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Supreme Court's Overruling of Chevron Will Invite More Challenges to Agency Decisions

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In the consolidated cases *Loper Bright Enterprises v. Raimondo, Secretary of Commerce and Relentless, Inc. v. Department of Commerce*, the U.S. Supreme Court overruled *Chevron v. NRDC*, the 1984 case that established the bedrock Chevron doctrine.

The underlying cases themselves addressed a narrow question of fishery management law: Whether the National Marine Fisheries Service's (NMFS) requirement that certain vessels pay for federal observers onboard their boats was consistent with the Magnuson-Stevens Act. But embedded in that focused question was a bigger methodological issue: Whether a court adjudicating that administrative law dispute could use the *Chevron* doctrine, which requires some deference to NMFS's interpretation, or whether the court should decide the question on its own. The D.C. Circuit and the First Circuit both relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984) and deferred to NMFS's interpretation of the Magnuson-Stevens Act.

In a 6-3 opinion, with the majority authored by Chief Justice Roberts, the Supreme Court vacated both of those cases and overruled *Chevron*. The Court held that *Chevron* was inconsistent with both the constitutional obligation of courts to say what the law is, and with the Administrative Procedure Act (APA). And the Court held that the stare decisis factors did not support retaining *Chevron*, which the Court described as grievously wrong from the outset. Going forward, courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."

In dissent, Justice Kagan defended *Chevron* as "rooted in a presumption of legislative intent," and a "rule of judicial humility" that the majority has replaced with a "rule of judicial hubris."

Loper Bright is likely to have a significant impact on administrative law. It will increase both the number of challenges to agency action and the likelihood of success of those challenges. And the Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* this term is likely to magnify those effects, because *Corner Post* expands the statute of limitations for

many APA challenges to agency action. See our July 9, 2024, client alert, "Supreme Court Opens the Door to More Rule Challenges by Extending Accrual Date for APA Cases."

Going forward, *Loper Bright* is a boon for regulated parties, who can now seek to invalidate agency action simply by showing the agency's interpretation of its statute is not the best one — it is no longer enough for the agency to argue that its interpretation is "reasonable."

Just how broad *Loper Bright*'s new rule is — and its effect on regulations that were previously upheld under *Chevron* — will no doubt be the subject of future litigation. The majority caveated its decision by saying that it was not automatically overruling prior decisions that relied on *Chevron*. But challengers likely will argue that those earlier decisions should not be followed given, for example, poor reasoning or unworkability.

The majority also held that the best reading of a statute could be that it delegated discretionary authority to an agency — and a reviewing court must respect that delegation. But whether, and how far, those delegations go will be hotly contested. And that focus on delegation likely will bring the nondelegation doctrine to the forefront, potentially prompting the Supreme Court to address the doctrine head-on. The Court may also have to resolve circuit splits that arise as courts reach differing decisions on the best reading of a statute.

Ultimately, though, overruling *Chevron* may prompt greater stability in the law, and greater predictability for businesses, as the best interpretation of a statute is less likely than the prior regime's "reasonable" interpretation to change over time.

Background

The question in *Chevron* was whether an Environmental Protection Agency regulation was consistent with the term "stationary source" in the Clean Air Act. The regulation defined "stationary source" to include all pollution-emitting devices within the same industrial plant, rather than to refer to each device individually. In upholding the regulation, the Court articulated the two-part approach that became known as the Chevron doctrine.

The first step, the Court instructed, was to ask "whether Congress ha[d] directly spoken to the precise question at issue." To answer that question, the Court continued, courts should use "traditional tools of statutory construction." If the "intent of Congress is clear" — if "Congress had directly spoken to the precise question at issue" — the inquiry is over.

But if Congress had not directly addressed the precise question, the Court continued, the reviewing court continues to the second step. The court should not "simply impose its own construction of the statute." Instead, it should decide whether the agency offered a permissible construction of the

statute, even if that construction was not the one the court would have reached if it was analyzing the statute on its own.

Chevron did not mention the Administrative Procedure Act, the landmark 1946 statute that sets out the contours of judicial review of agency action. Section 706 is the heart of the APA; it directs reviewing courts, "[t]o the extent necessary to decision and when presented, [to] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." It requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law." 5 U.S.C. §706(2)(A).

Instead, the Court grounded the doctrine in a presumption about Congressional intent: That when Congress uses ambiguous terms in a statute that is meant to be implemented by an agency, Congress intends for the agency (rather than courts) to resolve the ambiguity. *See Smiley v. Citibank (South Dakota)* N.A., 517 U.S. 735, 740-41 (1996). The Court reasoned that Congress could explicitly or implicitly delegate interpretive and policymaking authority to expert agencies. Thus, the Court reasoned, where a statute was silent or ambiguous, courts were required to defer to the agency's reasonable policy choice.

Before *Loper Bright*, the Supreme Court limited *Chevron*'s reach in a number of decisions, particularly in recent years. To start, the Court established a threshold requirement for applying *Chevron* (sometimes called Chevron "step zero"), holding that *Chevron* applied only when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). Most significantly, under the "major questions doctrine," the Court held that *Chevron* doesn't apply at all if the question at issue is one of "deep economic and political significance." *King v. Burwell*, 576 U.S. 473, 486 (2015).

History and Proceedings Below

The Magnuson-Stevens Act established eight regional fishery management councils, and required those councils to develop fishery management plans, which NMFS approves and promulgates as final regulations. 16 U.S.C. §§1852(a), (b), (h), 1854(a). The Act allows a fishery management council to require that "one or more observers be carried on board" fishing vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. §1853(b)(8). In 2020, NMFS approved a plan from the New England Fishery Management Council that required some fisherman to pay for a government-certified observer, at an estimated cost of $710 per day for the fishermen.

Loper Bright Enterprises and Relentless Inc., two fishing businesses subject to the NMFS rule, filed suit under the APA in the D.C. Circuit and the U.S. District Court for the District of Rhode Island, respectively. Both courts applied *Chevron* and upheld the NMFS rule. (The First Circuit later affirmed the Rhode Island district court opinion.) The courts both concluded at step one that Congress in the Magnuson-Stevens Act had not squarely addressed the issue of paying observers, and held at step 2 that the NMFS's interpretation was a reasonable construction of the act. Judge Walker dissented from the D.C. Circuit decision, arguing that Congress's silence about industry-funded observers in the act unambiguously indicated that the NMFS lacked authority to require fishermen to pay for observers. The fishing businesses sought Supreme Court review.

The Supreme Court's Decision

The Court granted the fishermen's petition for a writ of certiorari in both cases to decide whether to overrule or clarify *Chevron*. In a 6-3 decision, the Court overruled Chevron, vacated the decisions below, and remanded to the First and D.C. Circuits to review the NMFS's construction of the Magnuson-Stevens Act without deference to the agency.

Chief Justice Roberts authored the majority opinion, in which Justice Thomas, Justice Alito, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett joined. Justice Thomas and Justice Gorsuch each authored concurring opinions. Justice Thomas argued that *Chevron* deference was unconstitutional in violation of Article III, and Justice Gorsuch emphasized that *Chevron* was inconsistent with the role of judges at common law.

Justice Kagan, joined by Justice Sotomayor and Justice Jackson, dissented, arguing that *Chevron* was correctly decided, that the stare *decisis* factors strongly counseled against overruling the doctrine, and that in so doing, the Court arrogated powers to itself — an unelected, inexpert body — and away from agencies with expertise and political accountability.

The Majority Opinion

In the majority's view, *Chevron* deference is inconsistent with the role of courts to provide the final interpretation of the law. The Court described that role through founding-era texts like Hamilton's Federalist No. 78 (the final "interpretation of the laws" would be "the proper and peculiar province of the courts") and in *Marbury v. Madison* ("It is emphatically the province and duty of the judicial department to say what the law is."). And while the judicial branch has a long history of "according due respect to Executive Branch interpretations of federal statutes," respect means just that — a view that could influence the judiciary's judgment, but would not supersede it.

That view changed slightly during the New Deal Era, Chief Justice Roberts explained, but the pre-*Chevron*, pre-APA cases of that time showed deference to "fact-bound determinations" made by agencies, not deference to agencies' resolution of legal questions. The APA codified that no-

deference-on-legal-issues approach, the majority reasoned, by requiring that "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." 5 U.S.C. §706.

The majority explained that *Chevron* cannot be squared with that history or with the APA. *Chevron* requires a court to defer — to give binding deference — to agency interpretations that the court disagrees with. The post-hoc justification for *Chevron*, that Congress uses ambiguity as an implicit delegation to an agency, does not approximate reality; as *Chevron* itself conceded, sometimes ambiguities result because Congress could not answer the question at hand, or because Congress failed to consider the specific issue altogether.

Nor was the majority persuaded by the need for deference on account of an agency's expertise, because interpreting statutes falls "more naturally into a judge's bailiwick than an agency's." Moreover, in the majority's view, "Congress expects courts to handle technical statutory questions," and they are capable of doing so, especially with the agency's informed judgment at their disposal.

Having concluded that *Chevron* was wrong, the majority defended its overruling by discussing the stare decisis factors. The Court explained that *Chevron* was fundamentally misguided and that the doctrine was unworkable at both steps. Courts have never come to a meaningful definition on the concept of ambiguity, and if the doctrine requires courts to decide the bounds of a reasonable interpretation of a statute, a court can just as well decide the best reading of a statute.

The Chief Justice also pointed to all the "refinements" the Court had needed to make to *Chevron* to keep it workable, quipping that those efforts had "transform[ed] the original two-step into a dizzying breakdance." In addition, the Court reasoned that *Chevron* "destroy[ed]" reliance interests by licensing "an agency to change positions as much as it likes." The Court observed that it had last afforded *Chevron* deference to an agency interpretation in 2016 and that the lower courts were relying on *Chevron* less and less.

The Court noted several limits of its holding:

- Although courts must now decide legal questions themselves without deference to agencies, some statutes may delegate authority to agencies. For example, the Court noted that Congress sometimes delegates "to an agency the authority to give meaning to a statutory term." "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."
- Ensuring that an agency acts within delegated authority means marking the boundaries of that authority and "ensuring that the agency has engaged in reasoned decisionmaking within those boundaries."

- The Court stated that it was "not call[ing] into question prior cases that relied on the *Chevron* framework," instructing that decisions upholding "specific agency actions" as lawful "are still subject to statutory stare decisis despite [the Court's] change in interpretive methodology." The Court explained that "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling" such decisions.

Justice Thomas's Concurrence

Justice Thomas issued a solo concurrence reiterating his view that *Chevron* is unconstitutional because it curbs the judicial power afforded to courts in Article III and aggrandizes agencies' power afforded to the executive in Article II. Justice Thomas emphasized that the Constitution mandates that "only the vested recipient of [constitutional] power can perform it," so the legislative branch alone can exercise legislative power, and so on with the executive and judicial branches. *Chevron* disturbed that balance by permitting the executive to exercise judicial powers. And, he continued, defending *Chevron* deference as a delegation of policymaking authority to agencies does not work either, because policymaking authority is legislative authority, meaning agencies cannot exercise it.

Justice Gorsuch's Concurrence

Justice Gorsuch also penned a solo concurrence defending the majority's ruling on *stare decisis* grounds. In his view, the decision "returns judges to interpretative rules that have guided federal courts since the Nation's founding" — rules from which *Chevron* had improperly and radically departed.

Justice Kagan's Dissent

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented. The strongly worded dissent accused the majority of seizing power for the unelected, inexpert judiciary out of the hands of expert federal agencies who are ultimately answerable to the President. In response to the majority's claim that agencies have "no special competence" for resolving ambiguities in the statutes they administer, while judges do, Justice Kagan wrote, "Score one for self-confidence; maybe not so high for self-reflection or -knowledge."

Defending *Chevron*, the dissent pointed to the primary justification for agency deference: Congress often enacts statutes that contain uncertainties, and when it does, unless Congress says otherwise, it intends for agencies to wield discretionary power in interpreting Congress's statutes. In the dissent's view, Congress understands that agencies have expertise that courts lack, and that resolving statutory ambiguity is more a policy judgment than it is a question of legal interpretation.

Moreover, Congress has known about *Chevron* since the decision in 1984 and at this point now is presumed to legislate with the doctrine in the background. By the same token, the dissent

explained, Congress has had ample opportunity to discard *Chevron*, but it has provided a different rule only in a handful of statutes, reinforcing that *Chevron* remains the default rule.

Neither history nor the APA, the dissent continued, changes that basic understanding. Section 706 of the APA requires courts to decide all relevant questions of law, but it does not prescribe a de novo standard of review. And two prominent Supreme Court decisions of the 1940s, in the dissent's view, reflected the Supreme Court's deference to agency interpretation in the pre-APA, pre-Chevron era.

Finally, the dissent attacked the majority's *stare decisis* analysis. *Chevron* is entitled to the "strongest form of protection" because it has been a foundational part of administrative law for decades — indeed, the Court has relied on it at least 70 times, and Congress has not intervened to provide a different result.

Implications

Loper Bright is a major development in administrative law that is likely to increase both the number of challenges to agency action as well as their likelihood of success. In addition, when put in context, the decision holds clues about the way administrative law will continue to develop.

- *Loper Bright* is likely to produce an immediate uptick in regulatory challenges. Challengers will no longer be constrained to argue that Congress spoke directly to the issue at hand (a relative rarity) or that the agency's interpretation was outside the bounds of reasonable interpretation. Rather, litigants can prevail in court by arguing that an agency's interpretation of its authorizing statute is not the best interpretation of the statute.
- The Court's *Corner Post* decision announced just days after *Loper Bright* (which we address in more detail here) likely will contribute to the increased litigation and provide opportunities for challengers to try to invalidate regulations previously found lawful. *Corner Post* held that the six-year statute of limitations for an APA claim challenging the lawfulness of agency action begins to run only when the action causes the plaintiff injury. Thus, a plaintiff who has suffered injury only recently from a regulation enacted more than six years ago can sue to challenge the regulation's validity.
- Although the majority in *Loper Bright* stated it was not questioning earlier decisions relying on *Chevron* to uphold particular agency actions, challengers are likely to argue (with some degree of success) that courts should not follow those earlier decisions. While the majority said that "mere reliance on *Chevron*" is not a ground for departing from precedent, challengers likely will point to factors like poor reasoning or unworkability, for overruling those earlier decisions now that *Chevron* itself cannot justify those outcomes.

And because *Chevron* step 2 mandated deference to agency decisions, many circuit court decisions implementing that step did not engage in a detailed analysis. *Corner Post*'s procedural holding, combined with *Loper Brights*' substantive holding, likely ensures that regulatory challenges will be a major area of litigation for years to come.

- The majority focused primarily on questions of law, noting that Congress may explicitly delegate discretionary authority to agencies to define terms or otherwise make policy. But increased litigation over those issues is likely as well.
    - For one thing, courts must still decide *whether* Congress has delegated authority to an agency. For instance, *Loper Bright* explained that certain statutes use terms like "reasonable" or "appropriate" to indicate that Congress intends for the agency to fill in gaps.
    - Just how far such delegation goes, though, can be open to dispute. Deciding whether Congress has delegated discretionary authority may prove difficult, and courts may decide to increasingly rely on the major questions doctrine as a presumption against finding delegation of authority over issues of deep economic or social significance.
    - Regulated parties are also likely to raise nondelegation arguments, pressing the view that Justice Thomas reiterated in his concurrence: The Constitution prohibits Congress from delegating policymaking authority — which is legislative — to the executive branch. Regulated parties are likely to argue that Congress unconstitutionally delegates its legislative power by using terms like "reasonable" or "appropriate" in conferring rulemaking authority.
    - Regulated parties are also likely to continue raising classic APA arguments, such as the charge that an agency has not engaged in reasoned decisionmaking because it failed to respond to significant comments from interested parties or ignored important aspects of the regulatory problem. The Court reinvigorated that doctrine this term in *Ohio v. Environmental Protection Agency*, No. 23A349, 2024 WL 3187768 (U.S. June 27, 2024).
- The majority also did not focus on mixed questions — questions about the application of law to fact. But both Justice Gorsuch's concurrence and Justice Kagan's dissent suggest that the majority's reasoning as to questions of law extends equally to mixed questions of law and fact. As Justice Kagan explained, "It is frequently in the consideration of mixed questions that the scope of statutory terms is established and their meaning defined." Indeed, two weeks before *Loper Bright*, the Court held in *Garland v. Cargill*, 602 U.S. 406 (2024), that bump stocks do not fall within the statutory definition of "machineguns." Notably, the Court did not mention *Chevron* once, and did not find the statute ambiguous,

although the en banc Fifth Circuit had considered at length whether *Chevron* applied (ultimately holding it did not), with a majority of the judges finding the statute ambiguous.

- In the long run, *Loper Bright* also may promote stability in administrative law by making it more difficult for agencies to change their interpretation of a statute (upon changes in administration or otherwise).
    - The *Chevron* doctrine, as the Supreme Court extended it in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975 (2005), allowed an agency to change its interpretation and still receive deference so long as its interpretation was within the range of reasonable interpretations. And agencies sometimes did just that, with the Federal Communication's Commission's classification and reclassification of broadband — the very issue in *Brand X* — serving as a prime example. Now, *Loper Bright* requires courts to determine the best interpretation of the statute and to reject any contrary agency interpretations.
    - As a result, appellate courts, and even the Supreme Court, may be called upon more frequently to determine a statute's meaning. And if circuit courts cannot agree on the best reading of ambiguous language, the Supreme Court may increasingly be asked to step in.
    - But because courts' best interpretation of a statute is less likely to change over time, *Chevron*'s demise might result in greater stability — and more predictability for businesses.