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Chevron on the brink — the Supreme Court *could* revolutionize administrative law this term (but shouldn't)

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In 1984, a six-Justice Supreme Court — the minimum needed for a quorum — *issued Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] and introduced "*Chevron* deference" into the legal lexicon. *Chevron* provides a two-step process for evaluating an administrative agency's interpretation of its governing statute. At step one, the court considers whether the provision at issue is "clear" and, if so, gives effect to the clear terms.

If the court concludes the provision is "silent or ambiguous," though, at the second step, courts are to defer to the agency's interpretation if "reasonable." In the nearly 40 years since Justice Stevens' opinion issued, the Supreme Court has itself applied *Chevron* in more than 100 published opinions, and more broadly *Chevron* is among the Court's most-cited opinions in the lower courts.

Loper Bright Enterprises v. Raimondo, a case slated to be heard this term, places *Chevron* squarely in the barrel, with the Petitioners (Loper et al.) expressly requesting that the Court "overrule *Chevron*," or, alternatively, substantially limit its scope. In *Loper*, Petitioners challenged the National Marine Fisheries Service's (NMFS) interpretation of a provision of the Magnuson-Stevens Act (MSA).

The agency construed the MSA as authorizing it to require that commercial fishing vessels permit federal monitors on their ships (for data collection, to protect against over-fishing) and to pay the fees of those observers. Both the district court and the D.C. Circuit applied *Chevron* and upheld NMFS's interpretation. The Loper parties ("Loper") seek reversal, along with the jettisoning of *Chevron* all together.

Loper offers some strong arguments for doing so. As a constitutional matter, it asserts, *Chevron* impermissibly transfers Article III judicial power to federal agencies by requiring that courts defer to Article II agencies' *legal* interpretations (versus their policy choices or fact-finding) in nearly all cases. *Chevron* also, they claim, shifts Article I legislative power to Article II agencies, and implicates due process by requiring courts to systematically place a thumb on the scale against the citizenry.

Chevron has been a *bête noire* of one faction of the conservative legal movement for years (with the significant exception, generally, of the late Justice Scalia), and the makeup of today's Court suggests Loper's arguments might find favor. The Court has given less heed to *stare decisis* concerns in recent years, and has not hesitated to reverse longstanding precedents when a majority concludes they were "egregiously" wrong when issued. Any prediction as to outcome will be better informed by oral argument, with the three newest conservative Justices (Gorsuch, Kavanagh, and Barrett) likely to draw the most attention.

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What the Court *should* do is a different question. The view here is that the Court should clarify *Chevron* to ensure its constitutionality, and then affirm it. It should otherwise leave the statutory and policy questions raised by *Chevron* critics to Congress, which can eliminate (or modify) *Chevron* deference in "one stroke" by amending the Administrative Procedure Act.

Chevron doctrine has at times blown off course by presuming that the mere fact that legislation *contains* ambiguous terms *means* that Congress delegated the agency authority to resolve the ambiguity in the first instance. That is not what *Chevron* held, and such applications of *Chevron* are, in fact, constitutionally suspect.

Chevron requires that courts first independently determine whether Congress *intended* the agency to have interpretive authority over the terms at issue (or, instead, left such interpretations to the courts), before subjecting the statute for review for a "clear" statement and a "reasonable" agency interpretation (at a step sometimes called "*Chevron* step zero"). That way, the agency can draw from the reservoir of interpretive authority Congress may constitutionally delegate — the delegation of which is *not* squarely challenged here — before exercising such authority.

This clarification solves the Article III problems critics identify with Step 1. If administrative agencies have interpretive authority, they have it only because Congress gave it to them in their enabling statute — by clear implication, or expressly. If courts assume such

authority too liberally, they risk improperly transferring judicial power to the executive.

That fix also feeds into and helps solve the problems identified with Step 2, which requires deference to "reasonable" agency interpretations. This critique is that if courts must accept reasonable interpretations that implicate even the scope of the agency's authority, an agency can expand that scope via "reasonable" interpretations, without judicial check.

Clarifying and reaffirming Chevron, instead of repudiating it, will have the salutary benefits of ensuring its constitutional application and preserving the reliance and expectation interests of the regulated community.

But the proper application of *Chevron*, made clear in *United States v. Mead Corp.*,[2] resolves such questions *before* getting to Step 2. Those cases mandate *Chevron's* application only where an agency has been delegated authority to act with the force of law *and* the relevant interpretation has been rendered in the exercise of such authority.

Reaffirming those thresholds answers the Article I objection because an agency acting within its congressionally-delegated authority cannot at the same time be exceeding such authority at Congress' expense. The only remaining question with Step 2 is whether requiring courts to defer to reasonable interpretations independently violates separation of powers principles. This question is not presented by Loper's petition. That said, Congress' power to dictate the standard of review courts must employ to resolve statutory questions is long and well-settled.

Clarifying and reaffirming *Chevron*, instead of repudiating it, will have the salutary benefits of ensuring its constitutional application and preserving the reliance and expectation interests of the regulated community. Agencies have regulated, and business has ordered their affairs, against the background of *Chevron* for nearly 40 years.

Chevron presents a strange case for the application of *stare decisis* — its actual holding regarding the proper interpretation of the early 80's version of the Clean Air Act is of trifling importance to most — but as one of the Court's most cited cases clearly implicates the important principles undergirding *stare decisis*.

Congress' role, finally, in *Chevron's* application bears emphasis. Congress has always been, and will continue to be, free to enshrine *Chevron* into law more formally, eliminate it entirely, or mandate its application on an agency-by-agency, or even statutory provision-by-provision, basis. The current House of Representatives has *already passed* the "Separation of Powers Restoration Act" (H.R. 288), which would end *Chevron* deference.

While it has little chance to become law in the current climate, the point is that there is no legal roadblock to achieving by popular support the changes the Petitioners ask the Supreme Court to undertake. But once the Court removes the constitutional taint *Chevron* has been interpreted by some courts to permit, there is no need for the Court to do so.

Notes

[1] 467 U.S. 837 (1984).

[2] 533 U.S. 218 (2001).

About the author

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