

After ‘Chevron’ Deference, “Respect”: ‘Loper Bright’ and Agency Policymaking

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After four decades of *Chevron*’s influence on agency behavior and administrative litigation, the US Supreme Court has eliminated the deference doctrine in its opinion in *Loper Bright Enterprises v. Raimondo* (consolidated with *Relentless Inc. v. U.S. Department of Commerce*).

First articulated in the Supreme Court’s 1984 decision in *Chevron v. Natural Resources Defense Council*, the deference doctrine has been cited in more than 18,000 decisions and analyzed in more than 22,000 academic publications and legal treatises.

Chevron prescribed that courts review the lawfulness of agency rules and decisions in a now discarded “two step” process. First, courts evaluated whether a statute spoke clearly to the issue under review — if the statute was clear, “that [was] the end of the matter.”

Second, if the statute was vague or ambiguous, and the agency’s interpretation of the statute was permissible or reasonable, the reviewing court “deferred” to the agency’s interpretation.

But as courts applied *Chevron* deference in the decades following the decision, the doctrine proved to be controversial and unwieldy. Among other things, critics observed that the doctrine created an often impossibly high hurdle for plaintiffs complaining of unlawful agency action and enabled unelected agency leaders to execute wide policy shifts between presidential administrations. To make matters worse, the Supreme Court and the Courts of Appeals had to continually refine, tweak, and tailor the application of *Chevron*, transforming the two-step approach into what Chief Justice John Roberts called a “dizzying breakdance.”

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The Challenge to *Chevron*

Now that dance is over. By a 6-3 vote, the Supreme Court overruled *Chevron* and held the courts must exercise their independent judgment to “decide all relevant questions of law,” including interpreting complex or technical statutes. Accordingly, courts now must determine the “single, best meaning” of the text and may no longer defer to an agency’s interpretation simply because a statute is ambiguous.

The case involved a rule issued by the National Marine Fisheries Service (NMFS) under the Magnuson-Stevens Act (MSA) which required Atlantic herring fishermen to pay for onboard third-party observers to collect data for government use. Although the MSA authorizes NMFS to require such payments in certain circumstances, the statute is silent regarding the Atlantic herring fishing industry.

Vessel owners challenged the rule in separate appeals to the District of Columbia US Court of Appeals and the 1st US Circuit Court of Appeals. Each court relied on *Chevron* deference to uphold NMFS’s rule; in one case, the court treated the absence of clear statutory direction as an “ambiguity” and concluded that NMFS’s rule was a reasonable agency resolution of that ambiguity. In the other, the court declared the rule within NMFS’s statutory authority but without explaining how it was applying *Chevron*. Supreme Court granted *certiorari* in each case and consolidated the appeals.

“*Chevron* is Overruled.”

Writing for the Court’s majority, Chief Justice Roberts explained that *Chevron* deference lacked foundation in the Court’s prior administrative law precedents before 1984. In the Supreme Court’s pre-*Chevron* agency cases, the Court followed its obligation under Article III of the Constitution to “say what the law is.” Although it often considered agency views of a statute and typically treated agency findings of fact as binding, “[n]othing in the New Deal era or before it” resembled *Chevron* deference on questions of law.

The Supreme Court also found that *Chevron* deference is inconsistent with the codification of these principles in the Administrative Procedure Act (APA). APA Section 706 provides that a “reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions” Roberts noted that the Court’s *Chevron* case law never fully reconciled agency deference and the APA.

Although *Loper Bright* leaves no doubt that *Chevron* is overruled, the Court also explained that the opinion does “not call into question prior cases” decided

under *Chevron* because the need to adhere to precedent is particularly strong in cases of statutory interpretation.

Chief Justice Roberts noted that statutory *stare decisis* has “special force” and weighs heavily against overturning specific Supreme Court interpretations of statutes, because Congress remains free to amend statutes if it disagrees with Supreme Court interpretations.

Nonetheless, the Supreme Court recognized that Congress could commit certain decisions to agency discretion. In such cases, a reviewing court’s role is to consider whether the delegation falls within constitutional limits and “the outer boundaries” of the statute and ensure that the agency exercises its discretion consistent with the APA.

From Deference to Respect

What replaces *Chevron* deference is for “courts to do their ordinary job” of determining the “best reading” of the statute using all the traditional tools of statutory interpretation at their disposal. “Due respect” to an agency’s view remains one such tool.

Reviewing courts should look to pre-*Chevron* approaches to agency cases, especially the Supreme Court’s 1944 opinion *Skidmore v. Swift & Co.*, which instructed courts to consider the thoroughness, reasoning, and consistency of an agency’s view and “all those factors which give it power to persuade, if lacking power to control.”

The Future of Agency Policymaking

The demise of *Chevron* is unlikely to lead to a wholesale reconfiguration of existing regulatory regimes, especially considering Chief Justice Roberts’ pointed warning about statutory *stare decisis*. However, federal agencies moving forward should be circumspect in their policymaking and think twice before taking actions that read new and expansive regulatory powers into old statutes without clear congressional justification.

When the Supreme Court, in *West Virginia v. EPA*, vacated EPA’s Clean Power Plan because EPA sought to shift grid-wide power generation from dirtier to cleaner emitting sources, the Court issued that warning to agencies with respect to initiatives of major economic or political significance. In *Loper Bright*, the Court now clarifies that agencies are no longer free to start with the end in mind regardless of the scope of the initiative. Rather, they must look to, first, their authorizing legislation and carry out their missions as Congress defined them.

The *Loper Bright* decision will, however, have a major effect in litigation over various Biden administration actions, such as those part of the administration's "whole of government" approach to addressing climate change (for example, the Securities and Exchange Commission's climate disclosures rule) or politically controversial attempts to cancel student loan debt. Such actions may be difficult to defend if they do not fit into the reviewing court's idea of the "best reading" of the underlying statute.

In the wake of the *Loper Bright* decision, the Supreme Court also issued *Corner Post Inc. v. Federal Reserve*, in which the Court held, that for purposes of the general statute of limitations in 28 U.S.C. § 2401, an APA claim accrues not when the action is final, but when the action injures a person.

Although some, including Justice Ketanji Brown Jackson, have suggested that *Loper Bright* and *Corner Post* signal open season on even well-established agency rules, potential litigants would do well to focus on agency actions justified or upheld under *Chevron* where the quality of the agency's reasoning or the workability of the rule provide a "special justification" for re-litigating the rule beyond *Chevron*'s demise.

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