IS THIS THE END OF AGENCY DEFERENCE? THE LANDSCAPE OF ADMINISTRATIVE LAW AND THE IMPACT ON HEALTHCARE PROVIDERS

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The Birth of Agency Deference

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) established a two-step test to be applied by courts to determine the validity of a federal agency's interpretation of the statutes it administers:

- Step 1: Determine if Congress has directly spoken to the precise question at issue. If congressional intent is "clear," that is the end of the inquiry.
- Step 2: If the statute is silent or ambiguous with respect to the specific issue, the court must defer to the agency's interpretation if it is based on a "permissible" construction of the statute.

Chevron deference was the standard courts used for 40 years.

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The Death of *Chevron*

Loper Bright Enterprises v. Raimondo and *Relentless, Inc. v. Department of Commerce*

Magnuson-Stevens Fishery Conservation and Management Act ("MSA")

- Established regional fishery management councils to develop fishery management plans, which could require domestic vessels to:
  - Carry observers on board "for the purpose of collecting data necessary for the Conservation and management of the fishery."

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MSA identifies three vessel groups that must pay for observers:

(1) Foreign fishing vessels operating within the exclusive economic zone,

(2) Vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery’s total allowable catch, and

(3) Vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the nation operate.

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MSA does not address whether Atlantic herring fishermen may be required to bear the costs of the observers a plan may mandate.

- However, the New England Fishery Management Council proposed to amend its fishery management plans to require fishermen to pay for observers.
- The National Marine Fisheries Service (“NMFS”) promulgated a rule approving the amendment.
- The estimated cost of an observer would be up to $710 per day, reducing annual returns to the vessel owner by up to 20 percent.

Vessel owners sued in two separate cases arguing that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan.

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Lower Court Holdings

- D.C. Circuit Court in *Loper Bright* found in favor of the Government, concluding that the MSA was not “wholly unambiguous” whether NMFS may require Atlantic herring fishermen to pay for observers and because there remained “some question” as to Congress’s intent, the court proceeded to *Chevron’s* second step and deferred to the agency’s interpretation as a reasonable construction of the MSA.

- First Circuit in *Relentless*, applying *Chevron* deference concluded that “Agency’s interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not ‘exceed [ ] the bounds of the permissible.”

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The Plaintiffs in both cases sought *certiorari* which was granted by SCOTUS, limited to the question whether *Chevron* would be overruled or clarified.

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SCOTUS' Decision

SCOTUS surveyed the history of the authority of the courts:

- Article III of the U.S. Constitution assigns the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies."
- The Framers in the Federalist No. 78, (A. Hamilton): Envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts."
- Chief Justice Marshall in *Marbury v. Madison* (1803): Declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

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Section 706 of the Administrative Procedure Act (1946) directs that 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.
- hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.

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APA prescribes no deferential standard for courts to employ in answering those legal questions.

- That omission is telling because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential.
- Shows that Congress would have articulated a similar deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was “exclusively a judicial function.”
- Section 706 makes clear that agency interpretations of statutes are not entitled to deference.

Therefore, the text of the APA and its history provide that questions of law are for courts *rather than agencies* to decide in the last analysis.

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SCOTUS concludes, the deference that *Chevron* requires of courts reviewing agency action **"cannot be squared with the APA."**

- *Chevron* triggered a marked departure from the traditional approach.
- Eventually, the Court wrongly decided that *Chevron* rested on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."
- Neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the APA. The "law of deference" that this Court has built on the foundation laid in *Chevron* has instead been "[h]eedless of the original design" of the APA.
- *Chevron* demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time.
- Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else – unless the prior court happened to also say that the statute is "unambiguous."
- This regime is the antithesis of the time-honored approach the APA prescribes.

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Accordingly, SCOTUS concludes courts have a duty to exercise independent judgment in determining the best meaning of a statute.

In exercising independent judgment, Courts may seek aid from the interpretations of those responsible for implementing particular statutes, including:

- Accord due respect to Executive Branch interpretations of federal statutes.
  - The views of the Executive Branch could inform the judgment of the Judiciary but do not supersede it.
- Give appropriate weight – not outright deference – to the judgment of those whose special duty is to administer the questioned statute.

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SCOTUS acknowledged that a statute may grant authority to an agency to exercise a degree of discretion.

- A statute may expressly delegate to an agency the authority to give meaning to a particular statutory term; or
- Empower an agency to prescribe rules to “fill up the details” of a statutory scheme.

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When the ***best reading*** of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits by “fixing the boundaries of [the] delegated authority,” and ensuring the agency has engaged in “reasoned decision making” within those boundaries.

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- However, statutory ambiguities are **<u>NOT</u>** implicit delegations to agencies.

- Courts are to determine the best reading of the statute and resolve the ambiguity.
  - A best reading = the reading the court would have reached if no agency were involved.
  - “In the business of statutory interpretation, if it is not the best, it is not permissible. “

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- Agencies have no special competence in resolving statutory ambiguities.
- Courts do.
- The inquiry is not fundamentally different just because an administrative interpretation is in play.
- Traditional tools of statutory construction require courts to resolve statutory ambiguities, especially when the ambiguity is about the scope of an agency's own power.

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Even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency.

- The court will go about its task with the agency’s “body of experience and informed judgment,” among other information, at its disposal.

- Although an agency’s interpretation of a statute cannot bind a court, it may be especially informative to the extent it rests on factual premises within the agency’s expertise.

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Prior to *Loper Bright*, SCOTUS had endeavored to match *Chevron's* presumption to reality, applying a threshold requirement – sometimes called *Chevron* "step zero" – where deference is not warranted:

- Where the regulation is procedurally defective – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation .
- If the question at issue is one of deep "economic and political significance."
- Agency interpretations of judicial review provisions.
- Agency interpretations of statutory schemes not administered by the agency seeking deference.
- When a statute has criminal applications.

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The experience of the last 40 years has made clear that *Chevron's* fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies.

- *Stare decisis* does not require SCOTUS to persist in the *Chevron* project because *Chevron* has proved to be "fundamentally misguided."
- Experience has also shown that *Chevron* is unworkable because the concept of statutory ambiguity has evaded meaningful definition. A statute still has a "best meaning" even if the statute is silent or has gaps in its language.
- Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, thus allowing agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.
- SCOTUS has not relied upon *Chevron* in any decision since 2016.
- "Judicial humility" requires SCOTUS to admit and correct its mistakes.

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Key Takeaways from *Loper Bright*

- Chevron is overruled.
- Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.
- Careful attention to the judgment of the Executive Branch may help inform that inquiry.
- When a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it.
- But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.
- Prior cases that relied on the *Chevron* framework are still subject to statutory *stare decisis* despite SCOTUS' change in interpretive methodology.

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Post *Loper Bright* Judicial Decisions

- No clear consensus from courts, except to state that *Chevron* deference is no longer permitted.

- Supreme Court has consistently granted certiorari, reversed lower court decision, and remand for review in light of *Loper Bright* decision on all pending case which relied on *Chevron*.
  - Numerous Circuit Court decisions have done the same.

- Some have found an express delegation of authority to the agency.

- Upheld regulations based on earlier decisions relying on *Chevron*.

- Overturned regulations finding they were contrary to statute.

- Referenced *Skidmore* deference and analyzed case under that standard.

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Issues Requiring Further Clarification by Courts

- What constitutes an express delegation of authority to an agency.
  - *Mayfield v. U.S. Dept. of Labor* held the statute gave agency the express right to "define and delimit" terms of the "White Collar Exemption" to minimum wage and overtime requirements.

- Since prior cases decided under *Chevron* have not been overruled, can courts rely on prior decisions addressing the validity of the regulation without independently interpreting the language of the statute.
  - *Tennessee v. Becerra*, upheld regulations based on earlier decisions relying on *Chevron*.

- What level of deference does *Skidmore* permit or require.

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Skidmore Deference

- In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) the Supreme Court explained that while an agency's interpretation of statute is "not controlling" it may still have the "power to persuade."

- Similar language was used by the *Loper Bright* Court.

- The weight given to an agency's interpretation depends upon:
  - The thoroughness of the agency's consideration;
  - The validity of its reasoning;
  - Its consistency with earlier and later agency pronouncements; and
  - "All those factors which give it power to persuade."

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Chevron Deference and New Jersey State Law

- While New Jersey does not specifically follow *Chevron*, it provides a similar level of deference to agency actions.
- Under New Jersey law a reviewing court will not disturb an agency's decision unless it is arbitrary capricious or unreasonable. *Allstars Auto Group v. New Jersey Motor Vehicle Commission*, 234 N.J. 150, 157 (2018).
- The reviewing court "must be mindful of, and deferential to, the agency's expertise" and "may not substitute its own judgment for the agency's, even though the court might have reached a different result." *Id*. at 158.
- Similarly, New Jersey Courts will defer to an agency's interpretation of its implementing statute unless the interpretation is "plainly unreasonable." *East Bay Drywall v. Dept. of Labor and Workforce Development*, 251 N.J. 477 (2022).
- While the deference provided under New Jersey law is similar as under *Chevron*, any challenge to that deference would need to raise separate arguments, as the New Jersey APA does not contain the same requirements as the federal APA which SCOTUS relied upon to decide *Loper Bright*.

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Potential Basis for a Challenge to Agency Deference Under New Jersey Law

- *Loper Bright* focused primarily on the incongruence between the APA's requirement that a reviewing court decide all relevant questions of law and interpret constitutional and statutory provisions.

- New Jersey APA does not include similar language, and only references judicial review once stating, "any judicial review shall be from the final action of the agency."

- The right to judicial review in New Jersey arises from Article VI, Section 5, Paragraph 4 of the New Jersey Constitution.

- Thus, any challenge to the deferential review would likely need to focus on a Separation of Powers argument.

- The concurrences in *Loper Bright* addressed these arguments, but they were not the basis for the majority's decision.

- The basic argument would be that:
  - The interpretation of a statute is exclusively the function of the courts, and any deference to an agency interpretation infringes on judicial power and is unconstitutional under the doctrine of separation of powers.

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Key Takeaways on the Future of Federal Administrative Law Under *Loper Bright*

- The flood gates are open, and difference to agency interpretations of federal statutes is no longer permissible.

- To determine when an agency interpretation should be challenged, the regulated industry should:
  - Determine whether the enabling statute authorizes the agency to “fill-in the blanks” of the statute
  - Determine whether agency interpretation is consistent with the enabling statute
  - Review prior declarations by the agency to identify any inconsistencies between prior and current interpretations

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Thank You

Questions?

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