Rebalancing the Role of Deference to State Tax Regulations

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In one fell swoop, *Loper Bright*[16] rebalanced the way in which federal courts will apply federal regulations and other administrative guidelines. The U.S. Supreme Court's decision to reverse *Chevron*[17] will have short-term and long-term consequences regarding the application of state tax regulations and other administrative guidance. Many states never adopted *Chevron* deference in the first place. And those states that have adopted it, will now reconsider it.

Background

In 1984, the Supreme Court's *Chevron* decision established a two-step analysis to apply federal administrative authority: If a federal statute is determined to be ambiguous or silent as to an issue before a court (step 1), then a court should defer to a federal agency's "permissible" construction of the statute (step 2). *Loper Bright* at *19. *Chevron* had the effect of tipping the scales in favor of governmental agencies — their interpretations of statutes win the day if those interpretations are "permissible," not necessarily the best. In overturning the two-part test, the *Loper Bright* Court may have been motivated by the U.S. Constitution's separation of powers, but the decision is premised on federal statutory grounds. Specifically, the Court relied on the following section of the APA:

> To the extent necessary to decision and when presented, 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.[18]

The Court found that "the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[19]

State Adherence to *Chevron*

Not all states adopted *Chevron* — in fact, most states apply other deference standards.[20] Those states that do apply *Chevron* likely will reconsider it. For instance, South Carolina has applied a *Chevron*-type deference rule.[21] Most state APAs also differ from the federal APA and do not conform to the statutory foundation of *Loper Bright* (5 U.S.C. section 706), which raises a question as to the meaningfulness of *Loper Bright* for state purposes.

The U.S. Supreme Court's ink was barely dry when the South Carolina Court of Appeals demonstrated the immediate trickle-down consequence of *Loper Bright*. On July 17, regarding the application of a property tax exemption, the court stated:

> We are cognizant of the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S.__2024 WL 3208360 (June 28, 2024), which overruled precedent requiring a reviewing court "to defer to 'permissible' agency [interpretations of the statutes those agencies administered,]" even when a reviewing court might read the statute differently, if "the statute [was] silent or ambiguous with respect to the specific issue' at hand." *Id.* at *2, *22 (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). . . . The Court reminded us that "[t]he Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear, but envisioned that the

[15] This article does not reflect the views of Eversheds Sutherland or its clients. Thank you to Glen "Tax Zen Master" Kohl for his comments and suggestions.

[16] *Loper Bright Enterprises v. Raimondo*, No. 22-451 (S. Ct. 2024).

[17] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[18] 5 U.S.C. section 706.

[19] *Loper Bright*, No. 22-451, at *18.

[20] *See* Luke Phillips, "*Chevron* in the States? Not So Much," 89:2 *Miss. L. J.* 313, 315 (2020) (finding that 14 states and the District of Columbia applied *Chevron* deference).

[21] *Id.* at 356.

> final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Id.* at *1 (quoting The Federalist No. 78, at 525 (A. Hamilton)). The Court overruled *Chevron*, which "demand[ed] that courts mechanically afford binding deference to agency interpretations."[22]

This decision may be the first example of a state court's reconsideration of an abandoned federal approach to deference, but it's not likely to be the last.

States' Rejection of *Chevron*

Other states rejected (or never adopted) *Chevron*. Of these states, some legislated a "hard no" to *Chevron* and restricted or eliminated judicial deference to a state agency. For instance, Georgia law commands that "in an action for a refund . . . all questions of law decided by a court or the Georgia Tax Tribunal, including interpretations of constitutional, statutory, and regulatory provisions, shall be made without any deference to any determination or interpretation."[23]

Interestingly, some states' courts have judicially rejected *Chevron*. Maryland's Supreme Court recently held:

> With respect to deference given to a state agency's interpretation of a statute that it administers, we have applied either a "no deference" approach, or "some deference." . . . In other words, the deference owed to an agency's interpretation of the law will vary depending on a number of factors. In this regard, our sliding-scale approach to state agency deference is similar to federal *Skidmore* deference.[24]

Maryland's adoption of "*Skidmore* deference" is in line with *Loper Bright*; federal courts now may "seek aid" from the interpretations of administrative agencies, but are not required to follow their interpretations, permissible or otherwise.

Long-Term Consequences

To be sure, most states' judicial deference to administrative agencies is the same today as it was before *Loper Bright* was decided. As previously mentioned, *Loper Bright* was decided on federal statutory law that does not directly apply to the states. However, it is likely that at least some states that apply *Chevron* deference will — over time — embrace either *Skidmore* deference or other approaches. After all, the proverbial chair has been kicked out from under their application of *Chevron*'s two-step test. Further, we should expect state legislatures to pick up this topic and legislate a deference standard. In 2024, three states ended judicial deference: Idaho (H.B. 626), Nebraska (L.B. 43), and Indiana (H.B. 1003).

[22] *Colonial Pipeline Co. v. South Carolina Department of Revenue*, No. 6072 at 9 (S.C. Admin. Law Ct. July 17, 2024).

[23] Ga. Code Ann. section 48-2-35(c)(7).

[24] *Comptroller of Maryland v. FC-GEN Operations Investments LLC*, 482 Md. 343, 360-363 (2022).