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Chevron's Demise Curbs Agency Power, Boosts Congress's

by

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As advertised, the Supreme Court's overdue burial of the forty-year-old *Chevron* doctrine on June 28 in *Loper Bright Enterprises v. Raimondo* should help check the ever-present bureaucratic imperative to expand federal agency power. But less frequently observed, it should also incentivize Congress to legislate more often with more specific policy directions. In other words, it should provoke Congress to do a better job of doing its job.

If both outcomes in fact occur – agency power is curbed and Congress is roused to adopt fewer amorphous laws – this should lead to sounder social and economic policies. And, as importantly, the result will be more consistent with the separation of powers that is at the core of the Founders' constitutional design.

The *Chevron* doctrine, as articulated by the Supreme Court, is easy to state: In reviewing an agency's action involving the interpretation of a statute, "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." But if the statute is ambiguous, the court must defer to an agency's reasonable interpretation of the provision.

While it may have been easy enough for Justice John Paul Stevens to announce the doctrine in 1984, almost from the beginning *Chevron* created confusion and conflict in its implementation. Triggered by a determination of statutory "ambiguity," only five years after *Chevron's* adoption, Justice Antonin Scalia asked: "How clear is clear?' Not surprisingly, judges often differ regarding the existence (or not) of ambiguity.

The Supreme Court's decision in *National Cable & Telecommunications Assn.* v. *Brand X Internet Services* in 2005, demonstrated the strength of the deference mandate. There, the Court ruled that *Chevron* even required a reviewing court to defer to an agency's statutory interpretation when a pre-existing judicial precedent held that an ambiguous statute means something different. In other words, an agency's own subsequent interpretation of its regulatory authority would prevail over what a court previously held was a better interpretation.

Writing for the Court's 6-3 majority in *Loper*, Chief Justice John Roberts held that *Chevron* deference is inconsistent with the Administrative Procedure Act (APA), adopted by Congress in 1946 as a framework to govern most procedures involving administrative agencies, including judicial review of their actions. The APA declares that the reviewing court shall "decide all relevant questions of law" and "interpret ... statutory provisions." Just four years after its enactment, in *United States v. Morton Salt* (1950) the Supreme Court asserted that the APA was adopted "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."

In addition to contravening the APA's statutory command, Chief Justice Roberts emphasized that the *Chevron* deference doctrine is fundamentally at odds with the separation of powers at the core of our Constitution. In Federalist No. 78, Alexander Hamilton stated that "the interpretation of the laws is the proper and peculiar province of the courts." And not long after the Constitution's ratification, Chief Justice John Marshall, in *Marbury v. Madison* (1803) – arguably the most important Supreme Court decision ever – famously declared, "it is emphatically the province and duty of the judicial department to say what the law is."

In his *Loper* concurring opinion, Justice Neil Gorsuch explained *Chevron's* conflict with the Constitution's separation of powers scheme this way: "It precludes courts from exercising the judicial power vested in them by Article III to say what the law is. It forces judges to abandon the best reading of the law in favor of views of those presently holding the reins of the Executive Branch."

Breaches of separation of powers are not of mere theoretical interest. The Founders established the three separate branches of government – the legislative, executive, and judicial – each with defined powers, as structural safeguards that would help protect our liberties from power grabs and give the people the means to hold politically accountable those who govern us. By granting unelected executive agency officials the discretion to resolve statutory ambiguities, *Chevron* enabled agencies to overreach by promulgating regulations that Congress may not have intended to allow.

But Congress should not be absolved of all blame. After all, *Chevron's* facilitation of the rapid growth of the administrative state was enabled, in substantial part, by Congress's proclivity to adopt laws lacking sufficient specificity. While overturning *Chevron* returns the power to definitively interpret laws to the courts, where it properly belongs, it also should be a clarion call for Congress to write laws that make its intentions clearer. Of course, if it wishes, Congress can always delegate broad decisional authority to agencies, for example, with respect to technical or otherwise complex issues that rely on highly specialized expertise, as long as it clearly states its intent to do so.

In sum, *Chevron's* demise should curb the expansion of the administrative state that has relied on statutory ambiguities to execute power grabs that affect so many individuals and businesses in so many ways every day. And it ought to incentivize Congress to do its part by providing more specific policy direction when it delegates regulatory authority to administrative agencies.

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