THE END OF *CHEVRON* DEFERENCE

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OUTLINE

- *Chevron* Deference
- *Loper Bright* - *"Chevron* is overruled"
- *Loper Bright* - The Best Reading
- Criticisms
- Post-*Loper Bright* Decisions
- Takeaways
- Questions

Chevron Deference

- *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

- Applies to questions of law as to the proper construction of a statute in the context of an agency action, such as promulgating a regulation

- *Chevron* Deference …
  - Courts generally must defer to "permissible" agency interpretations of the statutes the agency administers - even when a reviewing court reads the statute differently
    - Why? Congress left a "gap for the agency to fill" through regulation

Chevron Deference

- The *Chevron* two-step process (as explained in *Chevron*)
- Applies when a court reviews an agency's construction of the statute which it administers
- Step 1
  - Has Congress directly spoken to the precise question at issue?
    - If the intent of Congress is clear, that is the end of the matter as the court and agency "must give effect to the unambiguously expressed intent of Congress"
- Step 2
  - If not, "the court does not simply impose its own construction on the statute"
  - Instead, if the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute"
    - Footnote 11: The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question initially had arisen in a judicial proceeding
  - If permissible, must defer

Chevron Deference

- Initially, *Chevron* was not routinely cited in cases involving statutory questions of agency authority
  - But, soon became a governing standard

- Still, Supreme Court "spent the better part of four decades imposing one limitation on *Chevron* after another"
  - Inapplicable if:
    - There is doubt that Congress intended to delegate interpretive authority to an agency or authority to the agency generally to make rules carrying the force of law
    - There were procedural defects
    - The question at issue is one of "deep 'economic and political significance'" (major questions)

- Result: Supreme Court "has not deferred to an agency interpretation under *Chevron* since 2016."

Loper Bright Enterprises

- *Loper Bright Enterprises, Inc., et al v. Raimondo*, --- S.Ct. --- (2024), 2024 WL 3208360
  - "*Chevron* is overruled."

- Why?
  - Separation of powers problem

  - Framers envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts."
    - Traditional view of court's role
    - As old as *Marbury v Madison* in 1803
    - Still afforded "due respect" to Executive Branch interpretations

  - Administrative Procedure Act (1946)
    - The "fundamental charter of the administrative state"
    - APA §706: 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
    - "The APA thus 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."
    - Makes clear that agency interpretations of statutes - like agency interpretations of the Constitution - are not entitled to deference

Loper Bright Enterprises

- Court must find a "best reading" of a statute (the reading the court would have reached if no agency were involved) after applying all relevant interpretive tools
  - Must answer "the question that matters: Does the statute authorize the challenged agency action?"

- Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority
  - Courts need not, and under the APA may not, defer to an agency interpretation of the law simply because a statute is ambiguous

- Decision does "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."

Loper Bright - The Best Reading

- How to get to the "best reading"?
  - "Courts use every tool at their disposal to determine the best reading of the statute"
    - "Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction"
  - General 'tools of statutory construction'
    - Always start with the words of the statute itself
    - Give undefined terms their ordinary, common meaning
      - Use established dictionaries
    - Look at the statutory context of the term or phrase
    - Use the 'canons of construction'
      - Such as *Reading Law: The Interpretation of Legal Texts (*Scalia and Garner), which includes descriptions/explanations of the 'canons' of interpretation, such as semantic canons, syntactic canons, and contextual canons
    - Legislative history of the statute
    - Major questions doctrine
      - Congress must expressly authorize actions with major economic or political impacts

Loper Bright - The Best Reading

- How to get to the "best reading"?
  - An agency interpretation "may constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"
  - An interpretation "issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning"
  - A statute may provide some authority for an agency to "exercise a degree of discretion" and/or "confer discretionary authority on agencies"
    - If the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits
    - 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

Loper Bright - The Best Reading

- *Skidmore* Deference (since 1944) - The weight or deference provided to an agency …
  - Depends upon the thoroughness evident in its consideration
  - The validity of its reasoning
  - Its consistency with earlier and later pronouncements, and
  - Factors which give it power to persuade

- *Auer* or *Seminole Rock* Deference - Supreme Court deference to "agencies' reasonable readings of genuinely ambiguous regulations" (explained in *Kisor v Wilkie* (2019))
  - Applies if regulation is generally ambiguous after exhausting all the ''traditional tools'' of construction
  - If genuine ambiguity remains, the agency's reading must still fall ''within the bounds of reasonable interpretation"

Criticisms

- Allows “unelected judges” to undermine the will of Congress
  - Judges are not accountable to the public
- Gives judges a “policymaking role”
- Severe blow to the ability of federal agencies to do their jobs
  - No deference to “expertise of agencies on how to interpret ambiguous language in laws pertaining to their work”
- Congress relies on federal agencies - under the supervision of the president - to carry out laws and policies according to their best good-faith interpretations

Post-*Loper Bright* Decisions

- *US Sugar Corp. v EPA*, 2024 WL 4019031 (D.C. Cir. Sep. 3, 2024)
  - CAA: A "new source" is "a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source."
  - Question: First proposed in 2010 (so "new" after 2010, as per EPA) or first proposed in 2022 (so "new" after 2022, as per Industry)?
  - Court acknowledges it could be "interpreted either way" because of the use of the word "an," which is "indeterminate"
    - Under *Chevron*, likely deferred to EPA
  - But, using "statutory structure and context," Court found "first propose[d] means the first proposal of each consecutive standard."
  - Result: Court "set aside EPA's 2022 Rule to the extent that it defines sources constructed or reconstructed before August 24, 2020 - that is, the date the 2022 Rule was proposed by EPA - as 'new source[s].'"

Post-*Loper Bright* Decisions

- *Restaurant Law Center v. DOL, 2024 WL 3911308 (5 Cir. Aug. 23, 2024)*
  - Acknowledged *Loper Bright* and interpreted statute without *Chevron*
  - FLSA: Defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."
  - Used statutory tools
    - Started with statutory text
    - Used dictionaries to find common meaning
    - Reviewed context of statute
  - Rejected a consistent, long-standing interpretation because not consistent with "FLSA's plain text"
  - Found the rule contrary to FLSA

Post-*Loper Bright* Decisions

- *Mayfield v DOL,* 2024 WL 4142760 (5 Cir. Sep. 11, 2024)
  - Relates to "White Collar Exemption" in FLSA: Exemption for "any employee employed in a bona fide executive, administrative, or professional capacity" from definition of 'employee'
    - DOL revised the "Minimum Salary Rule" (Rule) in 2019
  - FLSA: Provides DOL with authority to "define and delimit" the terms of the White Collar Exemption
    - Question: Did DOL exceed statutory authority in revising Rule?
  - Falls into category of statutory formulations discussed in *Loper Bright*
    - With a clearly delegated discretionary authority, court must "independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA."
  - Used dictionaries to define "define" and "delimit"
    - Found the Rule properly defined and delimited
    - And so was within statutory grant of authority
  - Also found that FLSA provided enough guidance to DOL to provide a general policy that applies and provide adequate boundaries for the delegated authority

Post-*Loper Bright* Decisions

- *Huntsman Petrochemical v. EPA*, 2024 WL 3763355 (D.C. Cir. August 13, 2024)
  - Question: Was EPA arbitrary and capricious in incorporating the ethylene oxide cancer-risk assessment into the MON?
    - Was not a statutory construction case
  - Arbitrary and capricious when agency:
    - Fails to consider an important aspect of the problem
    - Offers an explanation that runs counter to the evidence
    - Fails to examine the relevant data and articulate a satisfactory explanation for its action
  - "Extreme degree of deference" provided in the case of EPA's evaluation of scientific data within its area of expertise
  - Court reviewed EPA's conclusions and reasons in the assessment, reconsideration, and rule
    - Because EPA articulated its reasoning and that reasoning did not run afoul of the three items above, EPA was not arbitrary and capricious
  - Takeaway: When EPA addresses comments, addresses all aspects of an issue, and articulates its reasons, it likely will be upheld

Takeaways

- Agencies will have to fully justify a regulation by arguing that its interpretation is the 'best reading' of the statute
  - Must use all available tools of statutory construction to arrive at that 'best reading'
  - Still entitled to 'respectful review' by courts
- Will likely limit expansive new regulations based on older environmental statutes
  - Unless found to have been authorized by Congress
- Congress may begin to include express delegations in future legislation
- Courts will struggle to discern the 'best reading'
  - Who has the 'best reading'?
  - An agency, a district court, an appellate court??
- *Loper Bright* can be used, and is being used, by industry, agencies, and NGOs to attack / question agency decisions

QUESTIONS??

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