THIRTY YEARS OF *CHEVRON v. NRDC* AND THE ADMINISTRATIVE LAW REVIEW: A LETTER FROM THE EXECUTIVE BOARD

467 U.S. 837. The citation alone conjures the cadence of a certain two-step analysis for most law students, and certainly any scholar of administrative law. The impact, relevance, and continued controversy of *Chevron USA Inc. v. Natural Resources Defense Council* cannot be understated, yet it is oft misunderstood. No matter an attorney's take on the doctrine, and regardless of its future impact, the case has deeply altered—and in many instances dictated—the power of our regulatory state. That is why the 2013–2014 *Administrative Law Review* (*ALR*) Executive Board set out to unpack the evolution of the case from its inception in June 1984 to the present, thirty years later, using our journal's coverage as a lens. We discovered consistent shifts in *Chevron* scholarship; the research unveiled a transformation in the case's meaning that largely followed the contours of regulatory practice in the United States. In the three decades since *Chevron* became the guide for the judiciary's analysis of agency action, the *ALR* has documented three subtle, unsurprising, and yet profound *Chevron* generations: confusion, progeny, and reincarnation.

CHEVRON'S INITIAL IMPACT

Although greeted with criticism when it was initially released, scholars did not begin a full analysis or commentary on *Chevron* until years after it was published. At first, *Chevron* seemed to be just another case that had muddied the waters in a stream of judicial review decisions—that is, until subsequent case law solidified *Chevron's* reign over judicial review of administrative law. It became clear years after *Chevron* that lower courts needed a concrete standard for analysis of agency action, but that *Chevron* did not necessarily produce consistent results. However, in the context of the *ALR*, the resulting confusion seemed like a continuation of themes already existing in traditional deference analysis.

Indeed, administrative law before *Chevron* and since has not been a

"monolithic age of judicial deference" as some scholars suggested.[1] As Professor Ann Woolhandler noted in a 1991 *ALR* article, early administrative law decisions demonstrated a frequent vacillation between deference to the agency and de novo judicial review. She aptly noted that, "one cannot conclude that there is one ideal and elegant allocation of power between court and agency where administrative law will necessarily have to rest."[2] Decades later, these words are no less true. Early coverage of *Chevron* made clear that when speculating on the future of administrative law, one should keep in mind that the past does not serve as a particularly reliable guide. What is in vogue today as the "correct" allocation of power between the courts and agencies may, very likely, invert in the future.

Unsurprisingly, within the first decade after *Chevron*'s release, the *ALR* chronicled various conflicting critiques and proposals for adjusting the case. Keith Werhan argued in 1992 that the Neoclassical model and its flagship, *Chevron*, was a failed experiment.[3] Werhan advocated a return to the traditional model embodied in *National Labor Relations Board v. Hearst Publications, Inc.*[4] and the Administrative Procedure Act (APA).[5] He criticized *Chevron* for removing the courts' role as guardians of agency action,[6] a viewpoint vehemently contrasted by future scholars who saw *Chevron* as a backdoor mechanism for greater judicial power. Also in 1992, the *ALR* published an empirical study of the consequences of *Chevron* in the D.C. Circuit which found that: (1) the Circuit affirmed more often using its own formulation rather than the Supreme Court's two-step test in *Chevron*; and (2) although the relationship between the D.C. Circuit and the Supreme Court was described as contentious before *Chevron*, the D.C. Circuit applied *Chevron* in 74% of its relevant cases.[7]

Perhaps the most prescient criticism of *Chevron* in its early days was in an *ALR* article by then-Judge Stephen Breyer, who predicted that the simplicity of *Chevron* was untenable in the complex world of administrative law. He noted that, "to read *Chevron* as laying down a blanket rule,

1. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 199 (1991).

2. *Id.* at 245.

3. Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992).

4. 322 U.S. 111 (1944).

5. Werhan, *supra* note 3.

6. *Id.* at 624.

7. John F. Belcaster, *The D.C. Circuit's Use of the* Chevron *Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745, 759 (1992). This first finding of the empirical study is particularly interesting (or ironic), given that *Chevron*'s solidification as a seminal doctrine is largely attributed to the D.C. Circuit. *See* Merrill, *infra* note 27.

applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless."[8] His criticism and outlook of course became the multi-factor Step Zero in *United States v. Mead Corp.*[9] more than a decade later. *Mead* and other cases following *Chevron* led the Supreme Court to adjust, and chip away at, the case's "blanket rule." As the case's progeny developed, scholars also began to more outwardly revere or despise *Chevron* in academic fora.

CHEVRON'S PROGENY

As courts around the country grappled with *Chevron*, and as the simple two-step test inevitably collided with complexity of the administrative state, the Supreme Court tweaked the case, and then tweaked it back again. Criticism from within the Court and academia mounted as this took place, and most scholarship directly criticized *Chevron* in the second decade of the *ALR*'s coverage. In the early 2000s, scholars began to plunge into the high-level, introspective analytical questions of what *Chevron* really meant for administrative law and the courts.

In this period, Professor Richard J. Pierce Jr. assessed the palliative potential of *Chevron*, while also recognizing that its power to lubricate the gears of agency rulemaking had been somewhat overstated.[10] Another scholar, and certainly the most vocal, Justice Antonin Scalia, fervently dissented in *Mead*, arguing for a return to a "pure" *Chevron* analysis.[11] A 2002 *ALR* article by Professor Cooley Howarth Jr. described Justice Scalia's insight in *Mead*. Professor Howarth remarked that the Court's failure to define "interpretation" led to two troubling consequences: (1) a court may provide for deference where it is inappropriate (for example, where congressional intent can be understood through the interpretation itself); and (2) vagueness around the term "interpretation" undermined the imperative that agencies, not courts, are trusted with regulatory-statute implementation.[12]

Professor Howarth was one of many who sharply criticized *Mead*. Professor William S. Jordan critiqued *Mead* and *Christensen v. Harris County*[13]

8. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

9. 533 U.S. 218 (2001).

10. *See generally* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

11. *Mead*, 533 U.S. at 239–61 (Scalia, J., dissenting).

12. Cooley L. Howarth Jr., United States v. Mead Corp.*: More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699, 701 (2002).

13. 529 U.S. 576 (2000).

in 2002 for unduly confusing the judicial schemata for determining the appropriate deference due to agencies.[14] Shortly thereafter, Professor William R. Andersen criticized *Chevron* and its progeny for creating a doctrine draped in unpredictability and subjected to manipulation by parties in each case. He suggested, instead, that § 706 of the APA be amended to abolish *Chevron* and institute standards lending toward more predictability in judicial determination.[15] This era of criticism and evolving case law might have signaled a permanent shift in deference analysis, but the coverage during *Chevron*'s third decade suggests otherwise.

REINCARNATION, OR PERHAPS NEVER GONE

Chevron entered its third decade as the most crucial precedent in administrative law, perhaps simply because of strikingly contradictory Supreme Court decisions which continually led academia to question the case's relevance; by odd circumstance, this criticism seems to have kept the doctrine alive. *ALR*'s coverage of *Chevron* in this period shows sharply divergent views on the case's value. Despite, or perhaps because of, the contradictory opinions in scholarship, *Chevron* unquestionably maintained its role as administrative law's seminal case.

The *ALR's* coverage during the third decade shows an underlying agreement among authors that modern *Chevron* is a considerably different doctrine than what was originally proposed. From there, however, the commentary diverges. Some works celebrated a predicted demise of *Chevron*, arguing that as a doctrine it was both confusing and no longer applied by the courts.[16] Yet the majority of authors praised *Chevron* for its lasting effect, either in its original or evolving form. Professor Abigail R. Moncrieff argued in 2008 that the basic assumptions underlying *Chevron* are correct, and suggested reverting to an earlier incantation of *Chevron* where the court plays a "refereeing" role.[17] Unlike the general trajectory of scholarly work on *Chevron* at this point, Professor Moncrieff accepted *Chevron* as a legitimate rubric of judicial review of agency decisions. She

14. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719 (2002).

15. *See* William R. Andersen, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 972 (2004).

16. *See* Linda Jellum, Chevron*'s Demise: A Survey of Chevron From Infancy to Senescence*, 59 ADMIN. L. REV. 725, 728 (2007) (suggesting, almost twenty-five years after *Chevron* was decided, that the Court has ultimately rejected the foundational theory of *Chevron* and has consequently reformulated *Chevron* in such a way that has hastened its demise).

17. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got it Wrong)*, 60 ADMIN. L. REV. 593, 597 (2008).

highlighted *Chevron*'s assumptions as flawed, but accepted them as valid nonetheless.[18] Her article criticized the Court's then-current view of *Chevron*, and harkened back to a stronger, clearer articulation for the doctrine.[19]

The evolution and permanence of *Chevron* is at the heart of recent scholarship. In 2007, for example, Professor Daniel J. Gifford claimed that *Chevron* remained crucial and was merely evolving, becoming better tailored to the needs of federal courts and the decisions they review.[20] Professor Elizabeth V. Foote praised the modification of *Chevron*, which she characterized as reincarnating a more APA-centric form of review, "more attuned to the actual legal function of public administration" rather than the "judge-made *Chevron* canons."[21] In contrast, Gregory M. Dickinson condemned the lacuna that has gone unfilled despite the Court's extensive efforts to recalibrate *Chevron*. The void Dickinson pointed to concerned the tension between the presumption against preemption on one hand and *Chevron* deference on the other. Dickinson expressed his concern for agency aggrandizement at the expense of state sovereignty in 2011, before the Court decided *City of Arlington v. FCC*.[22] However, the *Arlington* Court's decision in 2013 confirmed Dickerson's concern.[23]

Another group of scholars, practitioners, and jurists, most prominently including Justice Scalia, neither celebrated *Chevron*'s purported demise nor championed its "evolution," but instead inveighed against what they saw as the unnecessary muddling of an efficient and sensible rule. Recent *Chevron* scholarship probes the role of the courts and the use of *Chevron* as a form of judicial power. Many modern scholars conclude that contrary to the view that *Chevron* mandated deference to the executive, it has in fact given the judiciary additional power to determine the legitimacy of agency rulemaking. An empirical overview by Professor Pierce published by the *ALR* in 2011, concluded that the doctrine chosen by the courts was not determinative of outcome, and that courts deferred to agency action 70%

18. *Id.* at 608–10.

19. *Id.* at 642–44.

20. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 833 (2007) (arguing the *Chevron* doctrine was unclear at conception and suggesting that the more current iteration of *Chevron* deference that has evolved over the years is a better one for both the judiciary and the agency decisions).

21. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673, 674 (2007).

22. 133 S. Ct. 1863 (2013).

23. Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667, 672–75 (2011).

of the time regardless.[24] Randolph J. May noted the role of the courts when applying *Chevron* could influence political accountability in a way that Congress was unable, for example through oversight hearings and the confirmation process.[25] Even with widely varied expressions of *Chevron* in case law since its inception, and more recent suggestions diluting the case's initial standard and intention, the *ALR*'s coverage consistently demonstrates that the case's influence remains, at least for now, resilient, important, and continually evolving.

THE 30TH ANNIVERSARY AND BEYOND

The works that follow were chosen with *Chevron*'s history in the *ALR* and its inevitable future role in mind. The aim is not just to look back, but to also highlight how the doctrine's controversial impact might affect our lives and work moving forward. The first piece comes from Justice Antonin Scalia. Justice Scalia's opinions serve as a touchstone for administrative law practitioners, scholars, agency actors, and students. The piece below adds to this groundwork, providing previously unpublished remarks the Justice gave at American University Washington College of Law in 2009, at an *ALR* event commemorating *Chevron*'s 25th anniversary. The remarks offer a still relevant and prolific foreshadowing of what has become the *Chevron* doctrine's current state in administrative law.

The second piece in the commemorative section is from Professor Thomas W. Merrill, and is reprinted from ADMINISTRATIVE LAW STORIES.[26] Professor Merrill's piece provides a retrospective on the interesting idiosyncrasies in *Chevron*'s development. The piece offers useful context and insight to the foundation of the doctrine, particularly for anticipating the case's role in jurisprudence to come.

The third and final article is by Frederick Liu and focuses on the future

24. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) ("[T]he studies suggest that a court's choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts. The ranges of affirmance rates by doctrine are as follows: *Chevron*, 60% to 81.3%; *Skidmore*, 55.1% to 73.5%; *State Farm*, 64%; substantial evidence, 64% to 71.2%; and de novo, 66%.").

25. Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 447 (2010) (stating that *Chevron* can spark a wider discussion regarding what types of agencies and what types of actions by agencies ought to be afforded more or less deference, for example changes in policy by independent agencies).

26. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark in* ADMINISTRATIVE LAW STORIES 399 (Peter Strauss ed., 2006); Thomas W. Merrill, *Sometimes Great Cases are Made, Not Born: The Story of* Chevron *in* STATUTORY INTERPRETATION STORIES (William N. Eskridge, Jr., et al. eds., Foundation Press 2011); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551 (2012).

of *Chevron*. The piece discusses the inevitable contortions Mr. Liu sees in *Chevron*'s future, and offers a succinct and insightful standard for applying the case moving forward. Together, this scholarship highlights the seemingly simple background—yet immense effect—of a case that irrevocably changed administrative law and regulatory practice in this country.

The *ALR* Executive Board has extensively studied this doctrine, as traced by our journal, and the lessons are far-reaching. We, and the *ALR* staff at large, will join the ranks of practitioners in our administrative state—in public service and in representing regulated entities—and so we *must* understand how regulators interact with the judiciary, our representatives, and the public. As emerging attorneys in various fields heavily impacted by administrative law, we understand the importance of clarity and continuity in the deference framework. We have been intrigued, but also discouraged by looking back at *Chevron*'s impact, and its role as a signal of the confusion in our regulatory structure. Perhaps now more than ever, the impact of regulation is omnipresent in our lives, and uncertainty can be destructive and wasteful. But we believe in process. Our goal is to contribute to a field that faces difficult legal questions, convenient or not; one that maximizes the efficiency, but also the expertise, of our civil servants. We are entering the legal field trusting that the ebb and flow of political emphasis on regulation will always prioritize productivity. We also trust that our government will continue to support the administrative process that sets our legal system apart.

Before beginning this project we knew the vital presence the regulatory state has in our country, and the example it sets across the world. We understand also that *ALR*'s coverage of *Chevron*, and the trends discussed here, involve just a sliver of the case's breadth overall, and indeed just a portion of the journal's own record. Yet this commemorative project has helped us understand not only the impact of *Chevron* and other powerful legal mechanisms in administrative law, but it has also given us a better grasp of the challenges that lie ahead for practitioners. Above all, this project, and indeed our capstone year focused intensively on administrative law, has inspired us to keep working—to continue to stabilize and make more perfect our administrative state. We truly hope that it does the same for our readers.

– The 2013–2014 Administrative Law Review Executive Board