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Chevron Deference Destined for Change in Loper Bright & Relentless

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Practical Guidance: Litigation, Professional Perspective - Chevron Deference Destined for Change in Loper Bright & Relentless

Editor's Note: *This Professional Perspective addresses how the US Supreme Court's impending decisions in two key cases challenging Chevron deference could alter how courts review agency actions. For more information about Chevron deference and related concepts, see Overview – Judicial Standards for Review of Agency Action and Comparison Table – Chevron Deference in the Federal Circuits. For further resources on this topic, see In Focus: Chevron, Loper & Agency Deference.*

In January, the Supreme Court heard oral argument in two blockbuster cases addressing whether the Supreme Court should overrule or clarify the most cited and consequential decision in administrative law: *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984), which held that when a federal agency exercises interpretive authority granted by Congress, courts must defer to the agency's reasonable interpretation of an ambiguous statute.

Since 1984, *Chevron* has provided a two-step framework that federal courts apply to determine whether agencies receive deference to their interpretation of the laws that they administer: first, courts look to see if a statute is ambiguous and, if it is, then the agency's interpretation will prevail if it is reasonable. After *Chevron*, a fragile consensus formed around the doctrine's utility largely based on Justice Scalia's writings. Nonetheless, over the past decade or so, mounting frustration from federal judges, academics, and practitioners over the doctrine's inconsistent application and perceived incoherence has brought *Chevron*'s viability into question.

While the Supreme Court has largely sidestepped these concerns, we can expect a decision in the coming months in the two cases, *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc v. Department of Commerce*, that will likely provide a new test for when, if ever, federal courts should defer to an agency's interpretation of federal law.

***Chevron*'s Provenance**

For over two-hundred years, Congress has delegated authority to executive agencies to “fill up the details” of the more “general provisions” that it enacts. See *Wayman v. Southard*, 23 U.S. 1, 20, 10 Wheat. 1

(1825). For this reason, the Supreme Court has long recognized, at times, that when Congress delegates interpretative authority to an agency, federal courts should defer to the agency's interpretation when a statute is open-ended.

Even so, prior to *Chevron*, there was widespread confusion over when, and why, an agency's interpretation should receive deference due to conflicting Supreme Court precedent on judicial deference “which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.” See *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976).

The *Chevron* Doctrine

Against this backdrop, *Chevron* inaugurated a new test that came to dominate the law governing judicial review of agency interpretation of statutes. The underlying issue addressed by *Chevron* was whether the Reagan administration's Environmental Protection Agency (EPA) could issue a new rule on what constituted a “stationary source” under the Clean Air Act. The D.C. Circuit, in a decision by then-Judge Ginsburg, struck down the new rule announced by the Reagan administration. In a unanimous decision, the Supreme Court reversed the D.C. Circuit and reinstated the new rule promulgated by the Reagan administration because (i) the Clean Air Act did not provide a clear answer on what constituted a stationary source and (ii) the issue implicated agency expertise and policy concerns dealing with technical and complex matters.

Significantly, unlike the D.C. Circuit's opinion, the Supreme Court's analysis was not focused on determining the best interpretation of the statutory text. Instead, the Court found that, because Congress enacted an open-ended statute and delegated broad rulemaking authority to the EPA, the agency had the authority to issue a new rule because its interpretation of the statute was within a zone of reasonableness.

In subsequent decisions applying *Chevron*, the Supreme Court has explained that, by delegating to an agency the primary responsibility to implement a statute, Congress signals its intent to entrust to the agency, rather than to the courts, the primary responsibility for interpreting the statutory term.

***Chevron*'s Shortcomings**

The Chevron doctrine has received an onslaught of criticism for many reasons:

First, the decision is unclear on when an agency gets deference. On the one hand, the *Chevron* Court remarked that the judiciary is the final authority on issues of statutory construction and must employ traditional tools of statutory construction to determine the meaning of the statute. 467 U.S. at 843 n.9. But the Court also stated that a court “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”

Id. at 843 n.11. This tension between footnotes 9 and 11 has led to divergent applications of the doctrine, which has undermined its utility.

Second, the Court has never provided a clean framework for determining how much ambiguity is required before a court defers to an agency. This failure, in turn, has led some courts to abdicate their responsibility to interpret a statute's text and, instead, adopt a “reflexive deference” based on a cursory analysis of a statute whenever the statutory scheme is complex.

Third, the decision fails to explain how imposing a presumption that agencies have primary authority to resolve any ambiguities in statutes they administer is consistent with the Administrative Procedure Act, which sets forth standards of review for agency action.

Finally, liberal critics initially rejected the analytical framework adopted by the Court because they believed it weakened judicial review. While these criticisms subsided, they came roaring back from conservatives with the advent of textualism, which is rooted in the belief that Article III of the Constitution mandates that courts are to determine the best reading of a statute's text. Thus, both liberal critics in the 1980s, and conservative critics today, lament that Chevron empowers agencies to displace the constitutional authority granted to federal courts to determine a statute's meaning.

Conclusion

Many commentators, on the left and right, have acknowledged *Chevron*'s shortcomings. In *Loper Bright and Relentless*, the Supreme Court has an opportunity to develop a more durable doctrine that explains in what circumstances, if any, courts must defer to an agency's interpretation of indeterminate statutes involving complex and technical issues. How the Supreme Court addresses the issue of agency deference will have profound ramifications for administrative law and could empower courts to play a larger role in policing agency action.

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