Supreme Court Overturns *Chevron* Doctrine, Expands Power of Judiciary

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On June 28, 2024, the Supreme Court issued its decision for two consolidated cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce*, brought by commercial fishing groups challenging a National Marine Fisheries Service rule. In the decision, the Court overturns the 40-year-old *Chevron* doctrine, which stood for the principle that where Congress has left ambiguities in a federal statute, agencies may interpret the statute in implementing rules, as long as the agency's interpretation is reasonable.[1] In overturning the *Chevron* doctrine, the Court overrules a four-decade precedent, which, in the context of recent decisions by the Court confirms its intent to limit federal agencies' authority to address public health, safety, financial, and environmental protections.[2]

In its opinion, the Court states that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA [Administrative Procedure Act] requires."[3] The Court further states that "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."[4] In the dissent, Justice Kagan calls the decision "Hubris Squared" for the Court's willingness to overturn *Chevron* and, in doing so, dismiss *stare decisis*, inserting the judiciary in the "commanding role" with respect to regulation.[5]

In this piece, we provide an overview of the majority decision and dissent. On our recent CleanLaw podcast episode, Harvard Law professors Jody Freeman and Andy Mergen discuss the potential implications of the decision as well as the other administrative law decisions this term including *Ohio v. EPA*, *Corner Post v. Board of Governors of the Federal Reserve System*, and *Securities and Exchange Commission v. Jarkesy*. Jody Freeman notes, "if you add up these four cases, what you see is a collection of constraints, limitations, obstacles that the Supreme Court has put in place to agencies doing their jobs." She explains that "the Court winds up centralizing power in itself to make not just legal decisions [...] but also to make a lot of policy calls." Andy Mergen highlights that this set of decisions creates "instability [...] for industries that rely on clear signals from the regulators." He adds that

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[1] *See* Jody Freeman, "A Key Ruling Could Weaken U.S. Environmental Protections," *Yale360* (June 12, 2024), https://e360.yale.edu/features/chevron-doctrine-supreme-court.
[2] *See* Jody Freeman and Andrew Mergen, "Will the Supreme Court Show a Little Humility?" *New York Times* (Jan. 18, 2024), https://www.nytimes.com/2024/01/18/opinion/supreme-court-power-federal-agencies.html.
[3] *Loper Bright Enters. et al. v. Raimondo, Sec'y of Commerce, et al.*, No. 22-451, slip op. (S. Ct. June 28, 2024).
[4] *Id.* at 35.
[5] *Id.* at 3 (Kagan, J., dissenting).

"the Court is acting in a way that is truly remarkable in terms of aggrandizing power in itself." In addition to these resources, we will continue to evaluate these decisions and their implications for federal agencies and the private sector, and provide analyses here.

Fishing Regulations Bring *Chevron* to the Court

The petitioners in these consolidated cases from the D.C. Circuit and First Circuit challenged a rule issued under the Magnuson-Stevens Act. The Act states that fishery management plans implemented by the Secretary of Commerce and National Marine Fisheries Service "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."[6] The National Marine Fisheries Service (NMFS) promulgated a rule under which the government would pay for training and administrative costs of the observer and industry would pay for the daily fees. NMFS halted the monitoring program in 2023 and reimbursed the fishermen for the costs incurred while the program was in effect. However, some of the fishermen, represented by lawyers working for Koch-funded Americans for Prosperity, challenged the rule in district court, which upheld the rule and granted summary judgment to NMFS.[7] That decision was upheld in the D.C. Circuit, which agreed with the district court that the rule was reasonable.[8] The Supreme Court granted certiorari together with the *Relentless* case[9]—a similar challenge decided in NMFS's favor by the First Circuit—to consider only whether the *Chevron* doctrine should be overruled or clarified.

Majority Overturns *Chevron*, Calls for APA Review and Recognition of *Skidmore*

The majority's decision, written by Chief Justice Roberts and joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett, overturns the *Chevron* doctrine and directs courts to review agency actions under the APA to ensure that an agency has acted within its statutory authority while respecting agency expertise consistent with *Skidmore v. Swift & Co*.

The majority, quoting *Marbury v. Madison*, states that the judicial function is interpreting the law: "[t]his Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[10] The Court explains that while the judgment of the executive branch warrants "[r]espect," it is limited: "[t]he views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[11] The majority states that it has "made clear, repeatedly, that '[t]he interpretation of the meaning of statutes, as applied to justiciable

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[6] 16 USC §1853(b)(8).
[7] *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82 (D.D.C. 2021).
[8] *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022).
[9] *Relentless, Inc. v. United States Dep't of Commerce*, 62 F.4th 621 (1st Cir. 2023).
[10] *Loper Bright*, No. 22-451, slip op. at 7 (majority opinion).
[11] *Id*. at 9.

controversies,' was 'exclusively a judicial function.' *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 544 (1940) (additional citations omitted)."[12]

The Court then turns to the passage of the APA in 1946, which it explains was meant to serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."[13] APA section 706 lays out the scope of judicial review of agency actions, stating 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."[14] The majority explains that "[t]he APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment" when deciding "*all* relevant questions of law," including when the law itself is ambiguous.[15] The majority relies on both the plain language of APA section 706 and the history of the statute to come to this conclusion.[16] The Court explains that:

> The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140.[17]

While the Court sees APA review as its primary interpretive tool, it also discusses the role of *Skidmore* deference to agency expertise: "'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.[18]

The Court explains that the deference that the *Chevron* doctrine requires "cannot be squared with" the APA.[19] The Court frames the 40-year-old doctrine as "misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[20] The Court reviews the history of the *Chevron* doctrine, which it describes as "unworkable,"[21]

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[12] *Id*. at 10.
[13] *Id*. at 10, quoting *Morton Salt*, 338 U. S., at 644.
[14] 5 USC § 706.
[15] *Loper Bright*, No. 22-451, slip op. at 14 (majority opinion).
[16] *Id*. at 15.
[17] *Id*. at 16.
[18] *Id*. at 10, quoting *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944).
[19] *Id*. at 18-19.
[20] *Id*. at 23.
[21] *Id*. at 30.

"intricate,"[22] and "indeterminate and sweeping,"[23] concluding that "[f]our decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is.' *Marbury*, 1 Cranch, at 177."[24]

The majority opinion responds to the dissent's argument that APA section 706 does not specify a standard of review by courts that would be inconsistent with *Chevron* by noting the context and history of courts interpreting statutes and by stating that Congress did not need to "expressly reject a sort of deference the courts had never before applied," concluding that "some things 'go without saying.'"[25]

Dissent Criticizes Judicial Power Grab and Disregard of Agency Expertise

The dissent, authored by Justice Kagan and joined by Justices Sotomayor and Jackson[26], argues that "[a]t its core, *Chevron* is about respecting that allocation of responsibility—the conferral of primary authority over regulatory matters to agencies, not courts."[27] Justice Kagan explains that the *Chevron* doctrine represents the "backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades."[28] The dissent explains that the Court has understood *Chevron* as "rooted in a presumption of legislative intent" and embedded in democratic decision making because "[a]gencies report to a President, who in turn answers to the public for his policy calls" while "courts have no such accountability and no proper basis for making policy."[29]

The dissent argues that the decision "flips the script" by amassing power in the judiciary: "[a] rule of judicial humility gives way to a rule of judicial hubris."[30] Justice Kagan writes that, "[a] longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power."[31]

Justice Kagan asserts that *Chevron* is consistent with congressional intent, the text of the APA, and case law, noting that "abandoning *Chevron* subverts every known principle of *stare*

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[22] *Id*. at 29.
[23] *Id*. at 32.
[24] *Id*.
[25] *Id*. at 15, fn. 4 (majority opinion) citing *Bond v. United States*, 572 U. S. 844, 857 (2014). The decision includes two concurrences that would go further on separation of powers and *stare decisis*. Justice Thomas writes separately to "underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers," arguing that the doctrine required judges to abdicate their Article III power.[25] Justice Gorsuch writes separately to "address why the proper application of the doctrine of *stare decisis* supports"[25] overturning *Chevron* and draws three lessons about *stare decisis* to demonstrate why he believes overturning *Chevron* is warranted.
[26] Justice Jackson only joined the dissent as to the *Relentless* decision.
[27] *Id*. at 31. (Kagan, J., dissenting).
[28] *Id*. at 2.
[29] *Id*. at 2.
[30] *Id*. at 3.
[31] *Id*. at 4.

decisis."[32] Justice Kagan explains that the doctrine is premised on "a presumption about legislative intent" that when a statute is silent or ambiguous, the agency will "make a reasonable choice," positioning courts as "serving only as a backstop to make sure the agency makes a reasonable choice among the possible readings."[33] Thus, "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," and Congress "can always refute that presumptive choice."[34] She argues that there is a congressional presumption in favor of agency interpretation, when reasonable, for several reasons, including agencies' technical and scientific expertise, experience with complex regulatory frameworks, and ability to resolve questions of policy.[35] The dissent explains that agencies have "interpretive primacy [...] when—but only when—it is acting, as Congress specified, in the heartland of its delegated authority."[36]

The dissent also takes on the majority's argument that APA section 706 "makes clear" that agencies are not entitled to deference. Justice Kagan argues that the APA is "perfectly compatible with *Chevron* deference."[37] She explains that section 706 does not specify a standard of review and therefore a deferential standard of review under *Chevron* is consistent with the statute. The dissent also reviews the pre- and post-APA caselaw and finds that the Court never indicated that section 706 might mean that courts could not defer to agencies.[38]

In addition, Justice Kagan criticizes the majority's rejection of *stare decisis* in this case, arguing that "*Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long" and that the majority has no meaningful justification for this move.[39] She writes:

> The majority cannot destroy one doctrine of judicial humility [*Chevron*] without making a laughing-stock of a second [*stare decisis*]. (If opinions had titles, a good candidate for today's would be Hubris Squared.) Stare decisis is, among other things, a way to remind judges that wisdom often lies in what prior judges have done. It is a brake on the urge to convert 'every new judge's opinion' into a new legal rule or regime.[40]

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[32] *Id*. at 24-25.
[33] *Id*. at 7-8.
[34] *Id*.
[35] *Id*. at 10-11.
[36] *Id*. at 12.
[37] *Id*. at 15.
[38] *Id*. at 19-20.
[39] *Id*. at 4, 24-25.
[40] *Id*. at 3.

Throughout the dissent, Justice Kagan grounds her analysis in the "problem that gave rise to *Chevron*,"[41] by describing instances in which there are "gaps or ambiguities" in statute, for example where the subject matter is too "specialized and varying" to "capture in its every detail,"[42] and agency expertise is, in her view, needed. For example, she writes, "When does an alpha amino acid polymer qualify as a 'protein'? How distinct is 'distinct' for squirrel populations? What size 'geographic area' will ensure appropriate hospital reimbursement?"[43] Returning repeatedly to these and other real examples of the need for agency expertise to protect the public interest, Justice Kagan underscores how destabilizing the majority's opinion will be.

Looking Ahead

Despite the majority's assurance that cases decided under *Chevron* are still good law,[44] the dissent explains that the decision "will cause a massive shock to the legal system, 'cast[ing] doubt on many settled constructions' of statutes and threatening the interests of many parties who have relied on them for years. (citation omitted)."[45] We have already seen courts start to wrestle with the implications of the decision.[46] Jody Freeman notes on CleanLaw that the decision has "made it harder for agencies to do their jobs in every respect at every stage of the regulatory process. [It will be] harder to adopt rules that solve contemporary problems in a modern society and economy, harder to implement those rules at every step, harder to enforce those rules the way that they have traditionally done through administrative process and penalties, and harder to defend the rules against legal challenge." Nonetheless, Andy Mergen explains, "government can make good arguments and win, and I think they will win a lot of cases," noting that agencies "know how to write rules that will survive" this post-*Chevron* standard of review.

For future administrative law cases, the majority suggests that it may be willing to accept agency discretion in some instances when authorized by statute: "the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes."[47] The Court goes on to explain, "some statutes 'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U.S. 416, 425 (1977) [...] Others empower an agency to prescribe

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[41] *Id*. at 4.
[42] *Id*. at 5, quoting *Kisor*, 588 U. S., at 566 (plurality opinion).
[43] *Id*. at 13.
[44] The majority writes, "we do not call into question prior cases that relied on 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. See *CBOCS West, Inc. v. Humphries*, 553 U. S. 442, 457 (2008)." *Id*. at 34.
[45] *Id.* at 24 (Kagan, J., dissenting).
[46] For example, in oral argument the Fifth Circuit questioned whether to remand a Department of Labor rule upheld in district court under the *Chevron* doctrine. *Utah v. Su*, 5th Cir. No. 23-11097, oral argument July 9, 2024.
[47] *Id*. at 6 (majority opinion).

rules to 'fill up the details' of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' *Michigan v. EPA*, 576 U.S. 743, 752 (2015)."[48] It is unclear how this interpretive role will operate in practice and how lower courts will interpret the Supreme Court's direction as they review agency actions, creating uncertainty for agencies. However, the Court suggests that if the best reading is that Congress intended to delegate such authority, it will first independently interpret the statute and determine that the statute and such delegation is constitutional. Then, courts will evaluate if the agency engaged in "reasoned decisionmaking" within the boundaries of the statute.[49]

While the majority takes pains to present its ultimate decision as necessary to ensure that courts, and not agencies, interpret the law, the dissent highlights the absurd practical implications of this decision, which will limit agencies' ability to make important technical and policy decisions. As Justice Kagan writes, "[s]ome interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not."[50] She also notes that some "demand a detailed understanding of complex and interdependent regulatory programs, and agencies know those programs inside-out; again, courts do not."[51] Justice Kagan warns that "[i]n every sphere of current or future federal regulation, expect courts from now on to play a commanding role. It is not a role Congress has given to them, in the APA or any other statute. It is a role this Court has now claimed for itself, as well as for other judges."[52]

We will continue to assess the implications of *Loper Bright* and other recent decisions and will post new analyses on the EELP website.

[48] *Id.*
[49] *Id.* at 18, citing *Michigan*, 576 U. S., at 750 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998).
[50] *Id.* at 2 (Kagan, J., dissenting).
[51] *Id.*