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Legal Sidebar

Chevron at the Bar: Supreme Court to Hear Challenges to *Chevron* Deference

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In what has the potential to be one of the most consequential decisions in administrative law, the Supreme Court is scheduled to evaluate the constitutionality of the *Chevron* framework in its 2023 term in a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce*. The *Chevron* doctrine requires federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutory provisions the agency administers.

For the better part of four decades, *Chevron* has been one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. As one scholar put it: *Chevron* "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever." For the past decade or so, however, *Chevron* has come under increasing fire from some corners of the federal judiciary and legal academia. Once cited often and approvingly by a majority of Supreme Court Justices, *Chevron* appears to have recently fallen into desuetude at the Court. Over the past several terms the Court has declined to apply or even cite *Chevron* in cases where it may once have governed. Other methods of statutory interpretation, such as the major questions doctrine, appear to have displaced *Chevron*, at least in some instances. *Chevron*'s absence at the Court has not gone unnoticed either, with several Justices commenting on *Chevron*'s absence as evidence that it should be overruled.

Both *Loper* and *Relentless* raise the same challenge to a decision by the National Marine Fisheries Service (NMFS) to require commercial fishing vessels to pay for observers to ensure compliance with regulations governing the herring fishery in the Atlantic. NMFS issued the regulation based on its interpretation of the Magnuson-Stevens Act (MSA), which empowers NMFS through delegated authority from the Department of Commerce to regulate commercial fishing. The petitioners—four fishing companies in *Loper* and two vessel owners in *Relentless*—contend that the MSA is silent on whether NMFS has authority to impose industry-funded monitoring. The petitioners ask the Court to overrule *Chevron* or, short of that, to limit its application in situations where a statute is silent "concerning controversial powers expressly ... granted elsewhere in the statute." As *Loper* and *Relentless* raise the same challenge to the same agency action, for the purposes of describing the statutory and procedural background, this Sidebar will only refer to the *Loper* appeal.

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Background

The *Chevron* Framework

Under the *Chevron* framework, a court must defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation is reasonable. The framework takes its name from a 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, which sets out a two-step process for determining whether a court must defer to an agency's statutory interpretation.

The *Chevron* framework of review usually applies if Congress has given an agency the general authority to make rules with the force of law. If a court determines that *Chevron* applies, at step one it will use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court. If the statute is clear on its face with respect to the issue before the court, the court must implement Congress's stated intent. If the court concludes instead that a statute is silent or ambiguous with respect to the specific issue, the court then proceeds to *Chevron*'s second step. At step two, courts must defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own. The *Chevron* framework rests on several related assumptions, including that statutory ambiguity indicates a congressional delegation of interpretive authority, that agencies have more expertise than courts to interpret the statutes they administer, and that agencies are politically accountable and therefore have more claim to make policy than courts.

Loper's Path to the Supreme Court

Congress passed the MSA to "conserve and manage the fishery resources ... of the United States." The MSA authorizes NMFS to implement a fishery management program to achieve these goals. The MSA creates eight fishery management councils, each responsible for a different region. Councils can propose fishery management plans that NMFS can approve or deny. The MSA requires that a plan include certain provisions while making other requirements optional. Plans "shall contain the conservation and management measures" that are "necessary and appropriate for the conservation and management of the fishery." Among the discretionary provisions, plans "may require that one or more observers be carried on board a vessel ... , for the purpose of collecting data necessary for the conservation and management of the fishery." The MSA also permits plans to include measures "determined to be necessary and appropriate for the conservation and management of the fishery."

The MSA expressly permits or requires vessels to bear the cost of observers in three instances. First, the North Pacific Council may station observers on vessels and establish a system of fees to pay for those observers. Second, for certain programs that specify the quantity of allowable catch—known as *limited access privilege programs*—the MSA requires observers to be stationed on vessels and requires those vessels to cover the cost. Third, in cases where a foreign vessel is fishing in the U.S. exclusive economic zone, the MSA requires an observer to be stationed on the vessel and requires the vessel to cover the cost.

In 2020, prompted by amendments proposed by the New England Council (the council responsible for the Atlantic herring fishery), NMFS promulgated an "omnibus amendment" to all New England fishery management plans. The amendment requires fishing vessels to bear the cost of observers in cases when Congress has not appropriated the funds to cover the costs.

Four fishing companies that participate in the Atlantic herring fishery filed suit against NMFS, alleging that the MSA did not authorize NMFS to mandate industry-funded monitoring. The district court found in favor of NMFS, holding that *Chevron* governed its analysis and that the provisions of the MSA that apply to the New England Council unambiguously authorizes industry-funded observers. A divided panel of the

U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) affirmed. As with the district court, the D.C. Circuit felt bound to apply *Chevron* but found the MSA silent as to whether NMFS could require industry-funded monitors in the Atlantic herring fishery. The court then proceeded to step two of *Chevron*, finding NMFS's interpretation reasonable. The court explained that the MSA's "necessary and appropriate" provision, combined with the authority to require vessel monitors, rendered NMFS's choice to require industry to fund the monitors reasonable.

The Petitioners' Case Against *Chevron*

The fishing companies raise three constitutional claims before the Supreme Court. First, they argue that *Chevron* violates Article III—which vests all judicial power in the federal courts—by shifting interpretive authority of federal law from the courts to the executive branch. Second, *Chevron* violates Article I when it functions to permit agencies to formulate policy, because Article I vests Congress with all lawmaking power. Finally, *Chevron* violates due process by tipping the scales in favor of the federal government in litigation with private citizens.

The petitioners' Article III argument rests at its core on an understanding that if any power is included in the judicial power vested in the federal courts by Article III, it is the power to render authoritative interpretations of federal law. In American law, this proposition traces its origin to the foundational 1803 case *Marbury v. Madison*. In *Marbury*, Chief Justice John Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is." The petitioners argue that it is impossible to square *Chevron* with this interpretation of Article III because, where *Chevron* deference applies, a federal court must defer to the agency's interpretation rather than rendering its own interpretation.

Petitioners' related Article I argument centers on Article I's Vesting Clause, which vests all lawmaking power in Congress. The *Chevron* decision rested its outcome on two related assumptions that implicate Congress's lawmaking power. First, as already noted, *Chevron* assumes that an ambiguity or a gap in a statute indicates congressional intent to delegate interpretive authority to the agency. This interpretive authority, the *Chevron* Court reasoned, gives an agency, rather than a court, the space to make policy where Congress did not explicitly specify a policy choice. Keeping politically unaccountable judges out of the "formulation of policy" was one of the main aims of the *Chevron* decision. The petitioners argue, however, that *Chevron*'s recognition that agencies have lawmaking power that courts are bound to respect in some instances raises Vesting Clause problems—specifically, that it violates the *nondelegation doctrine* by unlawfully delegating lawmaking power to administrative agencies. Though a number of current Justices have expressed a desire to apply a more robust form of the doctrine, the Court has relied on it only twice, in a pair of cases from 1935, to strike down a congressional delegation of power to an agency. So long as the statute provides the agency with an "intelligible principle" by which to exercise its discretion, it will pass muster. The petitioners acknowledge this history but assert that the Court has been reluctant to enforce the nondelegation doctrine because the Court has yet to develop a manageable standard for when a delegation to an agency crosses from an administrative function to lawmaking power. According to the petitioners, the Court should not openly endorse delegations of the type *Chevron* enables, even if the Court has yet to develop a standard that would prevent all delegations of lawmaking power.

The petitioners final constitutional argument asserts that *Chevron* violates due process principles by undermining the Constitution's fundamental commitment to fair trials and fair tribunals. The petitioners argue that requiring a court to defer to an agency's interpretation of federal law tilts the scales in favor of the government—the most powerful litigant. To provide a fair trial and fair tribunal, courts must resolve contested terms in a statute independently and without resort to deference.

The Government's Case for *Chevron*

The government's response brief defends *Chevron* as an appropriate, circumscribed, and historically grounded approach to the limitations of the federal courts in interpreting statutes administered by a federal agency. The government contends that when applied appropriately the *Chevron* framework includes sufficient safeguards to ensure that agencies do not have free license to usurp Congress's lawmaking authority. For instance, *Chevron* applies only where the statute is ambiguous. Where Congress has spoken clearly, the statute controls. In cases where the statute is ambiguous, only an agency's *reasonable* interpretation deserves deference. Moreover, *Chevron* applies only when Congress has provided the agency with the authority to speak with the effect of law. Finally, the government argues that the major questions doctrine provides an additional safeguard by limiting *Chevron*'s application where a regulation of major political or economic significance is at issue.

Relying on the original justifications of the *Chevron* framework outlined by the Court in the *Chevron* case itself, the government asserts that *Chevron* plays an important role in keeping courts out of policymaking. Courts, the government argues, have neither democratic accountability nor policy expertise. As the Court has observed, when a statute is susceptible to multiple reasonable interpretations, reconciling conflicting interpretations is "often more a question of policy than law."

The government's response also traces a long line of judicial deference to executive actions dating back to the beginning of the Republic through the *Chevron* decision itself. In a direct response to the petitioners' invocation of *Marbury*, the government points to another one of Chief Justice Marshall's statements from that case: "The province of the court is ... not to enquire how the executive, or executive officers, perform duties in which they have a discretion." The government argues that *Chevron* took this well-established tradition of deference and provided a framework to standardize its application.

The government further argues that none of the petitioners' constitutional arguments are availing. Responding to the petitioners' Article III argument, the government argues that a judicial determination that a statute delegates authority to an agency to resolve an ambiguity or a gap is consistent with Article III's requirement that courts interpret the law. If Congress actually delegated authority to the agency, a court independently determining that a statute's best reading requires delegation is an interpretation that fulfills Article III's requirements.

The government's response to the petitioners' Article I argument notes that the Court has consistently applied the intelligible principle test to nondelegation cases. In its application of that test, the Court has held that agencies may fill in the details of a statutory scheme where Congress has not made a policy choice.

Lastly, in response to the petitioners' due process arguments, the government argues that the Court's judicial due process cases are uniformly directed at the possibility of actual bias on the part of the presiding judge. *Chevron* is unrelated to that analysis. Further, the government argues that it is misguided to argue that *Chevron* unfairly favors the executive branch in litigation, because when courts apply *Chevron* they are giving effect to policy choices made by an executive branch agency subject to the accountability of the President through national elections.

Issues to Consider

The *Chevron* framework raises a number of practical considerations that may affect how the Court approaches the *Loper* case. The federal courts have cited it tens of thousands of times in the past forty years, making it one of the most cited cases in history. The Supreme Court alone has cited *Chevron* 238 times and applied *Chevron* in more than 100 decisions.

Despite its widespread use, however, petitioners argue that the *Chevron* framework is unworkable. The petitioners point to the Court's decision in *United States v. Mead Corp.* as evidence that *Chevron*'s growing complexity has confused courts and litigants to such an extent that it must be scrapped. The Court in *Mead* held that courts must engage in a *Chevron* "step zero" analysis to ascertain whether Congress in fact delegated to the agency the authority to act with the force of law before it can apply *Chevron*. The Court took up this issue on two other occasions (*Christensen v. Harris County* and *Barnhart v. Walton*) but failed to agree on the indicia of implicit congressional delegations. Some have called this trio of cases a "puzzle," while others have noted that lower courts rarely apply *Chevron*'s step zero.

The petitioners also note that courts disagree on when a statute is ambiguous enough to trigger *Chevron*'s second step. If it is difficult to ascertain both when *Chevron* applies and when to move from its first step to its second, the petitioners argue, *Chevron* is too unworkable to be saved.

Nonetheless, the Court may view *Chevron*'s benefits as justifying any difficulties in its application. Courts have become accustomed to applying *Chevron* over the past forty years and apply it regularly. Moreover, *Chevron* has likely taken on its significant role in the federal courts, in part, due to the differential capacity of the Supreme Court and the lower federal courts to engage in independent review of statutory interpretations. While the Supreme Court hears roughly 75 cases per year—a handful of which involve an agency interpretation of law—each lower court might handle thousands of cases per year. The Supreme Court may have time to engage in independent review of each interpretation advanced by an agency, but the lower courts likely do not. Some contend that *Chevron* may save lower courts time by permitting them to engage in meaningful review without having to start from scratch. Removing this tool, they argue, would add to the already heavy burden of the federal courts and could result in lower quality decisions, as generalist judges may lack the time and expertise to deeply engage in complex statutory schemes.

Overruling *Chevron* could be a seismic shift in the relationship between courts and agencies. As the government notes in its brief, Congress has legislated against *Chevron* and could have at any time modified or abolished it. Overruling *Chevron* could also unsettle prior court decisions deferring to agency interpretations as reasonable. It is not clear whether those cases would have to be relitigated if the Court overruled *Chevron*.

It is possible that were the Court to overrule *Chevron*, lower courts might turn to other forms of deference, such as *Skidmore* deference. *Skidmore* deference is generally considered less deferential than *Chevron*. *Skidmore* merely permits the court to weigh the agency's interpretation in proportion to its power to persuade. *Skidmore*, however, has received far less attention from the courts than *Chevron* has and may need additional development by the courts to refine its application.

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