's hopeless.

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[24] Morrison, *supra* note 1, at 298–99.
[25] *Id.*
[26] *Id.*
[27] *See* United States v. Mead Corp., 533 U.S. 218 (2001).

So what should replace *Chevron*? As a legal realist, I do not believe that any substitute is likely to produce a determinate or clear doctrine of deference to agency legal determinations. I do think that a more transparent standard would be preferable, one that takes into account sensible factors concerning when courts should defer. For example, when an agency carefully considers a legal question in a sober fashion and resolves it in a manner that takes into account Congress's intent or purpose underlying the statute, and is consistent with longstanding agency practice, courts ought to defer. If an agency breaks new ground or reverses a longstanding legal interpretation but provides a comprehensive explanation, courts ought to defer. In short, the factors enunciated by the Court in the *Skidmore* case provide a good starting point for deference to agency legal determinations.[28] Of course, *Skidmore* is not more determinate than *Chevron* but it is more honest, and focuses the inquiry on sensible factors. Nobody really believes that statutory ambiguity signals congressional intent to delegate lawmaking power to an agency, but many people agree that the *Skidmore* factors provide a sensible framework for evaluating agency claims to interpretive primacy.

It would be better to never have to mention *Chevron* again.

[28] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).