Chevron's Origin Story

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Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 **Yale L.J.** (forthcoming 2017), *available at* SSRN.

In his concurrence in *Perez v. Mortgage Bankers*, Justice Scalia reiterated his historical justification for *Chevron* deference (first articulated in his *Mead* dissent): "the rule of *Chevron*, if it did not comport with the [Administrative Procedure Act], at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.'" In a must-read article forthcoming in the *Yale Law Journal*, Aditya Bamzai casts serious doubt on Justice Scalia's (and many others') understanding of *Chevron*'s origin story.[1]

There is so much to like about this article, and one should really read the full article. But I'll highlight four main takeaways.

First and foremost, Bamzai exhaustively rebuts the historical argument that the case law and doctrine prior to the Twentieth Century supports the type of deference now being applied to agency statutory interpretations under *Chevron*. Instead, as documented in Part II of the article, the interpretive approach was traditionally to defer to executive interpretations of law that are longstanding and contemporaneous. Such "respect" or deference had nothing to do with agency expertise, congressional delegation, national uniformity in the law, or political accountability—the primary rationales invoked today to support *Chevron* deference. Instead, courts respected longstanding and contemporaneous executive interpretations because, under the traditional canons of statutory interpretation, courts respected longstanding and contemporaneous interpretations in general.

Second, Bamzai rejects the *Chevron* origin story based on Nineteenth Century mandamus doctrine and practice. Indeed, his review of the cases suggests the opposite: "Those cases distinguished between, on the one hand, the standard for obtaining the writ and, on the other, the appropriate interpretive methodology that would be applied in cases not brought using the writ." (P. 31.) This finding has particular significance, as it suggests that Justice Scalia may well have been mistaken in relying on the mandamus cases as historical justification for *Chevron* deference in his *Mead* dissent and *Mortgage Bankers* concurrence.

Third, as detailed in Part III of the article, *Chevron*'s origin story doesn't even really begin until the 1940s. To be sure, James Landis and others advocated for judicial deference to administrative interpretations of law before the 1940s. The Supreme Court, however, did not embrace such deference until in the 1940s, in cases with which administrative law professors are quite familiar (*Gray v. Powell*, *NLRB v. Hearst*, *Skidmore v. Swift & Co.*). (The one wrinkle to Bamzai's *Chevron* origin story may be Bates & Guild Co. v. Payne, 194 U.S. 106, 110 (1904), in which the Supreme Court concluded that "even upon mixed questions of law and fact, or of law alone, [an agency's] action will carry with it a strong presumption of correctness." Bamzai explains why the opinion had limited immediate impact and did not upset the contemporary and customary canons that had predominated statutory interpretation generally during that era.)

Finally, Bamzai adds his take on what Section 706 of the Administrative Procedure Act (APA) intended to

accomplish. Perhaps not surprisingly, Bamzai concludes that in passing the APA Congress sought to remove the deference the Supreme Court had just given to federal agency statutory interpretations earlier in the 1940s. Although many scholars have weighed in on this debate, Bamzai's novel contribution is to read the APA against the historical development of judicial deference to agency statutory interpretations. As Bamzai explains:

> The most natural reading of section 706—one that has, to my knowledge, heretofore escaped scholarly or judicial attention—is that the APA's judicial-review provision adopted the traditional interpretive methodology that had prevailed from the beginning of the Republic until the 1940s and, thereby, incorporated the customary-and-contemporary canons of constructions. In other words, when Congress enacted the APA, it *did* in fact incorporate traditional background rules of statutory interpretation. It did *not*, however, incorporate the rule that came to be known as *Chevron* deference, because that was not (at the time) the traditional background rule of statutory construction. Under the incorporated approach, a court would "respect"—or, to use the modern parlance, "defer to"—an agency's interpretation of a statute if and only if that interpretation reflected a customary or contemporaneous practice under the statute. (P. 61.)

I could spend much more time discussing in greater detail Bamzai's rigorous examination of *Chevron*'s origin story and underscoring how his account should make many of us reconsider the historical foundation for *Chevron* deference. But I hope this brief summary encourages you to download and digest the full paper from SSRN.

In concluding, however, I cannot resist speculating a bit about the article's origin story. After all, Bamzai clerked for Justice Scalia before joining the Justice Department and now (as of this Fall) the University of Virginia School of Law. In recent years Justice Scalia had begun to doubt the constitutionality of *Auer* deference—the deference owed to agency interpretations of their own regulations—but he had not (at least publicly) shared similar concerns about *Chevron* deference. As he noted in his *Mortgage Bankers* concurrence (and *Mead* dissent), *Chevron* deference "at least was in conformity with the long history of judicial review of executive action."

I wonder if we can trace Bamzai's interest in exploring the historical foundations of *Chevron* deference to his clerkship experience with a justice whose comfort with the doctrine may have been based on a historical misunderstanding. I further wonder whether this article would have changed Justice Scalia's mind. That we will never know. What I do know, though, is that I very much look forward to reading more of Bamzai's administrative law scholarship. This is just Bamzai's first article in what I expect to be a series of articles that make us rethink the foundations of the modern administrative state.

1. This paper was one of a half dozen presented at the Rethinking Judicial Deference Policy Conference, which was sponsored by George Mason University's new Center for the Study of the Administrative State under the direction of Neomi Rao.

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