Chevron is Dead! Long Live Loper!

By Paul Engel

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- Chevron Deference has been the bane of the constitutional community for decades.
- The decision in Chevron directly violated the Administrative Procedures Act, but that didn't stop the courts from allow executive agencies from rewriting laws.
- While Loper overturned Chevron, I have to wonder if allowing the courts to "fill in the blanks" will be any better?

There are certain legal terms and cases that most people don't know about, at least until they're used to bite someone in the backside. One of those terms is Chevron Deference, or the Chevron Doctrine. It comes from a 1984 case where the Supreme Court came up with the great idea that, when Congress isn't specific, the bureaucrats get to decide. While the court may have overruled Chevron, Loper may not be much better.

Background

The three branches of government have specific powers. The legislative branch writes the law, the executive branch executes the law, and the judicial branch decides controversies. What happens though, when the legislative branch doesn't do a very good job writing the law? Back in 1984, the Supreme Court decided in the case Chevron v. Natural

Resources Defense Council that, when Congress is not specific the executive agency gets to decide. This has led to what many call the Administrative State, where the agencies of the executive branch are the ones making the laws.

Today's case started with a rule about fishing. Specifically, did the National Marine Fisheries Service have the legal authority to make a rule requiring fishing boats to pay for federal observers?

Petitioners Loper Bright Enterprises, Inc., H&L Axelsson, Inc., Lund Marr Trawlers LLC, and Scombrus One LLC are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, 16 U. S. C. §1855(f), which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 et seq. In relevant part, they argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. The District Court granted summary judgment to the Government. It concluded that the MSA authorized the Rule, but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under Chevron.

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The "MSA" the court refers to is the "Magnuson-Stevens Fishery Conservation and Management Act". Lower courts decided, based on the Supreme Court's decision in Chevron, that they should defer to the decision of the National Marine Fisheries Service (NMFS). The question is, was the court's Chevron decision correct?

The Court granted certiorari in these cases limited to the question whether Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., …, should be overruled or clarified. Under the Chevron doctrine, courts have sometimes been

required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. … In each case below, the reviewing courts applied Chevron's framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 et seq., which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 et seq.

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The question before the court sounds relatively simple: Should Chevron be overturned or clarified? That decision though, would have a large impact on how the federal government works.

Chevron Deference

So what is this Chevron Deference people are talking about?

The Court recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time.

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Congress writes the law, but it's up to the President to see that they are faithfully executed. Being made up of humans, many of them attorneys, Congress has a habit of writing long, convoluted laws that don't necessarily match every situations. When an executive branch agency, like the National Marine Fisheries Services issues rules and regulation that align with the laws Congress has written, there is no problem. But what

if the agency goes beyond what the law says?

The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who may well have drafted the laws at issue. United States v. Moore, …. "Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. "[I]n cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." United States v. Dickson.

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This exposes some serious problems, not just in the Chevron Doctrine. First of all, the assumption that those who work in an executive agency are "usually able men, and masters of the subject" is foolish. Yes, there are experts within the agency, but those making the decisions regarding rules and regulations are often political appointees, not lifetime experts. Furthermore, those within said agencies do not represent the people. Loper is a classic example of taxation without representation, since no one in the NMFS was elected, yet they sought to impose a fee, effectively a tax, on fishing boats as a condition of being allowed to fish.

How Chevron Works

Which brings us to how Chevron works.

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning. The question in the case was whether an Environmental Protection Agency (EPA) regulation was consistent with the term "stationary source" as used in the Clean Air Act. 467 U. S., at 840. To answer that question, the

Court articulated and employed a now familiar two-step approach broadly applicable to review of agency action. The first step was to discern "whether Congress ha[d] directly spoken to the precise question at issue." … The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter,"… and courts were therefore to "reject administrative constructions which are contrary to clear congressional intent," … But in a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand, a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." … Instead, at Chevron's second step, a court had to defer to the agency if it had offered "a permissible construction of the statute," … even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," … Employing this new test, the Court concluded that Congress had not addressed the question at issue with the necessary "level of specificity" and that EPA's interpretation was "entitled to deference." …

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Chevron was unique. Of the nine justice on the Supreme Court, only six of them actually decided the case. Justices Marshall and Rehnquist were not part of the consideration of the case, and justice O'Connor did not participate in the decision. All six of the justices who decided the case agreed with it, including its two-step approach. First, If Congress was clear in what they meant, then the courts were to reject any act by the agency that contradicted said intent. If, however, the law was silent or ambiguous, the court was to defer to the agency's interpretation.

Notice, the court once again made up "law" out of thin air. There is nothing in the Constitution or laws of the United States that delegate the interpretation of laws to the

executive branch. In fact, the court actually ignored the law.

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." … The APA prescribes procedures for agency action and delineates the basic contours of judicial review of such action. And it 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. As relevant here, the APA specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, 5 U. S. C. §706 (emphasis added)—even those involving ambiguous laws. It prescribes no deferential standard for courts to employ in answering those legal questions, despite mandating deferential judicial review of agency policymaking and factfinding. … And by directing courts to "interpret constitutional and statutory provisions" without differentiating between the two, §706, it makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference. The APA's history and the contemporaneous views of various respected commentators underscore the plain meaning of its text.

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All the way back in 1946, Congress saw a need to check the powers of the administrative state. The Administrative Procedures Act specifically states that it's the courts, not agencies, that answer questions about the law. By telling the court to interpret both the constitution and laws, they also prohibit the agencies from doing so.

The Mistake in Chevron

The 1984 court erred in another way as well, in the

distinction between implicit and explicit delegation of power.

Chevron cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies. That presumption does not approximate reality. A statutory ambiguity does not necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. Many or perhaps most statutory ambiguities may be unintentional. And when courts confront statutory ambiguities in cases that do not involve agency interpretations or delegations of authority, they are not somehow relieved of their obligation to independently interpret the statutes. Instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity. But in an agency case as in any other, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. … It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.

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The Constitution uses explicit, not implicit, delegation of powers, as seen in the Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment X

That leaves no room for anyone to exercise implicit powers; they must be explicitly delegated. Furthermore, the power to write laws is vested solely in Congress.

All legislative Powers herein granted shall be vested in a

Congress of the United States

U.S. Constitution, Article I, Section 1

Which means executive agencies have no power, implicit or explicit, to make, modify, or interpret laws to their own understanding. For that matter, neither do courts have the power to make or modify laws, only to interpret what is written.

The 1984 court assumed that those making the decision in the agencies would have special competence in their area of expertise, an assumption that has been shown to be flawed. However, today's court recognizes that those agencies do not have any competence in dealing with legal ambiguities.

Perhaps most fundamentally, Chevron's presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. Chevron gravely erred in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

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The court then pointed out that political actors are not suited to interpreting laws.

Finally, the view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken because it rests on a profound misconception of the judicial role. Resolution of

statutory ambiguities involves legal interpretation, and that task does not suddenly become policymaking just because a court has an "agency to fall back on." … Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. To stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.

By forcing courts to instead pretend that ambiguities are necessarily delegations, Chevron prevents judges from judging.

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Dissent

It shouldn't be a surprise that not all of the justices agreed. Justice Kagan wrote a dissenting opinion, which was joined by Justices Sotomayor and Jackson

[I]f the court finds, at the end of its interpretive work, that Congress has left an ambiguity or gap, then a choice must be made. Who should give content to a statute when Congress's instructions have run out? Should it be a court? Or should it be the agency Congress has charged with administering the statute? The answer Chevron gives is that it should usually be the agency, within the bounds of reasonableness. That rule has formed the backdrop against which Congress, courts, and agencies—as well as regulated parties and the public—all have operated for decades. It has been applied in thousands of judicial decisions. It has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.

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Once again, we see justices placing their own tradition above the law. According to Justice Kagan, we should leave the Chevron Doctrine in place not because it is constitutional or was enacted by law, but because it's been around for forty years. In fact, she goes further, by claiming Chevron is giving deference is what Congress wants.

And the rule is right. This Court has long understood Chevron deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes.

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If Congress wanted the executive agencies to fix their imperfectly written statues, why did they give the power to make such interpretations to the courts?

To the extent necessary to decision and when presented, 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.

5 USC §706 – Administrative Procedures Act

Justice Kagan does point out one area of concern, but not in the way she seems focused on.

Today, the Court flips the script: It is now "the courts (rather than the agency)" that will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself

decision-making authority Congress assigned to agencies. The Court has substituted its own judgment on workplace health for that of the Occupational Safety and Health Administration; its own judgment on climate change for that of the Environmental Protection Agency; and its own judgment on student loans for that of the Department of Education. … But evidently that was, for this Court, all too piecemeal. In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar. It defends that move as one (suddenly) required by the (nearly 80-year-old) Administrative Procedure Act. But the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.

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Yes, the court has effectively moved interpretive power, and by it the power to modify law, from the executive branch to the courts. Justice Kagan seems quite offended by the idea, claiming that the court has substituted its judgment above OSHA, EPA, and the Dept. of Education. I personally find that list interesting, since the Constitution does not delegate the power to create any of those agencies to the United States in the first place. She also seems to be upset that a 40 year old decision of the court with absolutely no constitutional or statutory basis, is being overturned by an actual law passed by Congress and signed by the President of the United States, simply because it is 80 years old.

Chief Justice Roberts had a response to the dissent's position.

The dissent ends by quoting Chevron: "'Judges are not experts in the field.'" … That depends, of course, on what the "field" is. If it is legal interpretation, that has been,

"emphatically," "the province and duty of the judicial department" for at least 221 years. … The rest of the dissent's selected epigraph is that judges "'are not part of either political branch.'" (quoting Chevron, 467 U. S., at 865). Indeed. Judges have always been expected to apply their "judgment" independent of the political branches when interpreting the laws those branches enact. … And one of those laws, the APA, bars judges from disregarding that responsibility just because an Executive Branch agency views a statute differently.

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Interesting. One of the major complaints about Chevron is that it places politics above the law. Rather than looking for experts to interpret the laws Congress makes, Justice Kagan and the rest of the dissent seem more than happy to have political appointees making up the rules for political reasons rather than legal ones.

Conclusion

The overturning of Chevron is not the death knell to the Administrative State some pundits have been promoting. It is, however, a healthy blow for the rule of law.

Chevron has proved to be fundamentally misguided. It reshaped judicial review of agency action without grappling with the APA, the statute that lays out how such review works. And its flaws were apparent from the start, prompting the Court to revise its foundations and continually limit its application.

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Chevron was a mistake from the beginning. It ignored the law in a misguided attempt to move lawmaking power into the executive branch, thus establishing what we now call the

Administrative or Deep State. Removing that power from the Administrative State can, over time, restore the executive branch to its proper role of executing laws, not establishing policy.

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. And 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.

Because the D.C. and First Circuits relied on Chevron in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

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I do have a concern. Now that the courts are expected to infer what Congress meant when it was silent or ambiguous, we have a similar problem, just with another branch of government. What is to keep the courts from "interpreting" the law to mean something exactly the opposite of what Congress wrote? After all, that is exactly what they did in Chevron in the first place. All the more reason for We the People to demand Congress write better laws, and to punish those in the executive and judicial branches for assuming that powers are implied rather than explicitly delegated.

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