SUPREME COURT OVERRULES *CHEVRON*

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On June 28, 2024, the U.S. Supreme Court issued its highly anticipated decision regarding the continued viability of the long-standing *Chevron* doctrine. In a 6-3 decision,[1] the justices overruled *Chevron v. Natural Resources Defense Council*,[2] concluding that courts have a constitutional and statutory obligation to exercise their "independent judgment" when deciding whether a federal administrative agency has acted within its statutory authority. As Justice Neil Gorsuch noted in concurrence, the Court's decision "places a tombstone on *Chevron* no one can miss."[3]

This Comment discusses the Court's decision and its implications for legal challenges to federal agency actions. Prior to that, a refresher on the *Chevron* doctrine and the recent litigation is relevant.

I. The *Chevron* Doctrine

From 1944 until *Chevron* was decided in 1984, judicial deference to agency interpretations of statutes was principally discretionary and primarily governed by the standard pronounced in *Skidmore v. Swift & Co.*,[4] under which the amount of deference due depended upon the persuasiveness of the agency's position.[5] During this period, courts were required to defer to agency interpretations when the U.S. Congress had specifically authorized an agency "to define a statutory term or prescribe a method of executing a statutory provision."[6] *Chevron* expanded the set of situations in which deference was mandatory to include those in which a statute that an agency administers is silent or ambiguous on a given question.[7]

In *Chevron*, the Court held essentially that courts should approach an agency's construction of a statute it is tasked with administering in two steps. First, the court should ask whether congressional intent is clear with respect to the point in question.[8] If so, the court should apply the plain meaning of the statute regardless of the agency's interpretation.[9] If, however, congressional intent is not clear, and "the statute is silent or ambiguous with respect to the specific issue," the court should uphold the agency's interpretation so long as it is "based on a permissible construction of the statute."[10] To be permissible, an agency's interpretation need not be "the only one it . . . could have adopted, or even the reading the court would have reached if the question had initially arisen in a judicial proceeding," but rather need only be "reasonable."[11]

Chevron itself (naturally enough) provides an illustration of this framework. The *Chevron* Court upheld the U.S. Environmental Protection Agency's (EPA's) regulatory definition of "stationary source" for purposes of new source review under the Clean Air Act (CAA),[12] finding that the statutory text and legislative history were ambiguous.[13] Although the term "stationary source" was not defined for purposes of the section at issue, in another section it was defined in part as "any building, structure, facility, or installation." In yet another section, "major stationary source" was defined in part as "any stationary facility or source which . . . has the potential to emit one hundred tons per year . . . of any air pollutant."[14] EPA promulgated a regulation defining "stationary source" on a "plantwide" or "bubble" basis, such that changes to a plant's components would not necessitate a new permit if the plant's total emissions did not increase.[15]

1. Chief Justice John Roberts delivered the majority opinion, joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Concurring opinions were filed by Justices Thomas and Gorsuch. Justice Elena Kagan filed a dissent, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson.
2. 467 U.S. 837, 14 ELR 20507 (1984).
3. Loper Bright Enters. v. Raimondo, No. 22-451, 2024 WL 3208360, at *23, 54 ELR 20097 (U.S. June 28, 2024) (Gorsuch, J., concurring).
4. 323 U.S. 134 (1944).
5. *See* Jud Mathews, *Deference Lotteries*, 91 Tex. L. Rev. 1349, 1358-59 (2013); *see also*, *e.g.*, St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 783 n.13 (1981) (citing *Skidmore*, 323 U.S. at 140) (noting that deference to an agency interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade," but declining to defer to the U.S. Department of Labor's definition of "church" under the Federal Unemployment Tax Act after "considering the merits" and determining "it d[id] not warrant deference").
6. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 833 (2001) (quoting United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982)).
7. *Id.* (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996)).
8. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43, 14 ELR 20507 (1984).
9. *See id.*
10. *See id.* at 843.
11. *See id.* at 843-44 & 843 n.11.
12. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
13. *Chevron*, 467 U.S. at 845-66.
14. *Id.* at 846, 851.
15. *Id.* at 840 & n.2, 857-59.

The *Chevron* Court reasoned that the statutory text was ambiguous as to the meaning of a "source," not only because it was undefined, but also because the statutory text itself was inconsistent and subject to multiple interpretations.[16] For example, the Court noted that while "building, structure, facility, or installation" could be read to make each individual building a source, it could also suggest that a building was a source only if not part of a larger facility.[17] It also noted that the definition of "stationary source" defined a "source" only in part as a facility, along with other items, while the definition of "major stationary source" absolutely equated the two terms.[18]

Finding legislative history similarly unilluminating, the Court reasoned that EPA's interpretation represented "a reasonable accommodation of manifestly competing interests," and was therefore "entitled to deference."[19] The Court noted that the regulatory scheme was complex, and that EPA's interpretation involved reconciling competing policy interests, making EPA better suited than judges, who were neither "experts in the field" nor "part of either political branch of Government."[20] The Court therefore upheld EPA's interpretation as a permissible one.[21]

II. Subsequent Developments

The years following *Chevron* brought cases alternately refining or expanding upon the *Chevron* framework. In *United States v. Mead Corp.*,[22] for example, the Supreme Court clarified that agency interpretations were only entitled to *Chevron* deference if embodied in formally promulgated regulations.[23] And *Auer v. Robbins*[24] established that an agency's interpretation of its own ambiguous regulations should likewise be afforded deference.[25]

But as the proportion of Republican-appointed justices on the Court grew, *Chevron* seemed to fall from favor, eventually to such an extent that some legal observers (even before the Court's decision in *Loper Bright Enterprises v. Raimondo*) believed that the doctrine had been abandoned.[26] Increasingly, the Court seemed to avoid *Chevron* by finding statutes clear and unambiguous.[27] Prior to *Loper Bright*, the last time the Supreme Court deferred to an agency interpretation was in 2016.[28] And in recent years, "the Court ha[d] sometimes failed to mention *Chevron* at all, despite an agency interpretation of a statute being at issue."[29] The present litigation, then, was brought in part to make the implicit explicit and the obscure manifest.

III. The *Loper Bright* Litigation

Loper Bright and *Relentless v. U.S. Department of Commerce* (heard together by the Supreme Court and decided in one opinion) both arose from the same National Marine Fisheries Service (NMFS) rule requiring the herring industry to fund a monitoring program under which observers are placed on fishing vessels.[30] Although the Magnuson-Stevens Fishery Conservation and Management Act (MSA) provides that observers may be required on such vessels, it does not specify whether government or industry must bear the cost of such observers.[31]

Applying *Chevron*, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in *Loper Bright* found that statutory silence regarding the costs of observers meant that Congress had not spoken directly to the specific issue, and found at step two that the express permission to require observers, when coupled with a clause authorizing prescription of other "necessary and appropriate" measures for fishery conservation and management, made the agency's interpretation reasonable.[32] Similarly, in *Relentless*, the U.S. Court of Appeals for the First Circuit found the agency's interpretation permissible, noting that the cost of regulation is presumptively borne by industry and that the MSA provided penalties for failure to pay for observer services.[33]

The industry plaintiffs in both cases appealed, and the Supreme Court granted certiorari on the question of "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[34] At oral argument, the industry plaintiffs argued that the meaning of a statute should be determined by the best reading of the statute rather than by deference

16. *Id.* at 860-61.
17. *Id.* at 861.
18. *Id.*
19. *Id.* at 862-65.
20. *Id.* at 865.
21. *Id.* at 866.
22. 533 U.S. 218 (2001).
23. *Id.* at 231-34.
24. 519 U.S. 452 (1997).
25. *Id.* at 457, 461-63 (citing *Chevron*, 467 U.S. at 842-43).
26. *See, e.g.*, Daniel E. Walters, *Four Futures of* Chevron *Deference*, 31 Geo. Mason L. Rev. 635, 643 n.37 (2024) (citing Lisa Heinzerling, *How Government Ends*, Bos. Rev. (Sept. 28, 2022), https://perma.cc/RGC4-CNRB).
27. Heinzerling, *supra* note 25:
> After Gorsuch arrived at the Court, the Court—often led by Gorsuch—avoided *Chevron* issues by finding statutory language clear enough that the agency's interpretive authority did not come into play. Around the same time, the government stopped asking for deference altogether, prompting at least some courts not to give it because the government had not asked for it.

28. *See* Nathan D. Richardson, *Deference Is Dead, Long Live* Chevron, 73 Rutgers L. Rev. 441, 487-89 (2021) (citing Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 275-76 (2016)).
29. *Id.* at 487 (citing Nielsen v. Preap, 586 U.S. 392 (2019); BNSF Ry. Co. v. Loos, 586 U.S. 310 (2019); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657 (2020)); *see also* Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSblog (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ (At oral argument on *Loper Bright* and *Relentless*, "Chief Justice John Roberts suggested that the effect [of overruling *Chevron*] might be relatively minimal, noting that the Supreme Court had not relied on *Chevron* in several years.").
30. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022); Relentless Inc. v. U.S. Dep't of Com., 62 F.4th 621, 624 (1st Cir. 2023).
31. *See Relentless*, 62 F.4th at 628-29 (citing 16 U.S.C. §1853(b)(8)); *Loper Bright*, 45 F.4th at 607 (same).
32. *Loper Bright*, 45 F.4th at 609-11.
33. *Relentless*, 62 F.4th at 628-34.
34. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023); Relentless Inc. v. Department of Com., 144 S. Ct. 325 (2023).

to an agency interpretation.[35] The government, for its part, argued that *Chevron* should be retained under the doctrine of *stare decisis*, or at most limited by heightening the standard for finding ambiguity or restricting what interpretations are considered "reasonable."[36]

IV. The Court's Decision

Starting with the predicate of Article III of the U.S. Constitution assigning federal courts the obligation to adjudicate "cases" and "controversies," the majority's opinion takes a spin through the *Federalist* papers, *Marbury v. Madison*,[37] New Deal legislation and legal challenges to same, the 1946 Administrative Procedure Act (APA), and decisions preceding the 1984 *Chevron* decision. In discussing New Deal-era litigation, the majority focuses on the *Skidmore* case,[38] noting that the *Skidmore* Court explained that the "'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions."[39] However, the *Loper Bright* majority asserts, at that time the Court afforded no special deference to such interpretations or opinions.

Transitioning to the APA, the majority opinion identifies its enactment "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[40] APA §706 states that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[41] The majority notes that this provision is silent as to any deferential standard courts must employ when deciding statutory interpretation questions.[42]

After a thorough review of *Chevron*, the Court turns to *Chevron*'s progeny. The majority notes that over the intervening four decades, it has "impose[d] one limitation on *Chevron* after another, pruning its presumption [of deference] on the understanding that 'where it is in doubt that Congress actually intended to delegate particular interpretative authority to an agency, *Chevron* is "inapplicable."'"[43]

Finally, the majority addresses whether *Chevron* should continue to have life under the legal doctrine of *stare decisis*, the doctrine that a court should adhere to precedent. The Court cites to its numerous attempts over the intervening 40 years to "adjust" and "refine" *Chevron*,[44] its attempt now to reconcile it with the judicial review provision of the APA, and difficulties over the years in assessing what is a statutory "ambiguity" triggering *Chevron* deference.[45] Based on this evaluation, the majority concludes that "*Chevron* [ ] has undermined the very 'rule of law' values that *stare decisis* exists to secure."[46]

Because the D.C. and First Circuits relied on *Chevron* when deciding to uphold the NMFS rule at issue in the legal challenges, and the Court here overruled *Chevron*, it vacated the judgments and remanded the cases for further proceedings consistent with its opinion.[47]

V. The Dissent

Justice Elena Kagan, joined in dissent by Justices Sonia Sotomayor and Ketanji Brown Jackson, forcefully disagrees with the majority, casting the Court's holding as an act of "judicial hubris" by which the majority "grasps for power."[48] She begins by defending the *Chevron* presumption, reasoning that Congress knows its statutes unavoidably contain gaps and ambiguities that very often involve questions of a "scientific or technical nature," that implicate knowledge of "how a complex regulatory scheme functions," or that have more to do with policy than law. Thus, it makes sense to assume that "Congress would select the agency it has put in control of a regulatory scheme to exercise the 'degree of discretion' that the statute's lack of clarity or completeness allows"—at least when an agency is acting "in the heartland of its delegated authority."[49]

Next, countering the majority's interpretation of APA §706, Justice Kagan asserts that its silence regarding a standard of review for construing statutes actually cuts against the majority's interpretation, given that the APA does expressly specify de novo review in other contexts.[50] Noting that the APA was only meant to "restate[ ] the present law" regarding judicial review as of the time it was enacted, Kagan further reasons that the APA cannot be read to prohibit *Chevron* deference, both because the Supreme Court afforded deference to agency interpretations in cases decided before and after the APA's enactment, and because

35. Howe, *supra* note 28.
36. *Id.*
37. 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").
38. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
39. Loper Bright Enters. v. Raimondo, No. 22-451, 2024 WL 3208360, at *10, 54 ELR 20097 (U.S. June 28, 2024).
40. *Id.* at *12 (citing United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)).
41. 5 U.S.C. §706.
42. *Loper Bright*, 2024 WL 3208360, at *12. By comparison, Justice Kagan's dissenting opinion argues that the "[t]o the extent necessary" language means the APA is "'generally indeterminate' on the matter of deference." *Id.* at *45 (Kagan, J., dissenting).
43. *Id.* at *18 (citing United States v. Mead Corp., 533 U.S. 218, 230 (2001) (quoting Christiansen v. Harris Cnty., 529 U.S. 576, 597 (2000))).
44. The Court describes the result as "transforming the original two-step [evaluation set forth in *Chevron*] into a dizzying breakdance." *Id.* at *20.
45. *Id.* at *19-22.
46. *Id.* at *21 (citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).
47. *Id.* at *22.
48. *Id.* at *39-40, 52-53 (Kagan, J., dissenting).
49. *Id.* at *42-43 (Kagan, J., dissenting) (first citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996); then citing Kisor v. Wilkie, 588 U.S. 558, 571, 49 ELR 20113 (2019); then citing Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 153 (1991); then citing Center for Biological Diversity v. Zinke, 900 F.3d 1053, 1060-62, 48 ELR 20150 (9th Cir. 2018); and then citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).
50. *Id.* at *45 (Kagan, J., dissenting).

contemporaneous legal scholars viewed the APA as permitting such deference.[51]

Justice Kagan then turns to what she terms the majority's subversion of "every known principle of *stare decisis*."[52] She contends that *Chevron* is entitled to a heightened version of *stare decisis* because Congress could have rejected *Chevron* through legislation, and because at least 70 Supreme Court cases and more than 18,000 lower court decisions have relied on *Chevron*, making it "as embedded as embedded gets in the law."[53] In Kagan's view, the majority has not satisfied this heightened standard, which requires "an exceptionally strong reason" for overturning precedent.[54]

In particular, Justice Kagan contends that the Court's "refinements" of *Chevron* are relatively easy to apply, mostly requiring courts to make straightforward inquiries.[55] She also argues that judges are well accustomed to identifying ambiguities in statutes, as "ambiguity triggers" exist "all over the law," including in contract, criminal, and constitutional law.[56] She lastly asserts that reliance interests militate strongly against overruling *Chevron*, as "Congress and agencies alike have relied on *Chevron* . . . in their work for the last 40 years," and as a result "private parties have ordered their affairs . . . around agency actions" that may now be challenged.[57]

VI. Impact of the Court's Decision

Clearly, the Court's overruling of *Chevron* affects current and future litigants challenging a federal agency rulemaking promulgated pursuant to a statute it administers. In such a legal challenge, determining whether the statutory provision at issue is ambiguous will remain with a court, but when the court determines the provision is ambiguous, ascertaining Congress' intent and evaluating the agency's decision will shift from deference to the agency to a de novo review.[58] That is not to say that an administrative agency's determination will be irrelevant to the court, as *Skidmore* indicates such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[59] In its opinion, the majority recognizes this principle, stating that a court must give "due respect for the views of the Executive Branch" and an agency's interpretation of a statute it administers "may be especially informative," but "cannot bind a court."[60] This is because "Congress expects courts to do their ordinary job of interpreting statutes."[61]

While prospectively, the Court's decision to overrule *Chevron* is clear, the status of prior cases upholding agency decisions based on *Chevron*'s deferential standard is not. Chief Justice Roberts' majority opinion attempts to address this uncertainty, stating:

> By [overruling *Chevron*], we do not call into question prior cases that relied upon 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. Mere reliance on *Chevron* cannot constitute a special justification for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, just an argument that the precedent was wrongly decided.[62]

But Justice Kagan's dissenting opinion calls into question the "certainty" provided by the majority's opinion:

> The majority tries to alleviate concerns about a piece of that problem: It states that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone. That is all to the good: There are thousands of such decisions, many settled for decades. But first, reasonable reliance need not be predicated on a prior judicial decision. *Some agency interpretations never challenged under* Chevron *now will be; expectations formed around those constructions thus could be upset, in a way the majority's assurance does not touch.* And anyway, how good is that assurance, really? *Courts motivated to overrule an old* Chevron*-based decision can always come up with something to label a "special justification."* . . . All a court need do is look to today's opinion to see how it is done.[63]

Certainly, despite the majority's admonition that *Chevron* and cases decided under it remain valid, litigants will attempt to test the bounds of the Court's decision overruling *Chevron* and attempt to reverse earlier decisions that upheld an agency's conclusion based on a deferential review. Thus, while the majority's opinion attempts to provide certainty regarding the continued reliance on these prior decisions, only time will tell how courts will treat "new" legal challenges to these decisions.

As a practical matter, the uncertainty the Court's decision has introduced may, at least in the near term, provide regulated parties with greater leverage and a more level playing field in negotiating with or litigating against government agencies. But Justice Kagan's dissent suggests two possible ways *Loper Bright*'s impact might be limited in

51. *Id.* at *46-48 (Kagan, J., dissenting) (citations omitted).
52. *Id.* at *49 (Kagan, J., dissenting).
53. *Id.* at *50 (Kagan, J., dissenting) (first citing Petterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); then citing *Kisor*, 588 U.S. at 587; and then citing Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 Geo. Mason L. Rev. 475, 477 & n.11 (2024)).
54. *Id.* at *49 (Kagan, J., dissenting).
55. *Id.* at *50-51 (Kagan, J., dissenting).
56. *Id.* (Kagan, J., dissenting) (citations omitted).
57. *Id.* at *52 (Kagan, J., dissenting) (citations omitted).
58. Importantly, some environmental statutes already contain a de novo review standard. *See, e.g.*, Toxic Substances Control Act (TSCA) §21(b)(4)(B) (15 U.S.C. §2620(b)(4)(B)) (stating that in a legal challenge to a denial of a TSCA §21 petition, the court shall consider a challenge to the denial under the de novo standard of review).
59. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
60. *Loper Bright*, 2024 WL 3208360, at *17 (citing Bureau of Alcohol, Tobacco & Firearms v. Federal Lab. Rels. Auth., 464 U.S. 89, 98 n.8 (1983)).
61. *Id.*
62. *Id.* at *21 (cleaned up).
63. *Id.* at *52 (Kagan, J., dissenting) (emphasis added).

subsequent cases or avoided by lower court judges reluctant to wade unaided into an abstruse regulatory quagmire.[64] First, she suggests (albeit skeptically) that *Loper Bright* may be limited to cases involving pure legal questions rather than mixed questions of law and fact, which would leave *Chevron* preserved "in a substantial part of its domain."[65] Second, she comments that "the same judges who argue today about where 'ambiguity' resides" may "argue tomorrow about what 'respect' requires,"[66] raising the possibility that lower court judges may be able to reach results similar to those they would have reached under *Chevron* simply by framing their analyses in terms of "persuasiveness" and "respect" rather than "ambiguity" and "deference."

Another concern with the Court's decision is how courts now tasked with ascertaining the meaning of an ambiguous statutory provision will land on the proper meaning. In his concurring opinion, Justice Gorsuch points to changing administrations and how *Chevron* led to uncertainty regarding ambiguous statutory provisions left to administrative agencies to decipher. In particular, Gorsuch cites to a broadband Internet services law and changes to the implementing regulations by the administrations of Presidents George W. Bush, Barack Obama, Donald Trump, and Joseph Biden, with each administration asserting each new rule "was just as 'reasonable' as the last."[67] Rather than promoting consistency, Gorsuch asserts, *Chevron* deference led to "constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."[68]

But just like administrative agencies changing positions, the abandonment of *Chevron* will likely lead to conflicting judicial interpretations of the same ambiguous statutory provision. In her dissent, Justice Kagan predicts this likelihood of divergence by the courts in the wake of the majority's decision: "*Chevron* is an especially puzzling decision to criticize on the ground of generating too much judicial divergence. There's good empirical—meaning, non-impressionistic—evidence on exactly that subject. And it shows that, as compared with *de novo* review, use of the *Chevron* two-step framework fosters *agreement* among judges."[69] In sum, while the future of *Chevron* is clear, the effects of overruling it remain to be seen in future litigation.

64. *See id*. at *48, 50 (Kagan, J., dissenting).
65. *Id*. at *48 (Kagan, J., dissenting) (citations omitted).
66. *Id*. at *51 (Kagan, J., dissenting).
67. *Id*. at *34 (Gorsuch, J., concurring).
68. *Id*.
69. *Id*. at *51 (Kagan, J., dissenting).