Judicial Deference to Agency Interpretations in Rulemakings

Jason Marisam/Nov. 3. 2022

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The legislature enacts a statute that delegates power to an agency. The agency promulgates a rule that interprets provisions of the statute and fills in the gaps with specifics. How much deference do courts give to the agency interpretation?

My Roadmap

- Overview on Deference and Statutory Interpretation
- Federal Doctrine
  - *Chevron* deference
  - *Skidmore* deference
  - *Auer* deference
- Minnesota's similar approach
- Recent federal developments limiting or challenging these doctrines
- How will Minnesota courts react to federal developments?

A Spectrum of Deference

No Review | Strong deference | Weak deference | De Novo

Some Tools of Statutory Interpretation

- Text and context
  - Canons of construction
    - e.g., presumption of nonexclusive "include" – i.e., include introduces examples, not an exhaustive list
- Purpose of the statute
- Legislative history
- Policy or consequences
- Precedent

If a court were reviewing an interpretation de novo, *it would use these basic tools to find the "right" answer, without any deference to the agency.*

Chevron Deference

- *Chevron* Step 1: Is the statute clear or ambiguous?
  - If it's clear, follow the statute.
  - If it's ambiguous, go to step 2.
  - What tools do courts use at this step?
    - The usual tools of statutory interpretation.
- *Chevron* Step 2: Is the agency interpretation reasonable?
  - If it's reasonable, the agency interpretation controls.
  - What tools do courts use at this step?
    - The usual tools of statutory interpretation (but maybe they go heavier on pointing out the policy judgments and expertise that deserve deference)

Chevron Step 0

- What kinds of cases get *Chevron* deference?
  - This is known as *Chevron* Step 0.
- It is clear that *Chevron* applies when:
  - Congress delegated substantive authority to an agency, and
  - the agency exercises that authority by promulgating a rule through notice-and-comment rulemaking or by formal adjudication
- *Chevron* generally does not apply to interpretations in less formal sources, such as interpretive rules, guidance documents, policy statements, letters, legal briefs, etc.

Skidmore Deference

- Do these interpretations in less formal sources receive any deference?
- Typically, they receive *Skidmore* deference.
- The weight depends on many factors, such as:
  - Thoroughness
  - Reasoning
  - Consistency
  - Overall "power to persuade"

Auer Deference

- What about an agency's interpretation of its own regulation? How much deference does that get?
- Deference akin to *Chevron*.
- Courts accept the agency interpretation so long as: (1) the regulation is ambiguous, and (2) the agency interpretation is reasonable.
- SCOTUS has recently limited this deference, though. (More on that later.)

How do Minnesota Courts handle all this?

- An agency's interpretation of an ambiguous provision in a statute it administers receives strong deference.
- There is no deference to the agency when the statutory language is "clear".
  - *Matter of NorthMet Project Permit to Mine Application Dated Dec. 2017*, 959 N.W.2d 731, 757 (Minn. 2021), reh'g denied (June 15, 2021)
  - (Basically *Chevron* Step 1)
- If the statute is ambiguous, "an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature."
  - *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn.1988).
  - (Close to *Chevron* Step 2)

- Minnesota courts have applied *Skidmore* deference to agency interpretations in less formal documents.
- "But if an agency has not promulgated a regulation on the issue presented, courts will give the agency's interpretation 'a lesser form of deference.' In such a case, our deference to an agency's rulings, interpretations, or opinions will depend 'upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.'" *Verhein v. Piper*, 917 N.W.2d 96, 105 (Minn. Ct. App. 2018) (cleaned up).

- An agency's interpretation of its own regulation is entitled to "considerable deference."
  - *Matter of Reissuance of an NPDES/SDS Permit to United States Steel Corp*, 954 N.W.2d 572, 581 (Minn. 2021)
  - "When the agency's construction of its own regulation is at issue . . . considerable deference is given to the agency interpretation, especially when the relevant language is unclear or susceptible to different interpretations." *St. Otto's Home v. Minn. Dep't of Human Servs.,* 437 N.W.2d 35, 40 (Minn.1989)

West Virginia v. EPA, 142 S.Ct. 2587 (2022)

- This was a big case about climate change and whether the EPA has authority to promulgate a plan that would lead to "generation-shifting" toward renewables.
- The CAA gives the EPA authority to require the "best system of emissions reduction."
- Challengers took the position that this means the best mechanical systems and processes, like high-efficiency combustion.
- The EPA took the position that this includes broader systems of regulation, like generation-shifting toward renewables.
- Under *Chevron*, there would have been a strong argument for deference. But the majority never cited *Chevron*.
- It limited the EPA's authority by invoking the Major Questions Doctrine: "Precedent teaches that there are 'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority….Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims."

- Last Term, in *American Hospital Association v. Becerra,* some amicus asked the Court to overturn *Chevron*. The Court didn't touch *Chevron* and ruled on narrow grounds. But litigants see an opening and will continue to press their case.
- Two questions to think about:
  - (1) If SCOTUS ends or limits *Chevron* deference, what will that look like? Some options:
    - De novo review for everything
    - Weaken the deference to something more like *Skidmore*
    - De novo for "pure" questions of law but deference for mixed questions of law & fact
  - (2) Would Minnesota courts follow?

Kisor v. Wilkie, 139 S.Ct. 2400 (2019)

- Deference to an agency's interpretation of its own regulation only applies if:
  - The regulation is "genuinely ambiguous" and the interpretation "reasonable"
  - The interpretation must be the agency's authoritative and official position, not an ad hoc statement from a lower-level official
  - The interpretation must implicate the agency's expertise
  - The interpretation must reflect the agency's "fair and considered judgment," not a convenient litigating position or post hoc rationalization
- But this gets 4 votes plus a concurrence from C.J. Roberts.
- There were 4 votes to overrule *Auer* deference.
- Since then, Justice Ginsburg has been replaced by Justice Barrett.
- *Auer* deference is on very shaky ground at the Supreme Court.
- If it goes, what would Minnesota do?