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Chevron's Two-Step Deference to Agency Expertise Overturned. After 40 Years, the U.S. Supreme Court Refuses the Invitation to Dance

The *Chevron* Doctrine Overturned – Two-Step Deference Analysis Does Not Square with the APA

On June 28, 2024, Justice Gorsuch described the U.S. Supreme Court's action in overturning four decades of precedent, this way: the Supreme Court "places a tombstone on *Chevron* no one can miss."

Forty years ago, in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the U.S. Supreme Court required courts to defer to "permissible" agency interpretations of the statutes the agencies administer even when a reviewing court reads the statute differently.

The *Chevron* doctrine required courts to use a two-step framework to interpret statutes administered by federal agencies. Initially, a reviewing court must determine that a case satisfies the various preconditions set by the Supreme Court for *Chevron* to apply. If *Chevron* is triggered, the two-step dance commences.

Step One

A reviewing court must first assess "whether Congress has directly spoken to the precise question at issue." *Id.,* at 842. If, and only if, congressional intent is "clear," that is the end of the inquiry. *Ibid.*

Step Two

If the court determines that "the statute is silent or ambiguous with respect to the specific issue" at hand, the court must then defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.,* at 843.

The district and appellate courts in each of the two cases before the Supreme Court applied the *Chevron* framework and upheld the agency's interpretation of the regulation promulgated by the National Marine Fisheries Service (NMFS).

On the bases of those lower court opinions, and on June 28, 2024, the Supreme Court overturned 40 years of precedent and wiped *Chevron* off the books.

Marine Fisheries Act and the Administrative Procedures Act Set the Stage

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court granted *certiorari* in two cases brought by the owners of fishing vessels that challenged a regulation issued by the NMFS pursuant to the Magnuson-Stevens Act (MSA), 16 U.S.C.§1801 *et seq*. (MSA).

Importantly, as it is central to the Supreme Court's decision, the MSA incorporates the Administrative Procedures Act (APA), 5 U.S.C. §551 *et seq.*

In the first case, *Loper Bright Enterprises*, family-owned businesses operated in the Atlantic herring fishery. In February 2020, they challenged the NMFS's rule that required them to pay for observers on the fishing vessels for the purpose of collecting data "necessary for the conservation and management of the fishery." (*See* MSA §1855(f)). The district court granted summary judgment to the agency concluding that the MSA authorized the regulation but noted that even if the petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron.* 544 F. Supp. 3d 82, 107 (DC 2021).

The D.C. Circuit affirmed. *See* 45 F. 4th 359 (2022). The appellate court addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers. *Id.,* at 366. Because there remained "some question" as to Congress's intent, *id.,* at 369, the

court proceeded to Chevron's second step and deferred to the agency's interpretation as a "reasonable" construction of the MSA, *Id.,* at 370.

In the second case, Petitioners *Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC* owned two fishing vessels that also operate in the Atlantic herring fishery. These petitioners generally declare into multiple fisheries per trip so they can catch whatever they find. If the vessels declare into the Atlantic herring fishery for a particular trip, they must carry an observer for that trip if NMFS selects the trip for coverage. In their suit challenging the regulation as unauthorized by the MSA, the district court deferred to NMFS's contrary interpretation under *Chevron* and thus granted summary judgment to the government. *See* 561 F. Supp. 3d 226, 234-238 (RI 2021).

The First Circuit affirmed. *See* 62 F. 4th 621 (2023). The court concluded that the "agency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not 'exceed the bounds of the permissible.'" *Id.,* at 633–634. The court stated that it was applying *Chevron's* two-step framework. *Id.,* at 628. But it did not explain which aspects of its analysis were relevant to which of *Chevron's* two steps. Similarly, the appellate court declined to decide whether the result was "a product of *Chevron* step one or step two." *Id.,* at 634.

Deference re: Facts – That's Okay. Deference re: the Law – Not So Much.

Chief Justice John Roberts began the majority opinion by quoting Alexander Hamilton in the Federalist No. 78 (at 525) that the framers envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." And citing Chief Justice John Marshall in *Marbury v. Madison,* "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803).

Interpretation of the law is one thing – the courts control. Facts? That's different.

Historically, deference to an agency's determinations of fact were binding on the courts. The limitation was that there was "evidence to support the findings." *See e.g., St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 51 (1936).

And the Chief Justice Roberts' majority in *Loper Bright Enterprises* agrees:

> Congress could therefore "appoint[] an agent to act within that sphere of legislative authority" and "endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."
>
> But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function."

The 1946 Administrative Procedure Act – A Check Upon Administrator's Zeal

In 1946, Congress passed the Administrative Procedure Act (APA) (5 U.S.C. §§ 551-559). The act establishes how federal administrative agencies make rules and how they adjudicate administrative litigation. Four years later, the Supreme Court referred to the APA as "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *U.S. v. Morton Salt*, 338 U. S. 632, 644 (1950).

In the *Loper Bright Enterprises* case, Chief Justice Roberts said that the APA was the culmination of a "comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen v. Michigan Academy of Family Physicians*, 476 U. S. 667, 670-671 (1986). And further:

> The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.
>
> It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action . . . even those involving ambiguous laws – and set aside any such action inconsistent with the law as they interpret it.
>
> And it prescribes no deferential standard for courts to employ in answering those legal questions. . . .

> [B]y directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, Section 706 [of the APA] makes clear that agency interpretations of statutes – like agency interpretations of the Constitution – are not entitled to deference. Under the APA, it thus "remains the responsibility of the court to decide whether the law means what the agency says." *Perez v. Mortgage Bankers Assn.,* 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment).

Chevron **Deference Cannot be Squared with the APA**

Section III of Chief Justice Roberts' opinion summarizes the *Chevron* two-step analysis and explores the decades of court decisions employing that analysis. That serves as prelude to the Supreme Court's conclusion that "Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA."

> Moreover, *Chevron* "defies the command of the APA that "the reviewing court" – not the agency whose action it reviews – is to "decide *all* relevant questions of law" and "interpret . . . statutory provisions." . . . "*Chevron* turns the statutory scheme for judicial review of agency action upside down."

To drive the point home: "*Chevron's* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."

Justice Elena Kagan was highly critical of that conclusion. She read a summary of her dissent from the bench stating in part that agencies are more likely than judges to have the technical and scientific expertise to make decisions about ambiguities and gaps in statutes.

Four Decades of Rulings Made *Chevron* **Unworkable**

Citing multiple lower court cases, scholarly articles, and Supreme Court decisions, Chief Justice Roberts says that multiple attempts to "clarify" the *Chevron* doctrine have transformed the "original two-step into a dizzying breakdance." Thus, *Chevron* has become" an impediment, rather than an aid, to accomplishing the basic judicial task of 'saying what the law is.'"

Implications?

1. Federal agencies' future rulemaking authority has been curtailed. No longer will they be able to interpret statutes that appear to be either "silent" or "ambiguous" on any particular issue and rely on the *Chevron* two-step analysis that essentially "required" a court to defer to the agency's expertise.
2. As for earlier decisions related to agency rulemaking, Chief Justice Roberts confirms their viability:

   > [W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite our change in interpretive methodology.

   In other words, if agency actions in earlier cases have run the *stare decisis* gauntlet, those decisions are not being overturned. Going forward, however, courts will interpret the applicable law and determine if Congress statutorily authorized the agency actions. Deference to the agency's interpretation is no longer required.
3. Burden on the courts? There will undoubtedly be many more challenges to future agency rulemaking and enforcement actions. Floodgate-like volume? Unknown. Forum shopping to find what some may perceive as a district court judge (or an appellate panel) "more sympathetic" to the challenge? No doubt.
4. Will judges be allowed to "consider" the agency's interpretation of what Congress has authorized? Yes. Chief Justice Roberts' opinion does not eliminate a court's ability to "respect" and "consider" an agency's expertise and the agency's interpretation of its statutory authority in the context of promulgating regulations and enforcing those rules. Respect and consideration? Yes. Required deference? Not anymore.
5. How dramatic is the opinion? If Justice Neil Gorsuch is correct, not all that significant. In his 33-page concurring opinion, he said that although the Supreme Court "places a tombstone on *Chevron* no one can miss," the Supreme Court actually "returns judges to interpretative rules [concerning the statutory authority granted agencies by Congress] that have guided federal courts since the Nation's founding. His summary:

> [A]ll today's decision means is that, going forward, federal courts will do exactly as this Court has since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor.

6. Justice Kagan disagreed. She emphasized the deep roots that *Chevron* has had in the U.S. legal system for decades. "It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds – to name a few, keeping air and water clean, food and drugs safe, and financial markets honest."

   By overruling the *Chevron* doctrine, Justice Kagan concluded, the Supreme Court has created a "jolt to the legal system."

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