'The court giveth, and the court taketh away': the epitaph of the Chevron doctrine

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Forty years ago, legal conservatives lauded a decision by the Supreme Court upholding an interpretation of the federal Clean Air Act by then-President Reagan's Environmental Protection Agency that significantly eased regulation of air emissions from "stationary sources."

The Court articulated what seemed at the time to be an uncontroversial legal principle: When Congress has given an agency authority to administer a statute, in cases of ambiguity or silence, courts should presume that Congress implicitly delegated a limited interpretive authority to the agency to act within that delegation to fill in the gaps reasonably permitted by the statutory text.

The Court makes clear that the authority to interpret statutes and resolve any ambiguities arising thereunder rests solely with the courts.

That decision (and its later articulations) established a two-step framework for courts to use when evaluating whether an interpretation of a statute by an administrative agency in a formal adjudication or promulgated regulation was entitled to deference: analyzing first whether Congress had directly spoken to the issue (i.e., whether the statute was ambiguous absent such Congressional guidance) and, if so, whether the agency's interpretation was permissible (i.e., reasonable).

What came to be called the *Chevron* doctrine would go on to be enthroned as the most cited administrative law decision in American jurisprudence.

With the Supreme Court's recent decision in the together-heard cases of *Loper Bright Enterprises v. Raimondo* & *Relentless v. Dept. of Commerce*, that throne may not only be vacant but likely usurped as a new generation of legal conservatives have fomented a successful revolt.

The *Loper Bright* decision

The conservative justices of the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on June 28, 2024, holding the *Chevron* doctrine is inconsistent with the Administrative Procedures Act (APA), 5 U.S.C. § 551 et seq., specifically APA § 706, because it prevents courts from exercising their independent judgment to decide questions of law and statutory interpretation applicable to agency actions. The decision comes after years of chipping away at the doctrine.

Chief Justice John Roberts authored the majority opinion in which Justices Neil Gorsuch and Clarence Thomas each authored concurrences, expounding on the decision's consistency with the doctrine of *stare decisis* and *Chevron*'s violation of Constitutional separation of powers principles, respectively.

Justice Elena Kagan authored the dissent for the liberal faction of the Court, in which Justices Sonia Sotomayor and Ketanji Brown Jackson joined, though Justice Jackson only joined in the dissent as related to the *Relentless* decision, having recused herself from *Loper Bright* due to participation in the case during her time at the U.S. Court of Appeals for the D.C. Circuit.

Using heavy references to *Marbury v. Madison*, the Court held that the APA does not allow courts to recognize the presumption of deference articulated under *Chevron*: that is, courts cannot abdicate their sole authority to "say what the law is," and cannot recognize some presumption of deference to an executive agency in questions of law and statutory interpretation because "it prevents judges from judging." Thus, the Court makes clear that the authority to interpret statutes and resolve any ambiguities arising thereunder rests solely with the courts.

Within its discussion of *Chevron*'s errors, the Court's decision clarifies that, going forward without *Chevron*, courts will handle interpretation of ambiguous statutes and validity of regulations just as they would if an agency interpretation did not exist ... by identifying the single, best reading of the statute. The decision notes that any reading of the statute other than the best reading, done only by a court, would not be "permissible."

Under the Court's reasoning, in light of the APA and Article III, each of the bases and justifications *for* courts to defer to an agency interpretation under *Chevron* (i.e., congressional delegation of authority, agency expertise, and political accountability) are just that — justifications for an agency's interpretation — but these do not allow courts to abdicate from their own vigorous review and

interpretation process. Through this aspect of the Court's analysis in particular, the demise of *Chevron* leaves us squarely back in the world of *Skidmore* deference, described below.

The Chief Justice's opinion characterizes *Chevron* as "unworkable" as part and parcel of explaining why overturning *Chevron* is not inconsistent with the legal doctrine of *stare decisis;* however, it remains unclear whether any surviving principles of *Skidmore* solve all of *Chevron*'s problems.

The Court remarks that it has had to 'prune and refine' the nuances of the *Chevron* doctrine extensively over the years, yet creation of a meaningful definition of "ambiguity" remains a "futile exercise." The Court finds the inherent difficultly in defining ambiguity results in a rule of law that is impossible to apply consistently, and in fact is not. While consistency of application is certainly a flaw of *Chevron*, *Skidmore* has faced similar criticism. *See e.g., United States v. Mead Corp.*, 533 U.S. 218 (2001) (Scalia, J., dissenting).

The new old standard — *Skidmore* 'deference'

Drawing its name from the decision of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) but articulated more completely in more recent cases such as *Christensen v. Harris County*, 529 U.S. 576 (2000), *Skidmore* deference requires that courts treat as "persuasive authority" agency interpretations which "lack the force of law" (such as interpretive rulings, opinion letters, policy statements, agency manuals, and enforcement guidelines) when determining whether the agency's interpretation is permissible.

Legal scholars have come to call *Skidmore* deference an essential component of what has been coined as 'step zero' of a *Chevron* analysis, utilized when the agency interpretation at issue does not rise to a level that would afford *Chevron* deference because it did not come to be through formal rulemaking or adjudication procedures.

Skidmore deference is a bit of a misnomer in that courts do not actually *defer* to the agency's interpretation but give it due weight while continuing to exercise the court's own judgment and retaining the ultimate power to decide what the statute says. Under *Skidmore*, the extent to which an agency's interpretation is entitled to "respect" from or otherwise tolerated by a court depends on the extent to which the interpretation has "the power to persuade," as evaluated under a number of factors including, but not limited to, the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier positions of the agency.

If the standard sounds much like the criteria by which a court would judge the persuasiveness of a legal brief, that fact illuminates both what is likely to be the weight given *Skidmore* deference and the reason it survived *Loper Bright* — it in no way limits the interpreting court's analysis. Expectedly, the inherent lack of consistency that comes with such a multi-factorial test that is weighted at the discretion of the judge suffers similar disparagements to *Chevron* in application, attributable to the reality that the mind of a judge cannot be read with the same relative ease as the Federal Register.

While not explicitly stating it, the Court's articulation in *Loper Bright* points to *Skidmore* deference as the remaining doctrine to be employed by a court when considering *any* agency interpretation of a statute. In *Skidmore*, the Court articulated that "respect" was afforded to an agency interpretation, but *Loper Bright* seems to have substituted even this limited deferential measure with "careful attention."

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Considering that a chief frustration with *Chevron* deference discussed by the Court in *Loper Bright* is that it afforded agencies the ability to change course in their interpretations of statutes, it seems likely that the Court's decision has slightly endorsed the 'consistency' factor of *Skidmore* going forward and precluded recognition of changing agency interpretations.

Consequences

Just as *Chevron* was not considered or expected to be particularly consequential at the time it was decided, the full extent of the impacts from the Court's decision in *Loper Bright* are difficult to predict based on the decision alone. The Constitutional principles upon which the majority relies and the underlying tone of the decision can well signal the Supreme Court's grant to the lower federal courts of authority to use those principles aggressively across all litigation in which federal agencies are parties.

It is undeniable that promulgated rules and adjudicatory decisions of administrative agencies will be more vulnerable to challenge than they were under *Chevron* and that judges handling such cases will have more power than they did under *Chevron*, but the gravity of the decision's effects is uncertain. The reality may fall somewhere between the almost nonchalant portrayal of the majority as a necessary correction and Justice Kagan's disapprobation of the decision as a "jolt to the legal system."

Whatever the case may be, Justice Gorsuch is undeniably correct that the "tombstone" the majority's decision placed on the 'legal fiction' that it created 40 years ago known as the *Chevron* doctrine 'cannot be missed.' As with the *Chevron* decision, it may be the forthcoming cases first applying the Court's new outlook that mold jurisprudence in this area. And, just as with *Chevron*, the far-reaching permutations of this new reigning direction on agency power may lead to unexpected results.

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