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Loper Bright: Chevron is the Catch of the Day

By Joe Cosgrove Jr.

Deadliest Catch and Wicked Tuna are series¹ that depict the perils of commercial fishing in the Bering Sea and the North Atlantic, respectively. Similarly, Supreme Court sessions provide compelling stories to binge for court watchers. *Loper Bright*² netted a factual situation that led to the undoing of a well-established test in administrative law, applied in thousands of cases³ over four decades.

Executive Summary

Loper Bright involved a requirement that fishermen cover the costs of federal inspectors to ride along on their boats (estimated at \$710/day). The fishermen argued that this National Marine Fisheries Service (NMFS) regulation adversely impacted profitability and exceeded the agency's authority. From these facts, the challengers landed a huge catch for the Supreme Court to weigh—the continued viability of the *Chevron*⁴ deference doctrine,⁵ a true legal Leviathan.⁶

The *Chevron* “two-step” test was designed to apply when an agency attempts to address an ambiguous statute. This doctrine, pronounced in 1984, has been applied in thousands of cases, but court observers were not surprised with *Chevron*'s demise.⁷ However, the harshness of the majority's criticism of *Chevron* in *Loper*



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Bright and implications of the opinion warrant closer review.

Loper Bright focused on familiar law school lessons regarding the federal Administrative Procedure Act (APA) and Article III of the Constitution.⁸ The 6-3 opinion by Chief Justice Roberts highlighted two key reasons for overruling *Chevron*: recognition of “judicial powers” in Article III of the Constitution⁹ and the mandates of the APA in Section 706.¹⁰

Enacted in 1946, the APA¹¹ flowed from “New Deal” concerns designed “as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices”¹² (i.e., the “deep state” today).¹³

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Justice Roberts cited Section 706's introduction:

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.¹⁴

The majority emphasized that judges are mandated by Section 706 to interpret laws, and it is contrary to law for judges to defer to agency interpretations. This principle seems straightforward, yet the *Chevron* decision did not even mention the APA or Section 706!¹⁵ How did *Chevron* become such a dominant doctrine and go essentially unchallenged for decades?

APA Origin Story

The APA remains a significant piece of legislation governing the process by which federal administrative agencies create and enforce regulations.¹⁶ The APA provides a framework for regulating actions of administrative agencies and to ensure public participation and transparency in the rulemaking process.

After establishment of the Interstate Commerce Commission in 1887, the “administrative state”¹⁷ grew in number and power.¹⁸ The APA was a result of a post-WWII compromise. Elias summarized the Republican and Democrat viewpoints of that era:

Those oriented toward the Republican side worried that the growth of the administrative state posed a threat to individual rights and the efficiency of the free market. Democrats and their allies . . . saw advantages in using administrative agencies as instruments by which experts could make effective policies that were responsive to specific problems and needs in a way that legislation could never be.¹⁹

The APA established a framework to address these concerns via:

- Rulemaking procedures;
- Adjudication procedures;
- Judicial review, including “standards (or scope) of review” (e.g., “arbitrary, capricious,” and “abuse of discretion”);²⁰ and
- Transparency and accountability.

Nonetheless, these concerns lingered and reached a boiling point in *Loper Bright*.

Chevron Case Discussion

The EPA promulgated rules under the Clean Air Act allowing change out of one piece of equipment at a location without a permit if it did not increase the pollution at that site. Chevron challenged the EPA's decision to allow states to treat all pollution-emitting devices within the same industrial grouping as a single “bubble” (or source).²¹

The Supreme Court held that a government agency must conform to any clear legislative statements when interpreting and applying a law, but held *courts will give the agency deference in ambiguous situations as long as its interpretation is reasonable* following a “two-step test:”

- Whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, and there is no deference to agency's determination, but
- If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute, which entails considerable deference to the agency.

The majority (6-0) upheld the EPA's interpretation, emphasizing that courts should defer to agency expertise. Interestingly, Justices Rehnquist, Marshall, and O'Connor did not participate in the decision of the case. Perhaps this incomplete “roster” created a crack in the foundation of *Chevron* from the outset.

Arguments for and against Chevron

Before *Loper v. Bright*, the historic arguments in support²² of *Chevron* were:

- Congress should be understood to have delegated this power (i.e., to interpret ambiguous statutes) to agencies;
- Congress routinely gives agencies power to decide options on ambiguous statutes;
- This implied power is no different than delegating express power; and
- An ambiguous instruction to an agency is to be understood as vesting discretion in the agency to choose among the reasonably permissible interpretations.

Historic arguments against *Chevron* include those by then Judge Gorsuch while serving on the 10th Circuit.

Gorsuch wrote, “[m]aybe the time has come to face the [Chevron] behemoth.”²³ During his confirmation hearing,²⁴ *Chevron* was mentioned approximately 100 times, including by:

- The late Senator Dianne Feinstein, proclaiming that Gorsuch’s apparent call to eliminate Chevron deference was an attack on science and “would dramatically affect how laws passed by Congress can be properly carried out” by federal agencies;²⁵ and
- Senator Amy Klobuchar, asserting that Chevron’s demise “would have titanic real-world implications on all aspects of our everyday lives. Countless rules could be in jeopardy, protections that matter to the American people would be compromised, and there would be widespread uncertainty.”²⁶

Questions Regarding *Chevron* and “Step Zero”

In 2001, *United States v. Mead* discussed *Chevron* where an agency made an interpretation in an informal context (versus a formal rulemaking). *Mead* held that *Chevron* deference should apply only where “. . . it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”²⁷ In *Mead*, the Court decided that the agency should receive only limited *Skidmore v. Swift & Co.*²⁸ deference (i.e., respected but not binding on the court).

Thus, after *Mead*, the *Chevron* deference had *three* steps:

- *Step Zero*: Does the agency have authority to issue binding legal rules? If the answer is “no,” *Chevron* does not apply, but the agency may still receive some lesser degree of deference because of its expertise. If the answer is “yes,” the analysis moves to Step One.
- *Step One*: Is the statute ambiguous? If not, the court simply decides the interpretation of the statute by itself. Otherwise, the analysis moves to Step Two.
- *Step Two*: Is the agency’s interpretation reasonable (even if the court itself would have chosen a different interpretation)?

Things became more complicated after *Mead*. The most important case expanding Step Zero involved an issue about the interpretation of the Affordable Care Act, including the individual mandate. In *National Federation of Independent Business v. Sebelius*,²⁹ the majority declined to apply *Chevron* and concluded that the penalty for not having health insurance functioned as a tax and fell within Congress’s power to tax.

Later, in *Scialabba v. Cuellar de Osorio*,³⁰ two provisions of an immigration statute seemed to conflict. Here, the justices in the same case took opposite views on whether a statute is ambiguous when the majority said “yes” and the dissent said “no.”

In 2015, Justice Thomas signaled his concerns about *Chevron* in *Perez v. Mortgage Bankers Association*.³¹ The case was not about *Chevron* deference; it concerned interpretation of agency rules. But Justice Thomas made these points:

- The Court’s “steady march toward deference” risked “compromising our constitutional structure”³²;
- The Framers assigned the legislative, executive, and judicial powers to separate bodies designed to act as checks upon each other;³³ and
- Judicial deference to an agency’s interpretation of the agency’s own regulations “amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches.”³⁴

Also in 2015, in *Michigan v. EPA*,³⁵ the Court applied *Chevron* in the course of striking down an EPA rule; Justice Thomas wrote a concurrence criticizing *Chevron* deference as transferring the judicial power to “say what the law is” from the judiciary to the executive that is “in tension with” the Vesting Clause of Article III.³⁶

In 2020, Thomas wrote in dissent to the denial of certiorari in *Baldwin*: “*Chevron* compels judges to abdicate the judicial power with constitutional sanction” and “gives federal agencies unconstitutional power.”³⁷

As Professor Siegel highlights, Justice Gorsuch criticized *Chevron* before elevation to the Supreme Court.³⁸ In *Gutierrez-Brizuela v. Lynch*,³⁹ Gorsuch addressed the *Brand X* (to be discussed more herein), asking when *Chevron* is applied, “where in all this does a court *interpret* the law and say what it is?”⁴⁰ He also believed that *Chevron* deference violates Article III’s duty placed on courts to interpret the law.⁴¹

Thus, *Chevron* had been at the “crossroads” for some time before *Loper Bright*.⁴²

Impact of Major Questions Doctrine

Another development raising questions about the viability of *Chevron* is the newer so-called major questions doctrine (MQD), in essence a doctrine created as an exception to *Chevron*.

The origins of the MQD concept trace back to the Supreme Court decision in *FDA v. Brown & Williamson Tobacco Corp.*⁴³ In 1996, the FDA asserted jurisdiction to regulate tobacco products, concluding that nicotine is a “drug.” Unsurprisingly, the tobacco industry filed a suit challenging the FDA’s regulations. The Court held that “it is plain that Congress has not given the FDA the authority to regulate tobacco products as customarily marketed.”⁴⁴

As Justice O'Connor wrote:

Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter.⁴⁵

She then described an early carve-out to application of *Chevron*: “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”⁴⁶

MQD swam relatively in undefined legal waters until 2022 as the Supreme Court had not articulated a precise MQD test. Instead, it and other courts, applied their interpretations based upon other courts and commentators’ views.⁴⁷ In *West Virginia v. EPA*,⁴⁸ the Court reviewed the EPA’s authority to regulate greenhouse gas emissions from existing power plants under the Clean Air Act.

The issue was whether the EPA had the authority to regulate greenhouse gas emissions in virtually any industry, so long as it considers cost, non-air impacts, and energy requirements.⁴⁹ The Supreme Court held that under the “major questions doctrine,”

there are “extraordinary cases” in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority.⁵⁰

As Chief Justice Roberts wrote for the majority:

Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” . . . We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.”⁵¹

Justice Kagan, in dissent, criticized MQD, urging continued reliance on *Chevron*:

The Court has never even used the term “major questions doctrine” before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency’s view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, . . . whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience.⁵²

Reaction to the new prominence of the MQD⁵³ has been robust.⁵⁴ However, it became clear to many observers that MQD’s recent application by the Supreme Court represented a signal that *Chevron*’s days were numbered.⁵⁵

Background of *Loper Bright* and Oral Arguments

Although discerning the result after oral arguments is like reading tea leaves, the *Loper Bright* arguments signaled that *Chevron* was reaching the end of its useful life.

As noted above, the fishermen argued that the Magnuson-Stevens Act⁵⁶ (MSA) did not authorize the NMFS to mandate payment for observers required by a fishery management plan and that *Chevron* was based upon a fiction. The district court granted summary judgment to the government.⁵⁷ It concluded that the MSA “clearly” authorized the rule but added that even if these petitioners’ “arguments were enough to raise an ambiguity,” deference to the agency’s interpretation would be warranted under *Chevron*.⁵⁸

Paradoxically, the D.C. Court of Appeals decision⁵⁹ upheld the government’s victory applying *Chevron*, despite concluding that the statute was silent on the question. The court of appeals ruled that the NMFS’s interpretation of the law as obligating the industry to bear the costs amounted to a reasonable interpretation under the second step of *Chevron*.

Justice Kagan was active at the argument in defense of *Chevron*, asking questions such as:

—you think that the court should determine whether this new product is a dietary supplement or a drug without giving deference to the agency, where it is not clear from the text of the statute or from using any traditional methods of statutory interpretation whether, in fact, the new product is a dietary supplement or a drug?⁶⁰

Kagan moved to use artificial intelligence (AI) as a possible example:

When the normal techniques of legal interpretation have run out, on the matter of artificial intelligence, what does Congress want, Mr. Martinez?⁶¹

. . . Does the Congress want this Court to decide those questions, policy-laden questions, of artificial intelligence?⁶²

Justice Barrett took another route in defense of *Chevron* and the issue of *stare decisis*:

And maybe sometimes, like in Brand X, they might even be like, well, we would reach a different interpretation if it were our call—our call,

but it's ambiguous, so the agency can decide. . . . So maybe nothing happens immediately to those cases, but isn't the door then open for litigants to come back and say: Well, "stationary source" really means X or, you know, "broadband" or whatever the specific term was in—in Brand X? So isn't it inviting a flood of litigation even if for the moment those holdings stay intact?⁶³

On the other side of the divide, Justice Kavanaugh criticized the "internal inconsistency" of *Chevron*. He focused on the rarely discussed "footnote 9" of the decision, which reads:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.⁶⁴

Specifically, Justice Kavanaugh asked:

Can I ask you about what I see as an internal inconsistency in *Chevron* itself? It relates to Footnote 9, which is—instructs that a court should look—use all the traditional tools of statutory interpretation before getting to step two. My concern about that or my confusion about that is, if you use all the traditional tools of statutory interpretation, you'll get an answer, and we know that because, in cases where we don't have an agency involved and we use those same traditional tools, we get an answer. So how do we deal with Footnote 9, which seems to suggest that you'll never get to step two if you follow Footnote 9 by what it says?⁶⁵

To support his anti-*Chevron* views, Justice Gorsuch pointed out the different approaches taken by the lower courts:

So, even in a case involving herring fishermen and the question whether they have to pay for government officials to be onboard their boats, which may call for some expertise, but it doesn't have much to do with fishing or fisheries, it has to do with payments of—of—of government costs, we—we—lower court judges even here in this rather prosaic case can't figure out what *Chevron* means.⁶⁶

Justice Thomas indicated during arguments that he leans toward *Skidmore* "deference"⁶⁷ (to replace

Chevron), which states courts yield to agencies' statutory interpretations when they are persuasive:

The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁶⁸

After oral arguments, it was not a certainty how the Supreme Court would decide the fate of *Chevron*, but it appeared there was sufficient tugging on the line of this precedent to make a change.

Loper Bright Opinion Highlights

The change was dramatic. The hallowed *Chevron* doctrine was besmirched by Justice Roberts and the majority as lacking a strong foundation, being "unworkable"⁶⁹ and warranting "constant tinkering"⁷⁰ by the courts. The *Chevron* deference doctrine apparently is so unstable that it does not deserve any "*stare decisis*"⁷¹ respect (despite the court indicating that previous cases decided under the doctrine are not disturbed by this ruling).⁷²

Justice Roberts rejected the premise that agencies have more expertise to interpret statutes. He wrote that judges are the real experts at statutory interpretation even if agencies have subject matter expertise in their respective field (e.g., telecommunications).⁷³ He added that statutory interpretation is a legal exercise and not a political exercise and that *Chevron's* justification is "fictional."⁷⁴ Worse yet, he indicated that agencies use *Chevron* as an excuse to change their position on an issue with every change in political administration. The majority was more comfortable with a reliance on *Skidmore*, which involves "respect" for an agency interpretation but not "deference."⁷⁵

Roberts pointed to Article III, which assigns to the federal judiciary the power and responsibility to decide "Cases" and "Controversies"⁷⁶ with consequences for the parties. He noted that the Framers envisioned courts would provide "the final 'interpretation of the laws.'"⁷⁷ Roberts cited *Marbury v. Madison*, where Chief Justice Marshall declared, "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁷⁸

Justice Thomas built on the latter theme in his concurrence. Thomas wrote that *Chevron* violates the "separation of powers" by interfering with judicial authority and expanding executive branch authority.⁷⁹ He found it unreasonable to require a judge to accept an agency interpretation even if the judge believed that there is a better interpretation.

The concurrence of Justice Gorsuch started with common law to explain that judges were envisioned to decide cases and not create law.⁸⁰ The common law judges would give "weight" to prior decisions, especially

those that included principles established over time. But their primary job was to decide the controversy between the parties. Justice Gorsuch reviewed concepts such as *ratio decidendi* (an opinion's holding and essential reasoning) versus dicta (digressions) that warrant less weight as being “the vapours and fumes of law.”⁸¹ Justice Gorsuch explained that these common law practices and understanding of the role of judges migrated into Article III of the Constitution.⁸²

Justice Gorsuch pointed out the uncertainty for affected parties created by *Chevron* as agency officials could change their interpretations even if there had been *no* underlying change in statutory law.⁸³ Justice Gorsuch cited a key case from the Internet and telecommunications space—*Brand X*.⁸⁴ *Brand X* dealt with how to classify broadband Internet access service (BIAS) under the Communications Act.⁸⁵ Justice Gorsuch wrote:

Agency officials, too, may change their minds about the law's meaning at any time, even when Congress has not amended the relevant statutory language in any way. . . . And those officials may even disagree with and effectively overrule not only their own past interpretations of a law but a court's past interpretation as well. . . . None of that is consistent with the APA's clear mandate.⁸⁶

This important classification issue (as to whether BIAS was an information service or a telecommunications service) impacts the long-running net neutrality debate. The FCC's classification has bounced back and forth between the two poles over four different presidential administrations.

Justice Kagan's dissent elevated the status of *Chevron* as a “cornerstone” of administrative law.⁸⁷ She wrote that Congress wants agencies to be able to “fill” in the blanks.⁸⁸ She commented that agencies are the experts and hinted that agencies are closer to knowing the legislature's intent on issues. She criticized the majority as demonstrating “judicial hubris”⁸⁹ and ignoring *stare decisis* as *Chevron* is “entrenched precedent.”⁹⁰ Justice Kagan also noted that *Chevron* had been applied in thousands of cases.⁹¹ She argued that Section 706 does not preclude *Chevron*, and that Congress has never taken any action as to *Chevron* in 40 years of its existence.⁹² She predicted that courts would become more political.⁹³

Reviews of *Loper Bright* Decision

Negative criticisms/limitations of the decision by some commentators include that the decision:⁹⁴

- only affects rules or agency action that was based on a statutory ambiguity or silence;
- does not disturb the traditional judicial deference to agency factfinding;

- does not apply when Congress has conferred upon the agency the power to make the determination;
- does not call into question whether a prior case that relied on *Chevron* has a sufficient basis for overturning it now;⁹⁵
- will reduce agency flexibility/use of expertise;⁹⁶
- will increase judicial activism/hubris;⁹⁷ and
- creates increased litigation/uncertainty.⁹⁸

Positive reviews of *Loper Bright* include that the decision represents a(n):

- reaffirmation of congressional intent/limits agency overreach;⁹⁹
- strengthening judicial oversight/independence/predictability;¹⁰⁰
- reduction of frequent policy shifts under different administrations;¹⁰¹
- alignment with the Constitution's separation of powers;¹⁰² and
- increase in public accountability/transparency.

Other Recent and Relevant Supreme Court Decisions Limiting Agency Power

During this session, the court dealt other blows to agencies' power.¹⁰³ In *Jarkesy*,¹⁰⁴ the Court constrained the Securities and Exchange Commission's ability to secure civil penalties for securities fraud, holding that if the SEC wants to pursue civil penalties, it must do so before a federal jury.

*Corner Post*¹⁰⁵ addressed the six-year clock for challenging agency rules under the APA. The majority held that the clock starts running when a plaintiff is injured by the rule. In dissent, Justice Ketanji Brown Jackson predicted that *Corner Post* and *Loper Bright* authorize a “tsunami of lawsuits against agencies.”¹⁰⁶

Early Political Fallout Battles over *Loper Bright*

In letters dated July 18, 2024, two house committees sent letters to federal agencies (including the FCC), following the issuance of *Loper Bright*, requesting detailed information on implications for their agencies.¹⁰⁷

President Biden has been critical of the Supreme Court and several of its recent decisions, including *Loper Bright*. The president has used this case as one of his examples in calling for Supreme Court reform in a speech at the LBJ Library at the University of Texas.¹⁰⁸

How Can You Top This Fish Story?

The decision in *Loper Bright* marks a significant shift in administrative law, emphasizing judicial authority while raising concerns about the practical implications for regulatory governance and expertise. We have seen some early ripples of response to *Loper Bright* by Congress, by the president, and in a Sixth Circuit net neutrality case.¹⁰⁹

Before making any conclusions, here are some questions as to what issues will rise from the ashes of *Chevron*:

- Will there be an avalanche of litigation challenging old/new agency regulations?
- Will parties try to reopen litigated regulations?
- Will challengers have a greater chance of success since the agency no longer has the advantage¹¹⁰ of judicial deference?
- Will agencies issue fewer/more regulations (or be more precise)?
- Will courts become or be perceived as being more political?
- Will courts apply *Chevron* deference anyway?
- Will courts use *Skidmore* in more decisions?
- Will Congress enact more specific agency-related laws?
- Will Congress expressly delegate broad rulemaking authority to agencies?
- Will the “major questions” doctrine become more in focus or fade as an “old” exception to *Chevron*?
- Will states adjust their agency review standards in light of *Loper Bright*?
- Will states become more active on various issues to “fill the gaps” left open at the federal level?
- Will a future Supreme Court resurrect *Chevron*?
- Will some future bait lure the Supreme Court to address the metes and bounds of administrative law?

The Leviathan *Chevron* has been gutted, but it remains to be seen what future voyages bring to the shore to be weighed on the scales of justice.

Note: This article utilized supporting assistance from ChatGPT, an AI language model developed by OpenAI, for specific purposes such as drafting, researching, and editing. Specifically, the Chevron and Loper Bright opinions were uploaded to ChatGPT to obtain initial summaries. The author then read the opinions and drafted his own comments/views on the opinions. Also, ChatGPT was asked for comments/critiques on the Loper Bright opinion. Again, the author reviewed and cited referenced original sources in the endnotes. ChatGPT was also queried about the possible negative or positive impacts/issues of Loper Bright, which the author considered and included the ideas in the article if he agreed with the ChatGPT suggestions based upon his own expertise in this area of law. ChatGPT was also queried about the origins of the APA and the major questions doctrine. In all such cases, content generated by ChatGPT was used as a supporting resource/tool and final drafting was reviewed and modified by the author to ensure accuracy and coherence in his own voice. 

Endnotes

1. *Deadliest Catch* (Original Productions 2005–2024) is on the Discovery Channel and *Wicked Tuna* (Pilgrim Studios 2012–2024) is on the National Geographic Channel.
2. *Loper Bright Enters. v. Raimondo*, No. 22-451, slip op. (U.S. June 28, 2024). *Loper Bright* was argued and decided together with *Relentless, Inc. v. Dep’t of Comm.*, No. 22-1219, on certiorari to the U.S. Court of Appeals for the First Circuit. Both *Loper Bright* and *Relentless* involved challenges to the same NMFS rule under the Magnuson-Stevens Act.
3. More than 18,000 cases according to *Business Law Today*, Michael R. Blumenthal, Douglas W. Charnas, James William Sandy, & David Barry Waxman, *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, ABA (August 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/.
4. *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).
5. The *Chevron* decision’s ultimate test is sometimes referred to as “*Chevron* deference,” the “*Chevron* doctrine,” or the “*Chevron* deference doctrine.” I consider all these terms to be interchangeable and generally use *Chevron* as a shorthand to capture the case, test, and guiding principle.
6. *Psalms* 74:14; *Isaiah* 27:1; *Job* 41:1 (NIV).
7. For example, in 2020, Thomas wrote in dissent to the denial of certiorari in *Baldwin*: “*Chevron* compels judges to abdicate the judicial power without constitutional sanction” and “gives federal agencies unconstitutional power.” *Baldwin v. United States*, No. 19-402, 140 S. Ct. 690, 691 (2020).
8. U.S. CONST. art. III.
9. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 384–88 (2024).
10. *Id.* at 391–96.
11. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2022).
12. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).
13. Dudley commented that “. . . scholars often attribute the term *administrative state* to Dwight Waldo’s book of that title in 1948, although others point to earlier use in both the United States and elsewhere.” Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS, no. 3, Summer 2021, at 33, https://doi.org/10.1162/daed_a_01858.
14. *Loper Bright*, 603 U.S. at 391.
15. *Id.* at 404–405.
16. Like many major pieces of legislation, it should be noted that the APA has been subject to several important amendments such as:
 - Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2022).
 - Government in the Sunshine Act, *id.* § 552b.
17. Dudley, *supra* note 13.
18. As of 2021 the Code of Federal Regulations contained 242 volumes and more than 185,000 pages as compared to the

U.S. Code of Laws passed by Congress, which contains fewer than 44,000 pages. *Id.*

19. Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 *FORDHAM ENV'T L. REV.* 207, 208 (2016).

20. 5 U.S.C. § 706.

21. Shortly after the *Loper Bright* decision, Chevron announced the move of its headquarters from California to Texas. David Blackmon, *Chevron Taking Its Headquarters to Texas*, *FORBES* (Aug. 8, 2024), <https://www.forbes.com/sites/davidblackmon/2024/08/02/chevron-taking-its-headquarters-to-texas/>.

22. Johnathan R. Siegel, *The Constitutional Case for "Chevron" Deference*, 71 *VAND. L. REV.* 937 (2018).

23. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). "Behemoth" also refers to something that is of "monstrous size" and is found in the Bible at *Job* 40:15 (NIV). *Behemoth*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/behemoth> (last visited Aug. 16, 2024).

24. S. Hearing 115-208: Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary, 115th Cong. (2017), <https://www.congress.gov/event/115th-congress/senate-event/LC57462/text>.

25. *Id.* at 6–7 (statement of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary).

26. *Id.* at 30 (statement of Sen. Amy Klobuchar, Member, S. Comm. on the Judiciary).

27. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

28. 323 U.S. 134 (1944).

29. 567 U.S. 519 (2012).

30. 573 U.S. 41 (2014).

31. 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring in the judgment).

32. *Id.* at 1214–15.

33. *Id.* at 1216.

34. *Id.* at 1217.

35. 135 S. Ct. 2699 (2015).

36. *Id.* at 2712.

37. *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting).

38. Siegel, *supra* note 22, at 939, 950–51.

39. 834 F.3d 1142 (10th Cir. 2016).

40. Siegel, *supra* note 22, at 951.

41. *Id.*

42. Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 *DUKE L.J.* 1015, 1024 (2021), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4057&context=dlj>.

43. 529 U.S. 120 (2000). To be complete, Justice Rehnquist expressed his view about "non-delegation" and "major questions" years before in *Industrial Union Department. Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) ("When fundamental policy decisions underlying important legislation about to be enacted are

to be made, the buck stops with Congress and the President" in the legislative process.).

44. *Brown & Williamson*, 529 U.S. at 159.

45. *Id.* at 147.

46. *Id.* at 159.

47. KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10745>.

48. 597 U.S. 697 (2022); *West Virginia v. Environmental Protection Agency*, Oyez, <https://www.oyez.org/cases/2021/20-1530> (last visited Aug. 17, 2024).

49. *West Virginia*, 597 U.S. 697.

50. *Id.* at 700.

51. *Id.* at 723.

52. *Id.* at 766–67 (Kagan, J., dissenting).

53. MQD has been applied in other recent cases. For example, it was used to block President Biden's student loan forgiveness plan. Ariane de Vogue & Tierney Sneed, *Supreme Court Blocks Biden's Student Loan Forgiveness Program*, CNN (June 30, 2023), <https://www.cnn.com/2023/06/30/politics/supreme-court-student-loan-forgiveness-biden/index.html>.

54. See a progressive viewpoint that MQD is lawful but merits some possible refinements: Oren Tamir, *Getting Right What's Wrong with the Major Questions Doctrine*, 62 *COLUM. J. OF TRANSNAT'L L.* 543 (2024), <https://hls.harvard.edu/today/what-critics-get-wrong-and-right-about-the-supreme-courts-new-major-questions-doctrine/>.

55. MQD does pose interesting questions, such as will MQD become a dominant tool used by the courts? Or should MQD also be retired with *Chevron*?

56. 16 U.S.C. § 1801 et seq., which incorporates the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq.

57. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 382 (citing *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82 (D.D.C. 2021)).

58. *Id.*

59. *Id.* (citing *Loper Bright Enters. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022)).

60. Transcript of Oral Argument at 11–12, *Relentless, Inc. v. Dep't of Comm.*, (2024), No. 22-1219.

61. *Id.* at 44. Others have written that *Loper Bright* will increase uncertainty in the area of AI regulation. Gary Grossman, *AI Regulation in Peril: Navigating Uncertain Times*, VENTUREBEAT (July 21, 2024), <https://venturebeat.com/ai/ai-regulation-in-peril-navigating-uncertain-times/>.

62. Transcript, *supra* note 60, at 45.

63. *Id.* at 59–60.

64. *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

65. Transcript, *supra* note 60, at 82–83. For a further discussion of "footnote 9," see Chad Landmon, Alexander Alfano & Michelle Divelbiss, *Chevron's Hard-Hitting Footnote Nine Revived by Kisor v. Wilkie and Recent Decisions on Deference*, FDLI (2020), <https://www.fdi.org/2020/02/chevrons-hard->

hitting-footnote-nine-revived-by-kisor-v-wilkie-and-recent-decisions-on-deference/.

66. Transcript, *supra* note 60, at 91.

67. *Id.* at 6. There is a dispute as to whether *Skidmore* is a “deference” doctrine or a “weighing” the argument doctrine. See a discussion on resurrection of *Skidmore* in Margaret E. Tahyar, Joseph A. Hall & David A. Zilberberg, *The Supreme Court Rebalances the Administrative State*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 24, 2024), <https://corpgov.law.harvard.edu/2024/07/24/the-supreme-court-rebalances-the-administrative-state/>.

68. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

69. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 375 (2024).

70. *Id.*

71. Indeed, Justice Roberts commented that “*Chevron* accordingly has undermined the very ‘rule of law’ values that *stare decisis* exists to secure.” *Id.* at 411.

72. Justice Roberts wrote:

... 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.

Id. at 412.

73. *Id.* at 412.

74. *Id.* at 406.

75. *Id.* at 388, 399.

76. *Id.* at 384.

77. *Id.* at 385.

78. *Id.* (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

79. *Id.* at 413–14 (Thomas, J., concurring).

80. *Id.* at 417 (Gorsuch, J., concurring).

81. *Id.* at 419.

82. *Id.* at 429–30.

83. *Id.* at 438.

84. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

85. *Loper Bright*, 603 U.S. at 438 (Gorsuch, J., concurring).

86. *Id.* at 427–28.

87. *Id.* at 448 (Kagan, J., dissenting).

88. *Id.* at 451.

89. *Id.* at 450. One professor has described the holding of *Loper Bright* as being “more than a bit scary.” Deborah A. Sivas, *Stanford’s Deborah Sivas on SCOTUS’ Loper Decision Overturning Chevron and the Impact on Environmental Law*, SLS BLOGS (June 28, 2024), <https://law.stanford.edu/2024/06/28/stanford-deborah-sivas-on-scotus-loper-decision-overturning-chevrons-40-years-of-precedent-and-its-impact-on-environmental-law/>. Another view is that “For forward-looking clear grants of authority at least, *Chevron* lives on in the guise of the new *Loper Bright* delegation rule.” Jack Malamud et al., *Around the Halls: After Chevron, What’s Next?*, BROOKINGS (July 10, 2024),

<https://www.brookings.edu/articles/around-the-halls-after-chevron-whats-next/>.

90. *Loper Bright*, 603 U.S. at 451 (Kagan, J., dissenting).

91. *Id.* at 449.

92. *Id.* at 450.

93. *Id.* at 478–79.

94. Nowell D. Bamberger, Carmine D. Boccuzzi & William E. Baldwin, *After Chevron: What the Supreme Court’s Loper Bright Decision Changed, and What It Didn’t*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 18, 2024), <https://corpgov.law.harvard.edu/2024/07/18/after-chevron-what-the-supreme-courts-loper-bright-decision-changed-and-what-it-didnt/>.

95. Tahyar et al., *supra* note 67. It has been noted that the issue of “nondelegation” was not addressed in *Loper Bright*.

96. Earthjustice, *Supreme Court Eliminates Longstanding Legal Principle in Ruling About Fisheries Management*, EARTHJUSTICE (June 28, 2024), <https://earthjustice.org/article/loper-bright-chevron-doctrine-relentless>.

97. *Loper Bright*, 603 U.S. at 450 (Kagan, J., dissenting). One author wrote that *Loper Bright* represents a “massive power grab” that the court will come to regret. Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024), <https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab>.

98. Shay Dvoretzky, Parker Rider-Longmaid & Boris Bershteyn, *Supreme Court’s Overruling of Chevron Will Invite More Challenges to Agency Decisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 21, 2024), <https://corpgov.law.harvard.edu/2024/07/21/supreme-courts-overruling-of-chevron-will-invite-more-challenges-to-agency-decisions/>.

99. Press Release, H. Comm. on Oversight, Comer Calls on Federal Agencies to Rein in Regulatory Overreach in Wake of Supreme Court Decision (July 10, 2024), <https://oversight.house.gov/release/comer-calls-on-federal-agencies-to-rein-in-regulatory-overreach-in-wake-of-supreme-court-decision%ef%bf%bc/>.

100. Dvoretzky et al., *supra* note 98.

101. John P. Elwood et al., *Chevron Overturned: Impacts on Environmental, Energy, and Natural Resources Regulation*, ARNOLD & PORTER (July 2, 2024), <https://www.arnoldporter.com/en/perspectives/advisories/2024/07/chevron-overturned-impacts-on-environmental>.

102. Rebecca B. Kimmelfield & Nathan A. Beaver, *FDA: The Effects of Loper on the Regulatory Agenda*, FOLEY & LARDNER (Aug. 1, 2024), <https://www.foley.com/insights/publications/2024/08/fda-effects-loper-regulatory-agenda/>.

103. Shay Dvoretzky, Emily Kennedy & Parker Rider-Longmaid, *Supreme Court’s 2023 Term a Blockbuster for Businesses*, REUTERS (July 22, 2024), <https://www.reuters.com/legal/legalindustry/supreme-courts-2023-term-blockbuster-businesses-2024-07-22/>.

104. *SEC v. Jarkesy*, 603 U.S. 109 (2024).

105. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799 (2024).

106. *Id.* at 864 (Jackson, J., dissenting).

107. Mark Ruge et al., *What Overturning Chevron Means for the Way Congress Does Its Business*, NAT'L L. REV. (July 18, 2024), <https://natlawreview.com/article/what-overturning-chevron-means-way-congress-does-its-business>.

108. Kathryn Watson & Melissa Quinn, *Biden Lays out Plan for Supreme Court Reforms, Saying "Extreme Opinions" Have Undermined Confidence*, CBS NEWS (July 29, 2024), <https://www.cbsnews.com/news/biden-supreme-court-lbj-library-speech/>; Matt Viser, Tyler Pager & Ann Marimow, *Biden, at LBJ Library, Blasts Supreme Court and Proposes Major Changes*, WASH. POST (July 29, 2024), <https://www.washingtonpost.com/politics/2024/07/29/biden-supreme-court-reform-ethics-code-term-limits/>.

washingtonpost.com/politics/2024/07/29/biden-supreme-court-reform-ethics-code-term-limits/.

109. *In re MCP No. 185, No. 24-7000 et al.*, slip op. at 6 (6th Cir. Aug. 1, 2024). See accompanying article that discusses this case in more detail.

110. FCC Commissioner Carr commented after the decision that "It puts individuals or businesses on a much more level playing field with an administrative agency." Jake Neenan, *FCC's Carr: Loper Bright "Directionally a Really Good Thing"*, BROADBAND BREAKFAST (July 17, 2024), <https://broadbandbreakfast.com/fccs-carr-loper-bright-directionally-a-really-good-thing/>.