WHITHER CHEVRON? THE PAST, PRESENT, AND POSSIBLE FUTURES OF JUDICIAL DEFERENCE

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Since the rapid proliferation of administrative agencies in the New Deal era, a key issue concerning statutory interpretation has been: Who should fill the gaps of ambiguous statutes? And although the United States Supreme Court declared over two centuries ago in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is," it has generally tempered its exercise of that duty with deference to the statutory constructions of agencies charged with administering those statutes. This deference — based on the premise that there are only two political branches of American government, and the judiciary is not one of them — reached its apogee with the elucidation of the two-step namesake test of *Chevron v. Natural Resources Defense Council*. Now, however, following January's argument of *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. U.S. Department of Commerce*, the Court must decide whether it will wither or even overrule the *Chevron* doctrine — and if so, what will replace it. Whatever the result, the Court's decision is likely to shape the balance of interpretative power between our three branches of government for decades to come.

CHRISTENING THE ADMINISTRATIVE STATE

The need to decide "who decides" in cases involving judicial review of executive action taken pursuant to delegated legislative authority arose almost immediately after Congress created the first U.S. regulatory agency, the Interstate Commerce Commission (ICC), in 1887.

The statute creating the ICC delegated to it the power to determine whether railroad rates were "unjust and unreasonable" and thus "unlawful." (Pub. L. 49–104 (1887) 24 Stat. 379.) The ICC promptly determined that logically, Congress must have *also* delegated the power to *set* rates. This assertion of power was predictably — and successfully — challenged by the railroads on the ground that "no just rule of construction would tolerate a grant of such power by mere implication." (*Interstate Com. Comm'n v. Cincinnati, N.O. & T.P.R. Co.* (1987) 167 U.S. 479, 494–495 ["The grant of such a power is never to be implied."].) Soon after, Congress explicitly delegated rate-setting power. The Supreme Court approved that delegation, and

subsequently explained that while "Congress may not delegate its purely legislative power to a commission," it may set forth general rules and empower a commission to "mak[e] orders in a particular matter within the rules laid down by Congress." (*Interstate Com. Comm'n v. Goodrich Transit Co.* (1912) 224 U.S. 194, 214.)

Along with determining the scope of legislative powers that can be delegated to agencies, the Supreme Court was repeatedly called on in the first half of the 20th century to determine whether agencies had applied those delegated powers in an appropriate way. In doing so, it began to form the principles guiding judicial deference to agency action. Of particular note, Justice Cardozo's characterization of the law in a 1933 case upholding tariffs on Norwegian nitrite sounds almost like a proto-*Chevron* two-step: "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (*Norwegian Nitrogen Prod. Co. v. United States* (1933) 288 U.S. 294, 315.)

These principles set the stage for the quick growth of executive agencies during the New Deal era. We need not revisit here the long-running and well-documented feud between Franklin Delano Roosevelt and the so-called "Four Horsemen" of the Supreme Court, because that feud was settled by the passage of the Administrative Procedure Act (APA). Famously described by as a "fierce compromise" (George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics* (1996) 90 Nw. U. L. Rev. 1557), the APA created both the modern agency rulemaking process and the well-known "arbitrary or capricious" standard for judicial review of agency rules. (Pub. L. 79–404, 60 Stat. 237 (1946).)

FROM THE APA TO *CHEVRON*

Under the APA, federal agencies are required to provide public notice of proposed rule-making through publication in the Federal Register, allow for public comment, and engage with those public comments in the final rule. (See 5 U.S.C. §§ 553, 556–557.) The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." (§ 704.) Under this review, the APA directs that the reviewing court "shall" overturn "agency action, finding, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," unconstitutional, or in excess of the agency's statutory authority. (§ 706.)

In the decades following passage of the APA, both Congress and the Supreme Court divided over how much deference was due to agencies undertaking statutory interpretation in connection with a rulemaking. The Supreme Court's decisions on the subject of judicial review of agency interpretations crystalized into two lines that Judge Friendly described as "analytically in conflict" — one urging deference under which agency decisions "can be reversed only if without rational basis," and the other "sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term." (*Pittston Stevedoring Corp. v. Dellaventura* (2d Cir. 1976) 544 F.2d 35, 49.) Commentators have sometimes referred to the first of these approaches as a "reasonableness" or "deferential" review, and the latter as a "rightness" or "independent" review.

Each approach had its advocates through the 1960's and 1970's. For example, Chief Justice Warren advanced the deferential approach writing for the Court in *Udall v. Tallman*: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. ... When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." (*Udall v. Tallman* (1965) 380 U.S. 1, 16.)

By contrast, Justice Douglas articulated the independent approach writing for the Court in *Barlow v. Collins*: Where "the only or principal dispute relates to the meaning of [a] statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction." (*Barlow v. Collins* (1970) 397 U.S. 159, 166 ["Indeed, judicial review of such administrative action is the rule, and nonreviewability is an exception which must be demonstrated."].) Congress threatened for years to resolve the matter in favor of *de novo* review; in 1975, Senator Dale Bumpers first proposed an amendment to the APA that would have required courts to review *all* questions of statutory interpretation *de novo* and remove any presumption of validity for administrative rules, and the amendment received vigorous debate in various forms through the early 1980s, when the Reagan Administration took office and implemented a wide-ranging review of agency rulemaking. That review resulted in significant reversals of government policy, one of which led — though not intentionally — to the creation of what is now known as the *Chevron* doctrine.

THE *CHEVRON* TWO-STEP

At issue in *Chevron v. Natural Resources Defense Council* was whether one of the new administration's revised EPA regulations was based on a "reasonable construction of the statutory term 'stationary source,'" as that term was used in the Clean Air Act Amendments of 1977. (*Chevron v. Natural Resources Defense Council* (1984) 467 U.S. 837, 840.) More specifically, the new regulations adopted a "plantwide definition" that allowed factories to install or modify individual pieces of equipment within a single "industrial grouping" without meeting the "stringent" permitting conditions imposed by the Amendments. (*Ibid.*) The NRDC alleged that this definition was contrary to the intent of the Amendments and contradicted prior judicial interpretations of the term, and the D.C. Circuit agreed. (*Id.* at pp. 841-842.)

Writing for a unanimous Court, Justice Stevens opened his analysis by expounding the now-legendary *Chevron* two-step: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (*Chevron*, *supra*, 467 U.S. at pp. 842–843.)

This test cited both lines of authority described above — the 'independent' line of cases for the first step on the ground that "[t]he judiciary is the final authority on issues of statutory construction," *Chevron*, *supra*, 467 U.S. at p. 843 & fn. 9, and the 'deferential' line of cases for the second step, at pages 843-844 and footnote 11. But while the first half of this test echoed Justice Cardozo's observation in *Norwegian Nitrogen*, the second half put a thumb on the scale in favor of deference in two ways. First, the *Chevron* test provides that even when "the legislative delegation to an agency on a particular question is implicit rather than explicit" due to statutory silence or ambiguity, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." (*Id.* at p. 844.) Second, the *Chevron* test paid no attention to whether the interpretations were "consistent and generally unchallenged."

The philosophical rationale underlying *Chevron* is that policymaking should be left to the elected branches of government. (*Chevron*, *supra*, 467 U.S. at pp. 865–866.) Thus, where an interpretive dispute "really centers on the wisdom of [an] agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress ... federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." (*Id.* at p. 866.) This was a departure from prior decisions, which generally justified deference on pragmatic grounds. In *Norweign Nitrate*, for example, Justice Cardozo wrote that "[t]he practice [of deference] has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." (*Norweign Nitrate*, *supra*, 288 U.S. at p. 315.)

Notwithstanding these differences, Justice Stevens regarded the *Chevron* test as nothing more than a restatement of existing law, and legal historians have concluded that his colleagues on the Court likewise did not intend for *Chevron* to be a landmark decision. (*See* Thomas W. Merrill, *The Story of Chevron* (2014) 66 Admin. L. Rev. 253.) Perhaps this is why the analytical sections of the *Chevron* decision do not strictly follow the two-step test. Despite this, the two-step test (and its rationale) were quickly embraced by Reagan Administration lawyers and in turn applied by the D.C. Circuit — in particular by Judge-cum-Justice Scalia. As of this writing, the case has been cited by 18,540 judicial decisions and 3,589 administrative decisions.

The vitality of the decision has ebbed, however. First, the Supreme Court carved a significant subset of cases out of the *Chevron* doctrine by creating what is often called "*Chevron* step zero." At "step zero," courts must first determine whether the agency interpretation at issue was promulgated in connection with authority "to

make rules carrying the force of law." If it was not, then *Chevron* deference does not apply. (See *United States v. Mead Corp.* (2001) 533 U.S. 218.) More recently, the Supreme Court carved out another key subset of cases through its development of the "major questions doctrine." As described by Chief Justice John Roberts in a case that never cited *Chevron*, this doctrine applies to "extraordinary cases" where "agencies assert[] power beyond what Congress could reasonably be understood to have granted." (*W. Virginia v. Env't Prot. Agency* (2022) 597 U.S. 697, 723–724; see also *Biden v. Nebraska* (2023) 143 S.Ct. 2355, 2375–2376.)

Then, in the Court's 2023 term, the Supreme Court granted cert in two cases explicitly presenting the question whether the Court should overrule or narrow the *Chevron* doctrine.

THE *LOPER BRIGHT* AND *RELENTLESS* ARGUMENTS

At issue in *Loper Bright v. Raimondo* and *Relentless Inc. v. U.S. Department of Commerce* is whether the National Marine Fisheries Service is permitted to require commercial fishers to pay certain costs associated with federal monitoring. In *Loper Bright*, the D.C. Circuit applied the *Chevron* test, finding at step one that the statute underlying the regulation "suggests" the authority to require the payments, and finding at step two that even to the extent there is statutory silence, the agency's interpretation is reasonable. (*Loper Bright v. Raimondo* (D.C. Cir. 2022) 45 F.4th 359, 366, 368–370.) In *Relentless*, the First Circuit found the statute ambiguous at step one but had "no trouble finding" the agency's interpretation reasonable at step two. *(Relentless Inc. v. U.S. Department of Commerce* (1st Cir. 2023) 62 F.4th 621, 634.)

On appeal to the Supreme Court, the fishers contend that the *Chevron* doctrine violates "the basic division of labor" and separation of powers set forth in the Constitution by abdicating judicial and legislative responsibilities to the executive branch and undermines due process by favoring administrative agencies over those who sue them. They also blame *Chevron* for the fact that "Congress does far less than the Framers envisioned and the executive branch does far more." The fishers contend that *Chevron* is not entitled to *stare decisis* and call for the doctrine to be overturned (or, as they say on reply, that the Court "let lower courts and citizens in on the news" that it has long been abandoned, given that the Supreme Court has not cited the case since 2016). In the alternative, the fisherman ask that the Court narrow the doctrine so that it does not apply where the statute is "silent or ambiguous with respect to the specific issue" and therefore any "legislative delegation to an agency on a particular question is implicit rather than explicit." (See *Chevron*, *supra*, 467 U.S. at pp. 843-844.)

The United States advocates for retention of the *Chevron* doctrine in part based on the original rationale for the decision ("greater political accountability for regulatory policy") and in part on the pragmatic grounds that justified deference in the past (because it "gives appropriate weight to the expertise, often of a scientific or technical nature, that federal agencies can bring to bear in interpreting federal statutes" and "promotes national uniformity in the administration of federal law"). The United States contends that *Chevron* is entitled to *stare decisis* as "a bedrock principle of administrative law" that is rooted in "a long tradition of deference reaching back to the earliest years of the Republic," and notes that at no point in history has there ever been a rule of *de novo* review of all agency interpretations. With respect to statutory silence, the United States contends that "it is entirely sensible to presume that when Congress has not itself clearly answered an interpretive question in a statute, it intends for its vesting of rulemaking or adjudicatory authority in an agency — and the agency's reasonable statutory interpretation in the exercise of that authority — to be respected by the courts."

At argument, Justices Sotomayor, Kagan, and Jackson seemed inclined to retain *Chevron*, while Justices Thomas, Alito, Gorsuch, and Kavanaugh seemed inclined to overrule or at least substantially narrow the doctrine. Chief Justice Roberts asked only two substantive questions — whether the Court had effectively overruled *Chevron* by failing to cite it (which he seemed to indicate that it had not) and why the Court need reach the issue given the fishers' contention that they win at step one (to which the fishers responded that "nobody knows where step one ends"). Justice Barrett asked, among other things, whether overturning *Chevron* would lead to a flood of re-litigation of *Chevron* cases, and why a different result should obtain than in *Kisor v. Wilkie*, where the Court narrowed — but notably did not overturn — the *Auer v. Robbins* doctrine of deference to agency interpretations of agency regulations. (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400.)

The central issue at argument was what presumption courts should apply when a statute is silent or ambiguous. As above, the *Chevron* doctrine presumes in such cases that Congress implicitly intended to delegate legislative authority to the agency, and concludes based on that presumption that judicial deference to the agency's reasonable interpretation is consistent with Congressional intent. The fishers dispute that presumption, arguing that silence should be construed as Congressional intent for *courts* to decide and therefore *de novo* review should apply absent an express delegation of interpretive authority to the agency by Congress. The Solicitor General defended the presumption as arising logically from the fact of Congress having "left that gap or ambiguity" in the statute, whether intentionally or otherwise, "and coupled it with [an] express authorization to the agency to carry that statute into effect." Several questions addressed methods by which Congress could expressly state its intent to delegate interpretive authority.

The justices and counsel also discussed the distinction between legal questions and policy questions. The fishers asserted that every question implicating statutory interpretation is a question of law, including the question at issue in *Chevron* itself — notwithstanding that the Court in *Chevron* thought otherwise. In response to questions about whether the concern stated in *Chevron* about judicial involvement in policymaking was still valid, the fishers argued that this concern "has diminished over time" because "we've come a long way in statutory interpretation. ... we now, I think, are all textualists." The Solicitor General contended that this concern was still valid and argued that even to the extent these issues are legal questions, courts should not suggest that the answer is dictated by the statute because *Chevron* step two only applies where the statute is by definition silent or ambiguous.

Throughout the argument, the justices raised several practical concerns about *Chevron*, including the fishers' argument that *Chevron* is a "reliance-destroying" doctrine that encourages dramatic reversals in agency interpretation with each partisan change of administration. The fishers advocated for application of the rule set forth in *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, under which courts are free to choose whether to defer to an agency interpretation based on their independent judgment of the persuasiveness of that interpretation. The fishers noted that unlike *Chevron*, the *Skidmore* doctrine takes into account whether the agency's interpretation was close in time to passage of the statute and whether the interpretation is consistent with prior agency interpretations. Several questions focused on the extent to which the *Skidmore* doctrine constitutes true "deference," rather than merely recognition of an agency's persuasive power.

In rebuttal, the Solicitor General acknowledged that there are "practical concerns that have been raised about *Chevron*," but argued that "those concerns are manageable" and suggested, as Justice Barrett did, that "the right thing to do here" is what the Court did in *Kisor v. Wilkie*: "clarify and articulate the limits of *Chevron* deference without taking the drastic step of upending settled precedent." Particularly given that even the fishers acknowledged that overturning *Chevron* could lead to re-litigation of many of the thousands of decisions applying the doctrine, that may well be the most likely outcome.

CONCLUSION

Oral arguments in *Loper Bright* and *Relentless* made clear that the central question of which branch of government will take the lead in filling the gaps of ambiguous statutes is as important, and as hotly disputed, as ever. Whatever the outcome, the Supreme Court's decision will not only become the new tentpole of administrative law, but have a wide-ranging impact on millions.

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