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Fears About The End Of Chevron Deference Are Overblown

By **Daniel Wolff and Henry Leung** (April 1, 2024, 6:13 PM EDT)


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It is springtime in Washington, which means cherry blossoms, pollen and the usual rite of the Beltway punditry of offering prognostications about this year's most anticipated decisions from the U.S. Supreme Court. The authors of this piece now join that chorus.

Among the cases argued and awaiting decision are two that are being considered together — Loper Bright Enterprises v. Raimondo and Relentless Inc. v. U.S. Department of Commerce — that will decide the fate of the 40-year-old Chevron doctrine.

The doctrine famously, or infamously, stands for the proposition that if a statutory provision is ambiguous, the federal courts must defer to the interpretation given to that provision by the agency charged by Congress with executing the statute, so long as that interpretation is reasonable, even if it is not the best interpretation in the court's opinion.[1]

Something of a sleeper when it was decided, Chevron v. Natural Resources Defense Council eventually became the court's most frequently cited precedent in the lower federal courts because of the frequency with which agencies would invoke it to justify regulatory decisions — typically, but not exclusively, in the form of new regulations — that were not obviously supported by the statutory text on which the agencies relied for their authority.

To some constitutional originalists, Chevron got it exactly right: If Congress creates a law and hands over the execution of that law to a particular agency, then deferring to that agency's interpretation of ambiguous provisions of the law is nothing more than honoring Congress's implicit delegation to that agency to fill in any gaps in the law as part of its execution.

To other constitutional originalists, Chevron got it exactly wrong: If, as Justice John Marshall said in the early days of the republic, it is the courts' job to say what the law is, then it violates separation of powers for the courts to defer to the executive branch on questions of statutory interpretation.

Differing and corollary policy perspectives also took hold. The "for" crowd said Chevron's rule of deference made sense because the gap-filling exercise was really one of policymaking, well within the heartland of the executive branch's function of executing the laws.

But the "against" crowd saw it differently, viewing the rule of deference — at least on bigger, more controversial issues — as akin to allowing the executive branch, through the guise of executing the law, to actually create new law.

This view frequently perceived the Chevron doctrine as running at odds with the nondelegation doctrine, i.e., the rule that only Congress can create law, and thus any lawmaking delegation to an agency tramples separation-of-powers principles.

On occasion, Chevron's effect was tempered by what has in recent years solidified as a third doctrine: the major questions doctrine. The major questions doctrine holds that the courts will not defer to agency interpretations where the resulting agency action is one that, objectively speaking, has broad economic or political impacts that Congress has not clearly authorized.

In its infancy, the major questions doctrine arose as a situational exception to Chevron deference in big cases.[2] In that regard, it was invoked only sparingly and thus largely remained in the back-seat, while Chevron deference continued to sit in the driver's seat, putting pedal to the metal.

But in more recent years, between a changing makeup in the judiciary and an ever-louder clamor from some circles to restrain the expanding administrative state, the major questions doctrine picked up momentum in the lower courts and then took on outsize importance in a trio of cases decided by the Supreme Court in 2021 and 2022.

In August 2021, in Alabama Association of Realtors v. U.S. Department of Health and Human Services, the court struck down an eviction moratorium order issued by the Centers for Disease Control and Prevention in response to the COVID-19 pandemic.[3]

Several months later, in January 2022, the court held in National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, that the Occupational Safety and Health Administration lacked the authority to mandate COVID-19 vaccinations or weekly testing for all employees at large workplaces in the U.S.[4]

Finally, in June 2022, the court held in West Virginia v. EPA that the U.S. Environmental Protection Agency lacked authority under the Clean Air Act to force power plants to switch from coal-fired energy generation to cleaner fuel sources.[5]

In all three cases, the agencies had sought to exploit ambiguities in their respective governing statutes to advance their policy choices, and in all three cases the court invoked the major questions doctrine to say no dice.

In 2023, the court drove home the nail in a fourth decision, in Biden v. Nebraska, rejecting the Department of Education's authority to forgive federal student loans without new budget authority from Congress.[6]

To many practitioners and court observers, these decisions signaled a new era of statutory interpretation and the end of Chevron deference as a practical matter. Surely it was only a matter of time before the court would say so expressly.[7]

Enter Loper Bright and Relentless. The smart money is on some level of Chevron retrenchment, the only question being whether it is overruled outright, or kept alive on stare decisis principles or some such but so weakened that it is basically left on life support, as the court did to Chevron's kindred Auer doctrine, affording deference to an agency's interpretation of its own ambiguous regulations, in Kisor v. Wilkie in 2019.[8]

Chevron's defenders raise a number of concerns with its demise.

Chief among them are the following:

- That old regulatory disputes, decided on deference grounds alone, will be relitigated, thus flooding the courts and upsetting settled expectations;

- That new policy disputes, arising from new regulations in an era when agencies no longer command deference, will be decided by the courts, not the political branches, under the guise of legal interpretation; and

- That, between a dysfunctional Congress and a newly neutered executive branch, it will be impossible for our federal government to address hard problems.

We think all of these fears are overblown and, to paraphrase Pete Townsend, that in the end the kids will still be all right.

As a preliminary observation, the rolling back of Chevron the doctrine will mean that Chevron Corp., the company, can have its name back. Even more, who among us does not look forward to getting on board with the new Relentless Doctrine — a welcome cultural evolution, no less than when soulful 1990s grunge in the vein of Soundgarden, Alice in Chains and Nirvana pushed out insipid 1980s glam and pop-rock like Genesis, Bon Jovi and Motley Crue.

As for the substantive concerns, we think it unlikely that there will be a rush to the courts to settle old scores on numerous older regulations. Even putting aside potential statute of limitations obstacles, between investment-backed reliance interests and the simple staleness of issues, it seems unrealistic, at least by and large, that otherwise interested parties will want to spend their litigation budgets on the disputes of yesteryear.

And even if there is a flood of new cases challenging older agency pronouncements, so what?

Inasmuch as Chevron itself does not bind agencies to any particular interpretation,[9] settled expectations would be no more upset by new litigation results than a new administration's change of position, and even less so since any new decision based on what the law actually requires, instead of what the law may permit, would provide more assurance going forward than an older result based on deference alone.

As for new regulations that prompt new implementing policies, the suggestion that the courts will be making policy judgments seems overstated. For one thing, interpreting a statute is always a legal function, even if it carries with it implications for policy choices. And in any event, the Supreme Court, at least, has already moved past Chevron, so any official death notice will have limited effect on the high court's current approach to statutory interpretation.

This reality is illustrated by another 2022 decision, Becerra v. Empire Health Foundation, in which the court resolved a circuit split on how to interpret a provision of the Medicare statute.

Even though the circuit split was the result of differing views on how much, if any, deference to give to the interpretation of the HHS, the court decided the case without any reference to Chevron deference.

In competing opinions over what everyone agreed was ambiguous statutory text, the majority said HHS' interpretation "best implements the statute's bifurcated framework," while the dissent said "HHS's ... interpretation is not the best reading of this statutory reimbursement provision."

In olden days when Chevron controlled, what mattered to the court was not the best interpretation, but only whether HHS' interpretation was reasonable.

Equally insightful is that the majority opinion was authored by Justice Elena Kagan and joined by Justices Stephen Breyer, Sonia Sotomayor, Clarence Thomas and Amy Coney Barrett — illustrating that if you just don't say the "C" word, two hearts can beat as one.

Given this — and given especially that the major questions doctrine already seems to be doing the heavy work of preventing agencies from going big on novel regulatory efforts — one might fairly ask whether it is necessary for the court officially to pull back on Chevron.

Three words: the lower courts. As Justice Neil Gorsuch said in Kisor:

> If today's opinion ends up reducing Auer to the role of a tin god — officious, but ultimately powerless — then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it.[10]

If nothing else, it just seems as though the political weight that the Chevron doctrine bears has become too great for the current Supreme Court to tolerate.

That said, it also seems based on oral argument that respect for agency expertise will not be lost entirely. Skidmore v. Swift & Co., decided by the Supreme Court in 1944, holds that agency decision making is entitled to respect to the extent the agency rationale has the power to persuade, and several of the justices seemed to suggest that the rule of Skidmore might still apply in a post-Chevron world.

While on one level tautological,[11] Skidmore — more a rule of respect than deference, though that also is not without debate — is premised on common sense: Sometimes agency decision-makers really do have expertise that can be brought to bear, and that expertise is worthy of respect.

But the reality is that not all ambiguities require agency expertise, and in those instances it has never made much sense to give respect, let alone deference, to what are pure interpretations of law.[12]

The most principled criticism of Chevron is not with what it was intended to mean at the time it was announced — deferring to the EPA's definition of a statutory term to which the EPA could apply its subject-matter expertise — but with what it became over time, invoked for all manner of regulatory excess, as typified by the decisions discussed above.

As for the concern of Chevron's defenders that nothing will get done in Washington without Chevron and a strong executive branch because Congress cannot agree on anything, that position is constitutionally topsy-turvy and, in any event, also overstated.

It is topsy-turvy because the Constitution is not something to stick on a shelf when democracy gets difficult. If Congress cannot agree that something should become law — for example, comprehensive climate change legislation — that is not a justification to let the executive branch engage effectively in

lawmaking. Full stop.

It is overstated because, current political climate notwithstanding, statutory ambiguity has always been with us.

While counsel for Relentless opined eloquently at oral argument that Chevron should be overruled because it only encourages Congress to punt the hard lawmaking questions to the executive branch, that thesis is more rhetoric than reality. Exhibit A is Chevron itself. Chevron did not create the impulse in Congress to pass on hard questions — that impulse has always existed.

A sober understanding of Chevron is that it was never intended to imbue agencies with lawmaking might. It is hardly gap-filling to erect novel and big compliance programs through rulemakings. Regulations should reflect the interstices of the statutory programs created by Congress, not newly discovered powers that usher in entirely new programs.

With this in mind, we think agencies and regulatory lawyers alike will survive just fine under the forthcoming Relentless doctrine, whatever its contours. Maybe that doctrine will be Chevron as originally intended. More likely, it will look a lot like Skidmore.

Either way, or some other way, the federal government will continue, laws will be enacted, rules will follow, and grumbling and litigation after that. The work of the people will forge on, in fits and starts, for better or for worse. It has always been thus.

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[1] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 483-84 (1984).

[2] See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[3] Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

[4] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022).

[5] W. Virginia v. EPA, 597 U.S. 697 (2022).

[6] Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[7] See Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, . . . it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision.").

[8] See Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

[9] See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[10] Kisor, 139 S. Ct. at 2447–48 (Gorsuch, J., concurring).

[11] As Justice Kagan remarked during the Loper Bright argument: "Skidmore means: if we think you're right, we'll tell you you're right. . . . Skidmore has always meant nothing."

[12] See City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 318-22 (2013) (Roberts, C.J., dissenting).