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# Chevron's Demise Would Check the Administrative State's Expansion

**by**

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The Supreme Court has placed the notorious *Chevron* deference doctrine on a death watch. It's demise, if it comes to pass, bodes ill for further unchecked expansion of the administrative state.

Under the *Chevron* doctrine, if courts determine that a statute administered by a federal agency is ambiguous, they must defer to any agency interpretation of the statute that is reasonable. Indeed, as the Court put it in *Chevron U.S.A., Inc. v. Natural Resources Defense Council (1984)* nearly four decades ago, courts are to accord not just mere deference, but "controlling weight" to agency decisions interpreting ambiguous statutory provisions.

There is little doubt that *Chevron* deference has facilitated the rapid expansion of the administrative state. In *City of Arlington, Texas v. FCC (2013)*, when the Supreme Court ruled that judges must defer to an agency's interpretation of the outer bounds of its own jurisdiction, Chief Justice John Roberts, in dissent, emphasized what everyone already knew –

that the administrative state “wields vast power and touches almost every aspect of daily life.” Calling *Chevron* deference a "powerful weapon in an agency's regulatory arsenal," he lamented that "the federal bureaucracy continues to grow," observing that in the fifteen years prior to 2013, Congress had created more than 50 new agencies.

In a major law review article published only three months ago, I predicted, along with my co-author Andrew Magloughlin, that *Chevron's* complete absence from recent key Supreme Court decisions involving important statutory interpretation questions could "signal *Chevron's* demise or at least the shrinking of its domain." For example, in *NFIB v. Department of Labor, OSHA (2022)*, the Court held OSHA exceeded its authority under the Occupational Health and Safety Act to set "workplace safety standards" when the agency imposed a wide-ranging employee vaccine mandate. Tellingly, the Biden Administration's Solicitor General didn't seek *Chevron* deference or mention it in her brief, nor did any Justice in their opinions.

The Supreme Court didn't keep me waiting long, granting a petition for review in Loper Bright Enterprises v. Raimondo on May 1, specifically to consider whether *Chevron* should be overruled, or at least its reach curtailed.

It should be overruled.

First and foremost, *Chevron* deference is at odds with the tripartite separation of powers at the core of our Constitution's structure. In the early days of the Republic, Chief Justice John Marshall famously proclaimed in Marbury v. Madison (1803), “[i]t is emphatically the province and duty of the judicial department to say what the law is.” This comports with the understanding taught in every high school civics course – where such courses still exist! – that Congress enacts the laws, the Executive Branch implements them, and the Judiciary interprets them.

Surprisingly, Justice John Paul Stevens, in his opinion for the Court in *Chevron*, did not even mention *Marbury v. Madison* or Chief Justice Marshall's famous maxim.

Our nation's Founders understood that the Constitution's separation of powers, as James Madison put it in Federalist No. 51, "is essential to the preservation of liberty." And in Federalist No. 47, Madison warned that the accumulation of powers in one branch at the expense of another "may justly be pronounced the very definition of tyranny."

In its own way, *Chevron* deference rests in part on a purported separation of powers rationale. The idea is that in adopting an ambiguous statutory provision, Congress implicitly intends for the agency to which authority has been delegated to "fill in the gaps." And because agencies, as part of the executive branch, are more politically accountable than judges, they should be making policy choices.

And in part *Chevron* rested on the notion that agencies, rather than courts, possess the expertise to make the policy choices that Congress itself didn't make when it adopted statutes with ambiguous provisions.

While these are not frivolous rationales, they are not sufficient to overcome *Chevron's* problems. It's true that agency bureaucrats may be more politically accountable than judges, but they are not more politically accountable than the Members of Congress who enact our laws. If Congress adopts ambiguous laws, even with the implicit intent of passing the buck to unelected agency bureaucrats to make difficult policy choices that the Representatives and Senators prefer to avoid, that's not a sound reason for courts to acquiesce in diminishing the responsibility, and the concomitant accountability, that the Constitution assigns to Congress for the lawmaking function.

The real problem with *Chevron* is not that the Court said that agency interpretations of their statutory authority should receive any deference, but that the deference to be accorded is so strong – "controlling" – as to be outcome-determinative in virtually all cases. Prior to the 1984 *Chevron* decision, courts frequently accorded some degree of deference to agency decisions under the so-called *Skidmore v. Swift & Co.* (1944) deference doctrine. Following *Skidmore*, the deference due an agency's decision is based on the degree of the agency's care; the agency's consistency, formality, and relative expertise; and the persuasiveness of the agency's position.

This circumstance-specific deference analysis, more nuanced and less controlling than *Chevron* deference, doesn't implicate the separation of powers concerns raised by *Chevron*. At the same time, it allows a reviewing court to consider, to the extent warranted, the agency's expertise, one of *Chevron's* supporting rationales.

James Byrnes, little-remembered today, amazingly served as governor of South Carolina, U. S. Senator, Supreme Court Justice, and Secretary of State under President Truman. So, when he remarked that "the nearest approach to immortality on earth is a government bureau," he knew a thing or two about government.

If the Supreme Court overrules *Chevron* next year when it decides the *Loper* case, this likely won't mean the end of any existing federal agencies. But with the elimination of the requirement that judges give controlling weight to agencies' decisions regarding their own power, *Chevron's* demise likely would curtail the ongoing expansion of the administrative state.

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