WORLDWIDE AIRPORT LAWYERS ASSOCIATION

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The impacts of the reversal of the Chevron Doctrine on Aviation Regulation

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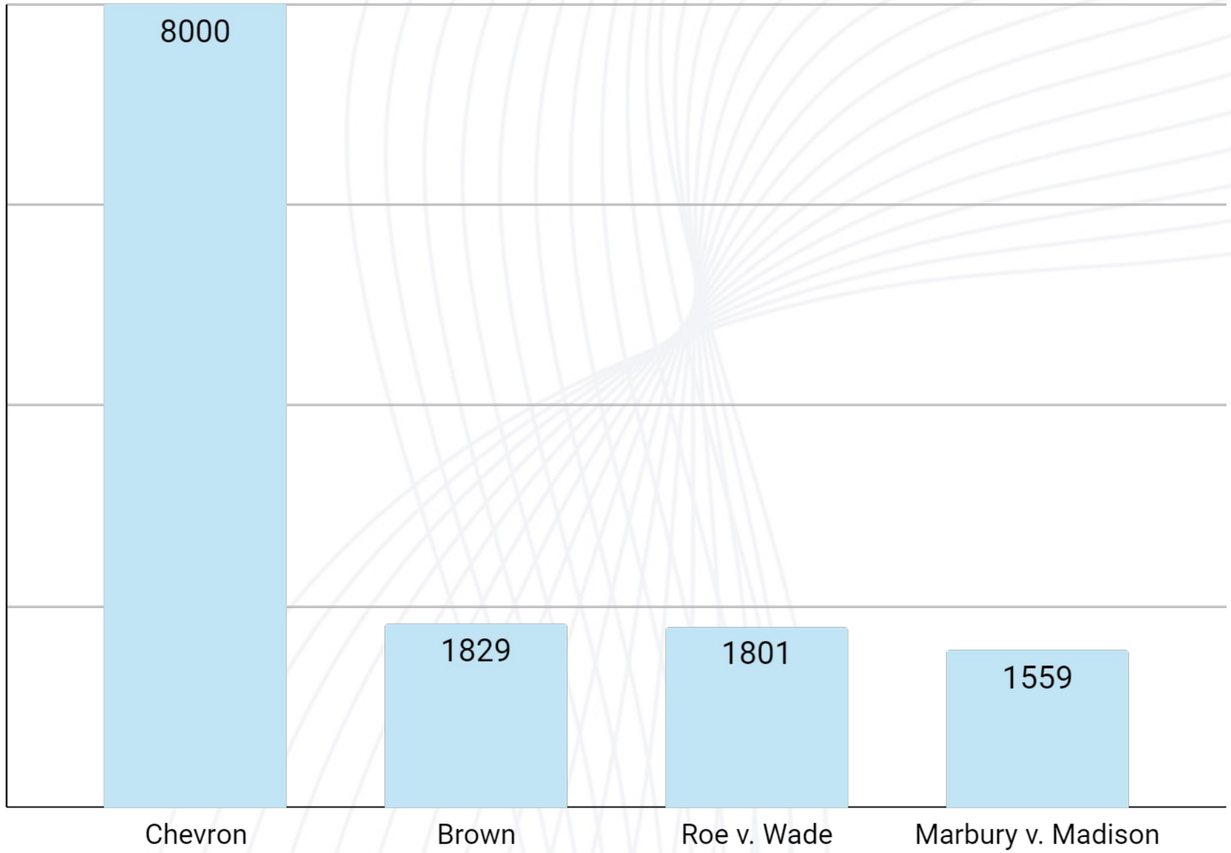
The Chevron Doctrine and Loper Bright

"Chevron Doctrine" refers to the doctrine established in Chevron U.S.A. v. Natural Resources Defense Council (1984), by the United States Supreme Court.

It is the **most cited public law decision in the American Public Law** –more than Brown v. Board of Education, Roe v. Wade, and Marbury v. Madison combined (Breyer, 2006).

It was recently overturned in Loper Bright v. Raimondo (2024).



To understand the revolution of Loper Bright,

however, we need to take a few steps back:

1 – What was Chevron about and why was it important?

2 – What are the existing models of deference in comparative law?

3 – What was the Chevron model of deference?

4 – What might the impacts of Chevron reversal be?

What was Chevron about?

Chevron was a doctrine that directed **courts to show deference to regulatory agencies**' interpretations of the law.

It is about the relationship of courts and agencies – and about the division of regulatory powers between them.

Why is it important?

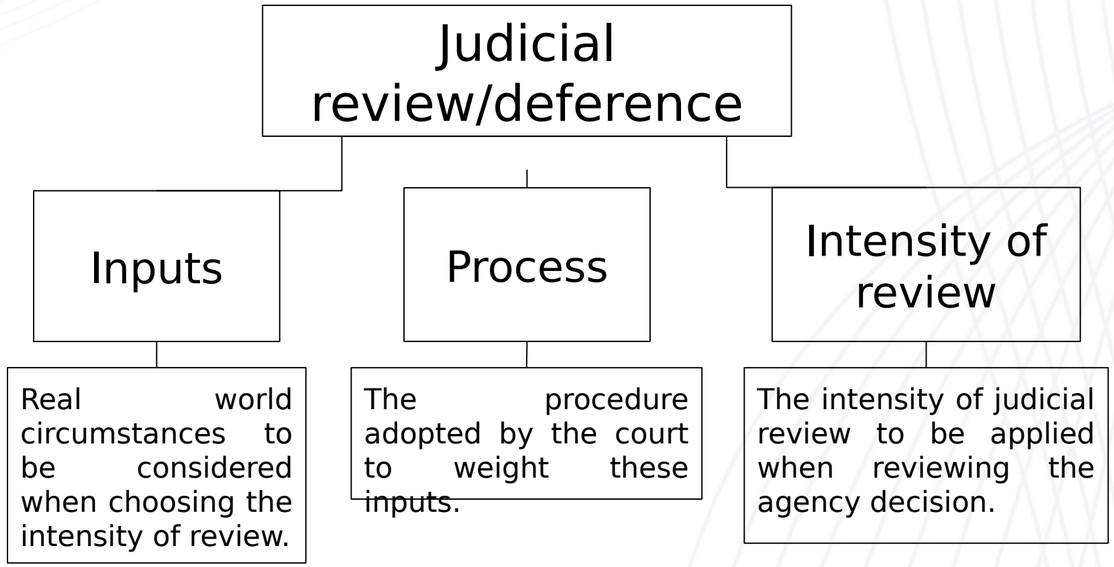
1 - As an important deference doctrine, **Chevron could (and did) inspire courts in other countries to adopt similar postures.**

In view of that, we could be concerned that Chevron's reversal might negatively impact the authority of regulatory agencies in the aviation sector around the world.

2 - Apart from that, **Chevron reversal will impact the way FAA (US Federal Aviation Administration) operate** – and this might also impact civil aviation regulation worlwide, since agencies in many countries tend to look to what FAA does (the point of Dan Sloat's paper).

Deference models around the world

Deference models can be compared according to three main dimensions: how they define the *inputs* in defining the level of judicial review, the *process* to be adopted in weighing these inputs, and the *intensity of review* to be applied.



The old Canadian model

("pragmatic and functional test")

The intensity of judicial review depended on :

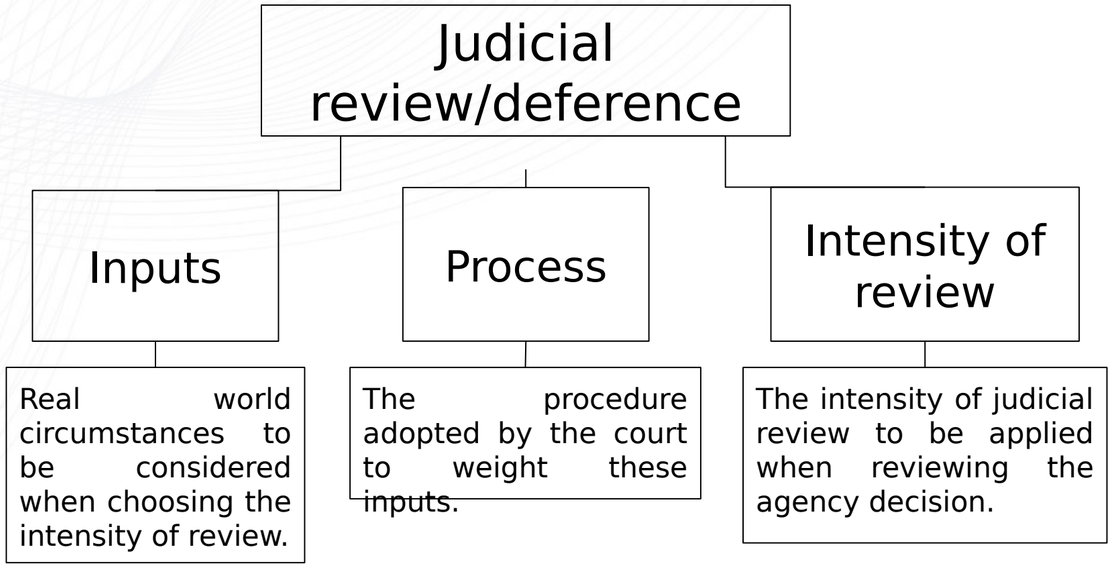
(i) whether the law directly determines the intensity of review to be applied;

(ii) the purpose of Congress in creating the agency that interpreted the law;

(iii) the agency's expertise regarding the issue under interpretation;

(iv) the nature of the issue under interpretation (legal, factual, or mixed).

The Canadian model ("pragmatic and functional test")



Inputs:
(1) legal determinations of the standard of review,
(2) purpose of Congress in creating the agency,
(3) agency's expertise;
(4) nature of the issue under interpretation.

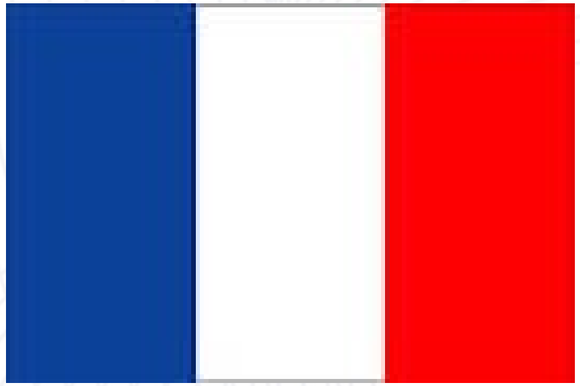
Process: not clear how to balance inputs

Intensity of review:
(1) "patent unreasonableness"
(2)"reasonableness"
(3) correctness"

Deference models around the world

Judicial review/deference

Inputs	Process	Intensity of review
Real world circumstances to be considered when choosing the intensity of review.	The procedure adopted by the court to weight these inputs.	The intensity of judicial review to be applied when reviewing the agency decision.



Deference models around the world

Judicial review/deference

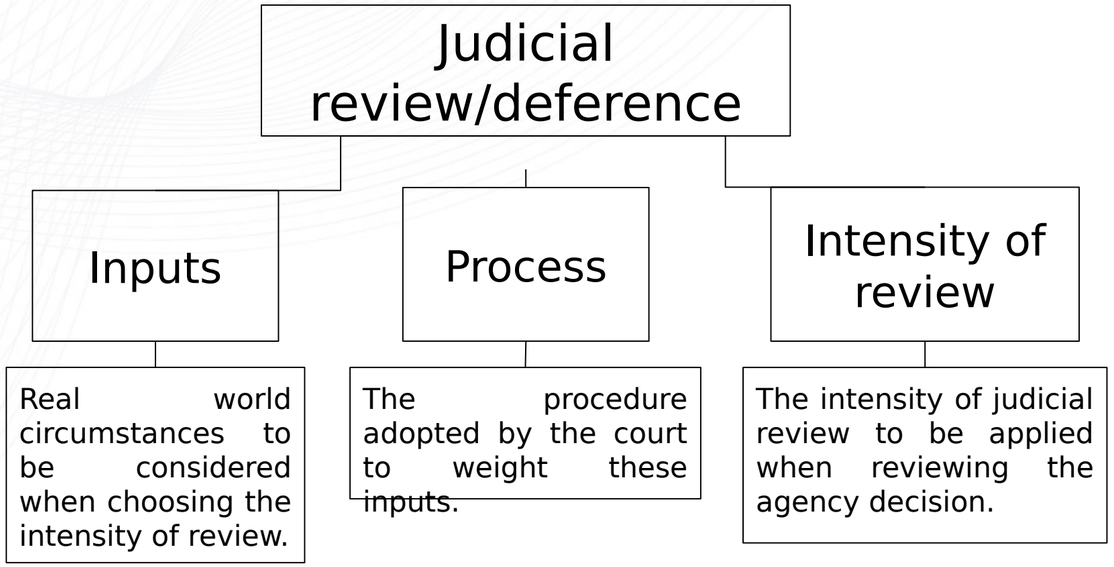
Inputs	Process	Intensity of review
Real world circumstances to be considered when choosing the intensity of review.	The procedure adopted by the court to weight these inputs.	The intensity of judicial review to be applied when reviewing the agency decision.

What was Chevron's model of deference?

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. **If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress**. (…)

"If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, **if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute**."

What was Chevron's model of deference?



In the US: Chevron

> "if the statute is **silent or ambiguous** with respect to the specific issue, the question for the court is whether the agency's answer is based on a **permissible** construction of the statute."

What does Chevron's reversal mean for deference in the US?

Loper Bright explicitly reversed the Chevron Doctrine.

> The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and **courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; Chevron is overruled**.

In the face of ambiguity, courts must independently interpret the statute, using the "traditional tools of statutory interpretation".

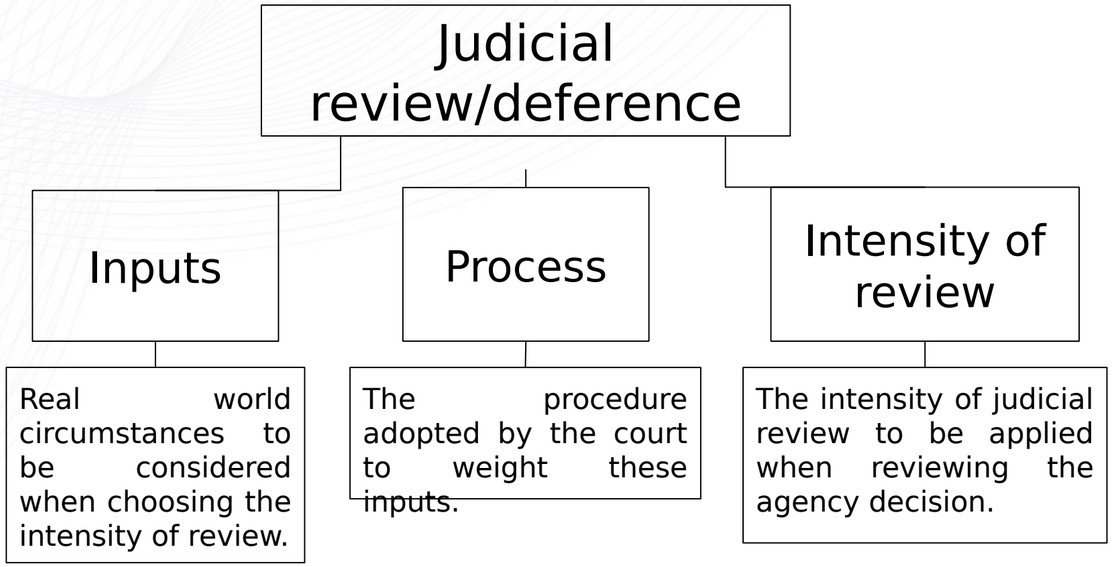
What does Chevron's reversal mean for deference in the US?

But (and this is important!):

- Some deference still might apply (the SCOTUS made reference to Skidmore)

> "The Court also continued to note that the informed judgment of the Executive Branch could be entitled to "great weight." Id., at 549. **"The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."** Skidmore v. Swift & Co., 323 U. S. 134, 140."

Deference models in the world



In the US: Skidmore

Inputs:
"all of the circumstances of the case"

Such as:

(a) the thoroughness evident in its consideration,

(b) the validity of its reasoning

(c) its consistency with earlier and later pronouncements

(d) all those factors which give it power to persuade, if lacking power to control."

What does Chevron's reversal mean **for**

deference in the US?

In summary: Chevron's reversal did not imply the end of deference to agencies, not even in the US – let alone on comparative law.

But it does **mark a shift from a more streamlined model of deference to one that is more complex, nuanced, and has less clear requirements for deference to apply (Skidmore "all of the circumstances" deference)**

What does Chevron's reversal mean **for aviation regulation** in the US?

This new judicial approach raise some concerns for aviation regulation in the US (building upon Dan Sloan's article):

- It could compromise predictability due to its shift to less clear criteria for the application of deference, which could also lead to more variation in court decisions (including due to judges' partisan alignment).

- It could compromise the FAA's ability to regulate, especially when it comes to new technologies and innovations, since it is less likely that Congress will have dealt with those issues explicitly and/or in a detailed manner via statute.

What does Chevron's reversal mean for aviation regulation **worldwide**?

Chevron's reversal may negatively impact the FAA's ability to regulate certain matters and create more uncertainty surrounding its decisions.

This could have an impact on aviation regulation worldwide since many agencies in other countries look to the FAA for guidance, especially in the face of uncertainty.

To sum up:

(i) Chevron is not the only possible type of deference that can be applied in reviewing agency action. Other countries (and even the US) have other models.

(ii) Chevron's reversal in the US does not mean the end of all deference in the country. However, it does raise the barrier for deference to apply, and makes the criteria for its application more fluid.

(iii) Courts elsewhere may still apply deference to agencies, either based on the Chevron model or on other models that exist in the US and in other countries.

(iv) This could have an impact on aviation regulation worldwide since many agencies in other countries look to the FAA for guidance, especially in the face of uncertainty (Dan Sloan's point)

THANK YOU!

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