



*Perspectives from FSF Scholars*  
*July 24, 2024*  
*Vol. 19, No. 25*

**Chevron's Demise Re-Aligns Administrative State With Founders' Vision**

by

**Randolph J. May \***

[RealClearMarkets](#)

July 23, 2024

As I explained in this recent RealClearMarkets [commentary](#), the Supreme Court, in [Loper Bright Enterprises v. Raimondo](#), jettisoned the forty-year old *Chevron* deference doctrine.

Under *Chevron*, a court reviewing an administrative agency action was required to defer to an agency's permissible statutory interpretation if the court deemed the statutory language ambiguous. Thus, even if the court determined that the agency's interpretation was not the *best* reading of a statutory provision, the court nevertheless was required to defer to the agency's *second-best* interpretation.

The reaction to *Chevron's* demise among most of the liberal commentariat was colorfully hyperbolic. For example, *Washington Post* columnist Ruth Marcus called it a "kneecapping" of the executive branch's ability to regulate. Law professor Lawrence Gostin called the *Loper* decision a "gut punch" for health, safety and environmental regulation.

---

---

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

Former Democratic FCC Commissioner Michael Copps, who served at the agency from 2001 to 2011, declared: "I think the *Chevron* decision was just a catastrophic reversal of the needs of modern government, taking us back basically to the horse and buggy days."

More troubling, some pundits employed over-the-top rhetoric suggesting the Supreme Court's burial of *Chevron* is anti-constitutional. For example, Norm Ornstein, the American Enterprise Institute's old-line liberal pundit, posted on X that "the US Supreme Court has staged a coup, brazenly seizing power from the other two branches in a way that is utterly contrary to the framers' vision." Writing in the *New York Times*, columnist Kate Shaw claimed abandoning *Chevron* not only was "reckless," but reflected a "retrograde constitutional vision."

In the main, *Chevron*'s demise likely will serve to curb, at least somewhat, overreaching by federal agency bureaucrats armed with court-sanctioned deference. So, I'll chalk up language such as "kneecapping" federal regulation, or administering a "gut punch" to health, safety, and environmental protections, as relatively unobjectionable literary license employed for dramatic effect.

On the other hand, talk of the Court staging a coup "contrary to the framers' vision" and adopting a "retrograde constitutional vision," well, those are more serious charges demanding refutation. These wrong-headed claims are based on a fundamental misunderstanding of our tripartite constitutional system of government rooted in separation of powers. And fundamental constitutional misunderstandings, if left unrefuted, ultimately serve to undermine our liberties.

In [Loper](#), the Court held that the *Chevron* deference doctrine was flatly inconsistent with the Administrative Procedure Act's (APA) direction that a court reviewing an agency action "shall decide all relevant questions of law" and interpret . . . statutory provisions." To put a point on it, in his opinion for the 6-3 majority, Chief Justice John Roberts stated that the APA "specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action." And he emphasized that the APA does not prescribe any deference standard for courts to employ in interpreting statutes.

While the *Loper* ruling rested on the Court's interpretation of the APA's direction, Chief Justice Roberts suggested that it is consistent with, if not dictated by, the Founders' constitutional vision: "The APA thus codifies for the 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."

In [Marbury v. Madison](#), the most famous of all Supreme Court decisions, Chief Justice John Marshall declared, "it is emphatically the province and duty of the judicial department to say what the law is." In this, Marshall was following Alexander Hamilton's dictum in [Federalist No. 78](#) that the final "interpretation of the laws" would be "the proper and peculiar province of the courts."

Cass Sunstein, the prolific liberal legal scholar, was certainly not wrong when, in a [2013 law review article](#), he said *Chevron* created "a kind of *counter-Marbury* for the administrative state." By turning *Marbury* on his head, as Professor Sunstein put it, "*Chevron* seemed to declare that in

the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is.”

It should now be clear that, in abandoning the *Chevron* deference doctrine, the Supreme Court staged no “coup,” nor did it adopt a “retrograde constitution vision.” Indeed, just the opposite. As Justice Clarence Thomas explained in his concurring opinion: “[T]he Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies’ executive power beyond constitutional limits.”

There is no doubt that, as its liberal critics complain, the *Loper* decision may serve to constrain the bureaucratic imperative to expand the administrative state’s reach beyond the bounds of congressionally delegated authority. I hope so. But just as fervently, I hope it is understood that the Court’s decision brings the administrative state into closer alignment with the Founders’ constitutional vision.

\* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Chevron's Demise Re-Aligns Administrative State With Founders' Vision* was published in *RealClearMarkets* on July 23, 2024.