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Chevron is Dead…But Modified Agency Deference May Exist

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"*Chevron* is overruled." The Supreme Court did not mince words in its June 28, 2024, opinion in *Loper Bright Enterprises v. Raimondo*. Contrary to many predictions, the Court did not merely clarify or water down its 1984 decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), requiring judicial deference to agency interpretations of statutes, known as "*Chevron* deference," but instead explicitly overruled it.

Here are the key takeaways:

1. Lower court opinions which relied on *Chevron* are still good law and existing agency rules are not in immediate danger.
2. The regulated community and agencies need to assess what rules may be vulnerable to future attack.
3. Going forward, courts (and litigants) will focus on the "best" interpretation of a statute rather than a "permissible" interpretation.
4. The US Supreme Court left a narrow window for deference-type arguments and litigants should be prepared.

What is "Chevron Deference"?

Chevron deference required judges to defer to agency interpretations of ambiguous statutes as long as they were reasonable. This doctrine often allowed agencies to interpret their statutes creatively and expansively to suit agency policy preferences and has been recognized as the most relevant precedent in administrative law for decades. Many of the agency rules which govern the regulated community have either been upheld on the basis of *Chevron* deference, or, at least, were written with the assumption that *Chevron* would likely protect the agency's interpretation in the event of a legal challenge.

Criticism of *Chevron* has been slowly building as agencies' ability to interpret their own statutes expansively and receive deference from courts have led many to conclude that the law is both interpreted *and* enforced by executive agencies in violation of fundamental constitutional principles and the judiciary's duty to "say what the law is."

The Supreme Court's Decision

In overruling *Chevron*, the Court provides four major justifications, (1) *Chevron* was inconsistent with the Administrative Procedure Act (APA), (2) its reasoning was based on a "fiction" about legislative intent, (3) it was unworkable in practice, and (4) it was deeply constitutionally suspect.

First, the Administrative Procedure Act provides that courts, not agencies,

decide “all relevant questions of law” arising on review of agency action. Second, *Chevron* reasoned that, when Congress enacted an ambiguous statute, it silently delegated the power to interpret that statute to the agency as opposed to a court. However, *Chevron* never explained why or how Congress engaged in this silent delegation, and this supposed delegation cannot be reconciled with the APA. Third, the trigger for *Chevron* deference, the statute being ambiguous, has proved unworkable in practice as lower courts have come to radically different conclusions about how much ambiguity is enough to trigger *Chevron*, and whether a particular statute is actually ambiguous at all. Fourth, as highlighted by Justice Thomas and Justice Gorsuch's concurring opinions, *Chevron* has led to a judicial abandonment of the constitutional role of courts to interpret statutes because, under *Chevron*, lower courts were rubber stamping agency interpretations, instead of scrutinizing statutory text.

What is the Legal Landscape Now?

What are the practical implications of *Loper Bright* and its reasoning? First, the decision explicitly states that lower court opinions which relied on *Chevron* to interpret statutes are still good law. There is no instantaneous effect on the agency rules governing the regulated community. However, the effect of *Chevron's* absence going forward could be profound. All existing interpretations of agency statutes which are remote from or in tension with agency statutory text are potentially in danger, even if older cases blessed those interpretations under *Chevron*. Agencies must be much more careful going forward about creative new interpretations which stray from statutory mandates and any switch from their prior interpretations. The focus now for agencies, challengers, and regulated parties will be to understand the *best* reading of a statute via statutory interpretation principles and not merely a permissible or acceptable reading. Finally, on a more fundamental level, *Loper Bright* is yet another instance of the Roberts Court encouraging Congress to legislate, update laws, and resolve statutory ambiguities in existing laws.

Going Forward, Modified Agency Deference May Exist

While *Chevron* is gone, the Court has teed up a potential partial replacement, known as *Skidmore*. According to *Loper Bright*, this doctrine requires judicial “respect” for executive branch judgments when they are thorough, well-reasoned, consistent, and otherwise persuasive. Alongside *Skidmore* “respect,” the longstanding principle that courts defer to agency fact-finding remains in place. Additionally, the opinion notes that, if the best reading of a statute is that Congress expressly delegates authority to an agency, for example when Congress uses terms like “appropriate” or “reasonable,” the agency has discretion to act within judicially determined boundaries of delegated authority. The reach of these remaining deference-type doctrines, interpreted by some to be loopholes which will replace *Chevron* under a different name, will be a critical issue going forward. Just as courts struggled with *Chevron*, they will likely struggle with *Loper Bright's* new delegation theory. *Chevron's* absence will be felt most strongly in the difficult cases where the tools of statutory interpretation cannot easily find a best reading. Under *Loper Bright*, courts are strongly

encouraged to make these difficult calls, instead of deferring to agencies.

Immediate Takeaways

The broad takeaways from *Loper Bright* are (1) that existing rules are not in immediate danger, as the overruling of *Chevron's* interpretive framework does not invalidate the decisions which rely on it, (2) agencies and the regulated community must assess what rules are vulnerable to future attack, (3) agencies and regulated community commentors should now argue for the best interpretation of a statute, not permissible or acceptable readings, and (4) all parties should be prepared to argue the deference-type doctrines, *Skidmore* respect and *Loper Bright's* delegation theory, as these doctrines provide new frameworks for lower court decision making.
