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Chevron Flip-Flops of a Different Sort - Understanding the Shifting Politics of Deference

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Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 **Vand. L. Rev.** ___ (forthcoming, 2022), available at SSRN.

Like vaccinations, voter fraud, guns, taking a knee, and, well, everything, views on *Chevron* deference have become not just ideologically tinged but ideologically determined. Progressives are *Chevron* enthusiasts; conservatives are *Chevron* skeptics. *Chevron* is under siege, and the battle lines are familiar. Yet, on its face, *Chevron* is politically neutral. It increases agency power at the expense of judicial power; whether that is politically helpful depends on whether your team controls the White House or if it controls the courts. Furthermore, the current ideological array has not always been the case. When *Chevron* was decided, the enthusiasts were on the right and the skeptics on the left. So what is going on?

In The Politics of Deference, Gregory Elinson and Jonathan Gould explain. They provide a richly documented descriptive account of the shifting politics of deference dating back to the 1970s. The shifts are what you would expect; the team that controls the White House likes deference, the team that controls the courts does not. Except . . . the pendulum did not swing when Donald Trump became president. Elinson and Gould describe why in fact deference *does* have a political valence and it makes sense that conservatives are skeptical and liberals supportive, regardless of who is in the White House.

Notably, “Chevron” does not appear in the article’s title. This is not one more *Chevron* article and, happily, it avoids all the nice questions about *Chevron*’s meaning and scope. It is an article about the broad idea of judicial deference to agencies, not the doctrinal particulars.

Accordingly it begins not in 1984 but earlier, with the fight over the Bumpers Amendment, first introduced in 1975. Senator Dale Bumpers (D-AR) sought to amend § 706 of the APA to provide that courts would decide all questions of law de novo, with no presumption of validity in favor of any agency regulation. The article provides a nice description of the political battle over the amendment, which almost became law. Pro-regulation liberals were horrified; supporters saw the amendment as part of a larger effort to save the country from over-regulation.

So the politics of the Bumpers Amendment battles were roughly aligned with those of present-day *Chevron* battles. Then Ronald Reagan became president, and “conservatives came to see that deference could be harnessed toward deregulatory ends.” Writing for the American Enterprise Institute, Professor Antonin Scalia lamented that congressional Republicans “seem perversely unaware that the accursed ‘unelected officials’ downtown are now *their* unelected officials, presumably seeking to move things in their direction” and pointed out that the Bumpers Amendment would, disastrously, transfer authority from the Reagan Administration to a judiciary dominated by liberal Democrats.

One of the impressive aspects of this article is that the authors have uncovered a great deal of interesting historical material. This includes memos from one John G. Roberts, then a young attorney in the White House Counsel’s Office. In several 1983 memos to Fred Fielding, Roberts acknowledged broad conservative support for the Bumpers Amendment, but cautioned that it “would shift power from the agencies to the judiciary” and “giving the courts added review power could jeopardize deregulatory efforts.”

The point was well-taken. As a result, when *Chevron* was decided, support was overwhelmingly from the right and

doubts on the left. I acknowledge I was one of the doubters. In 1985, I became a staff attorney at the Environmental Defense Fund, and it seemed quite clear that *Chevron* was bad for us and bad for the environment. By the mid-1980s, the "EPA" no longer stood for Every Polluter's Ally, but the overall structure was that the 1970s had seen passage of really ferocious environmental laws, and the 1980s saw meaningful backing away. For us, deference meant losing victories that had already been won in Congress. And I think inescapably my own skepticism about *Chevron*—at least, about a strong reading of *Chevron*—arose in part from that experience.

So inescapably part of what is going on is that, as in so many questions of structure, principle yields before the appeal of preferred outcomes. Or there is a principle, and the principle is "I want the decisionmaker to be the one who agrees with me." Federalism is Exhibit A of a "principle" that is almost always wielded instrumentally, but deference has a place on the list.

Part IV of the article, entitled "Depoliticized Deference," covers the period 1989-2009. Among professors of administrative law, of course, *Chevron* has never been in eclipse, but this was a period in which it "fell nearly entirely out of mainstream political discourse." The authors suggest a few explanations. In part, the traditional deference opponents in the right "had made their peace" with *Chevron*. In addition, neither the Bush I nor Clinton Administrations had a firm deregulatory or pro-regulatory approach, so neither side had a strong reason to embrace or reject deference; it was a mixed bag for each. Third, with the development of "step zero" in *Christenson* and *Mead*, the Supreme Court "lowered the political temperature around the doctrine."

Then along came Barak Obama. Part V, "Repoliticized Deference," recounts the new political salience of deference. Energetic and controversial agency decisions prompted a broad conservative backlash. Gillian Metzger has described the larger hostility to the administrative state of which objections to *Chevron* are a central piece. And, correspondingly, liberals were now *Chevron* enthusiasts. For both, the fight about *Chevron* was a thinly veiled fight about regulation.

This article recounts the story of political flip-flopping on *Chevron* exceedingly well. It is an important story. But what is more interesting is that it is not the whole story.

For something unexpected happens. Donald Trump becomes president, *and both sides hold to their positions*. In contrast to the election of Ronald Reagan or Barak Obama, the election of Donald Trump had very little impact on the political battles over deference. Recall, for example, debates over Supreme Court nominee Neil Gorsuch's *Chevron* skepticism.

Part VI speculates why it is that both sides have dug in their heels. The first explanation is that the phenomenon is not quite as striking as it looks. If *both* parties anticipate future Democratic presidents and/or a conservative judiciary, and both have just a modicum of maturity and ability to take the long view, then the politics of deference should not shift because of one Republican (electoral college) presidential victory. Everyone may still be urging the approach that will place decisionmaking authority in those who are on their side.

Second, and most importantly, the authors conclude that deference is not ideologically symmetrical, despite common assertions to the contrary. Over time and in the aggregate, it will favor regulatory initiatives over deregulatory ones. Deference is more likely to be called into service for significant new regulatory initiatives, for updating, and not for leaving things alone. Deregulation can be achieved through measures – nonenforcement, defunding, layers of internal procedure – that are not subject to judicial review or at least will not trigger deference if they are. *Chevron* applies most prominently in areas such as environmental protection, where conservatives are most wary of agency activity; it applies more haphazardly in areas where they support robust executive power, such as immigration. And *Chevron* empowers, if only indirectly, career bureaucrats who, as a generalization, are more likely to be pro-regulation.

Third, the partisan divide is also about symbolism. Taking a strong stand on deference, despite the many studies showing that its real-world impacts do not justify the heated debate, is a way for both sides to signal their overall views regarding the administrative state.

If all of this is right, it means that political debates about *Chevron* have reached a kind of maturity. What politicians say about deference is still largely nonsense. But the broad shape of the debate has a kind of coherence, which one might even call reassuring.

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