FOCUS: ADMINISTRATIVE LAW

Back to the Future: SCOTUS Undoes 40-year Precedent in Administrative Law Jurisprudence

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The *Chevron* decision that brought the deference standard to administrative law is history.[1] The famous case involved the Environmental Protection Agency in a dispute about its interpretation of the Clean Air Act Amendments of 1977. It dates almost to the time of a famous landmark movie, *Back to the Future*, which demonstrates what in part has happened in this area of the law.[2] In the recent *Loper Bright* decision involving another environmental topic—regulation of fisheries, the Supreme Court has done what only it could do—undo its own precedent. The decision returns the Supreme Court to a previous approach of reviewing administrative actions, overturning the deferential standard of the past four decades and returning to the far earlier standard of the 1940s era review of administrative action—placing the Courts into the role of interpreter and decider of the interpretation of statutes.[3] In essence, administrative law has moved "Back to the Future."

Background: The Federal Government's Challenge of Governing Many Complicated Issues Simultaneously

Administrative agencies have never existed without controversy. Nonetheless, they define government, regulating a significant part of our lives. The agencies were born in response to the challenges of the Great Depression by the Roosevelt Administration. Congress created an alphabet soup of agency names, from the Securities and Exchange Commission to the Food and Drug Administration, and eventually the Environmental Protection Agency ("EPA"), among many others. The agencies each address specific issues and legal areas. The difficulty in finding legislative consensus on the many details needed to address the underlying problems can lead to ambiguity and lack of clarity in the language of federal statutes authorizing agencies to act. The complexity of real problems—like addressing a changing climate—demonstrates the challenge of directing what agencies can and should do with emerging problems. Additionally, the science behind an ongoing and developing problem, like climate change, involves many factors and demonstrates that substantial expertise is needed for modern government to implement its mission. For example, climate change action must address multiple actors and areas that will impact the climate goals being addressed, balanced, and directed. These areas overlap and interconnect, including automobiles, factory emissions, and electricity production further complicating efforts.

Lawyers dealing with administrative law know that agencies can be challenging. Many times, litigation is necessary to address agency decisions. These challenges to the bureaucracy have resulted in an evolving judicial landscape that has brought us to where we are today.

The Supreme Court in the 1940s noted that the role of the Court was to determine if agency action would be upheld, reaching the decisions on a case-by-case basis without giving the benefit of the doubt to agency expertise or decision-making.[4] The agency, in essence, had to persuade the Court that they acted properly. Decades later, the Supreme Court then veered in a new direction when it was asked to determine a challenge to an agency's decision implementing the Clean Air Act. The Supreme Court held that the courts should defer to agency expertise in interpreting the law in cases where there was ambiguity in the law, as long as their actions were reasonable. The swing of the pendulum in favor of the agency has had significant implications for the increase in the growth of the role of administrative agencies and their ability to regulate in areas even if the law wasn't as precise as it could be.

The Supreme Court began to swing the pendulum back from the agencies with its "major questions doctrine," reasoning that for these types of questions, Congress could not be deemed to have allowed the agency to make decisions about the scope of the law. The pendulum has now swung back further, with the Supreme Court returning closer to where it all began in the 1940s, removing the requirement for a Court's deference to agency decisions and deciding whether agency decisions should be upheld. Many argue this returns the balance to due process under the law and will make unelected agency officials accountable for their actions. Many are concerned that complex issues will not be addressed without substantial litigation.

Evolution of the Supreme Court's Jurisprudence on Agency Actions

In *Skidmore v Swift and Co.*, the issues focused on the Fair Labor Standards Act and how "work" was defined. Employees challenged the interpretation of the labor law regarding what work periods would be paid regarding their shifts involving monitoring fire alarms—they needed to be available to respond but did not always respond. The workers challenged a determination between whether "waiting time" should be considered the same as "working time" and therefore constitute work hours. The lower court decision went against the workers. The Supreme Court's analysis looked at the Department of Labor's interpretation of its rules. It concluded that the Department of Laber was entitled to consideration and respect, but also concluded that the Department did not control the Court's interpretation. Instead, the Supreme Court concluded that it should take a case-by-case analysis to determine the level of deference it would apply to the agency when reviewing their determinations and actions.[5] The rule was in part respectful, but it was not deferential to the agency.

In *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, the lawsuit challenged the EPA's regulatory approach that allowed all of the air emissions of a stationary source to be treated as one—a single "stationary source." The lawsuit found fault with the Reagan Administration's approach because they did not agree that the intent of the law was to focus on the overall emission changes from a stationary source, instead of individual emission points within the stationary source. Plaintiff argued that the EPA's interpretation went against the Clean Air Act's purpose, specifically, its goal of reducing air pollution in states not meeting air quality standards. The Supreme Court upheld the EPA's policy. The Court decided that if a federal law is ambiguous, courts must defer to the administrative agency's reasonable interpretation of the law, establishing the modern principle now known as "*Chevron* deference." Ironically, the Court upheld the environmental interpretation deemed by many as less protective of the environment.

In *West Virginia*, in another Clean Air case, several states challenged EPA's Clean Power Plan aimed at shifting electricity generation from high-emission sources like coal and

gas to lower-emission sources such as wind and solar.[6] Under the Obama administration, the EPA issued an order requiring coal-fired power plants to either reduce electricity production or subsidize renewable energy sources, seeking a reduction in coal's national electricity-generation share by 2030. The EPA, under the Trump administration, repealed this rule, creating an Affordable Clean Energy Rule arguing that the shifting of electricity generation could not be an emissions-reduction standard. States filed petitions for review of the repeal order, leading to a legal battle that ultimately reached the Supreme Court that looked at the issues in the case as a "major question," holding that when an administrative agency takes actions of vast economic and political significance, it must have clear authorization from Congress and cannot infer such authority from ambiguous statutory text. The Supreme Court found that the EPA did not have that clear congressional mandate on changing energy generation required in the Clean Power Plan. This landmark case demonstrates a significant shift away from the view of Court deference to agency expertise and reasoning, and is the significant predecessor to the *Loper Bright* case that befell *Chevron*.

In *Loper Bright*, the National Marine Fisheries Service came under scrutiny when a group of commercial fishermen challenged a policy requiring the fishing industry to pay for fishing observers if federal funding became unavailable because onboard observers were mandated to collect data on fishery conservation and management under law. The fishermen argued that the law did not address whether fishermen must pay for observers, and it did not authorize passing these costs of monitors directly to the industry. The lower court upheld the policy by applying *Chevron* deference, affirming the agency's statutory interpretation requiring the fees as reasonable despite the statute's silence on whether fishermen must pay for observers. The Supreme Court, however, did not defer to the agency interpretation or expertise, and overturned the lower court and *Chevron*. The new *Loper Bright* doctrine returns back to the older pre-Chevron doctrine that it is solely the judiciary's responsibility to interpret ambiguous statutes, not an agency, unless Congress explicitly delegates that authority to the agency.

A Test Time for A Nostalgic View of Administrative Law

The reliance of other courts on the new *Loper Bright* approach is ultimately far from certain. The question of whether the courts will revert back to their earlier approach in the review of agency action is also unclear, since a review of recent court cases shows that reliance on the underlying reasoning—back to *Skidmore*—is not being consistently followed.[7]

The impact on the substantive work done at the various agencies is similarly uncertain. The expertise needed to deal with significant government challenges, such as climate change, will not abate. Congress will continue to need to pass legislation that provides clear direction for agencies and even clearly grants them discretion to act, which may prove difficult in an era of divided government and result in areas of concern going unaddressed. At this time, the *Loper Bright* decision does not appear to impact an agency's interpretation of its own rules or regulations requiring them to implement regulations and take administrative action that does not rely upon the deferential approach from the *Chevron* era. Nonetheless, there has been a shift away from giving deference to agency decision-making and expertise decidedly to the Court. The uncertainty about the extent of this shift will result in litigation, commentary, and analysis for the foreseeable future.

As we can all recall from history, there was a *Back to the Future II* movie. Here, much litigation is likely to result and will be responsible for creating a future script for judicial review of administrative action.

1. *Chevron, U.S.A, Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
2. The movie, released on July 3, 1985, sends Marty McFly back 30 years into the past in a time travel machine, returning to a reset future that he set into motion in that past. See Back to the Future (1985 Universal Pictures Amblin Entertainment); see *also Back to the Future*, imdb, https://www.imdb.com/title/tt0088763/ (last visited August 9, 2024).
3. *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*, 143 S.Ct. 2429 (2024).
4. *Skidmore v. Swift and Company*, 65 S.Ct. 161 (1944).
5. *Skidmore v. Swift and Company*, 65 S.Ct. 161 (1944).
6. *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).
7. See Robert Lafolla, *Courts Show Little Interest in Skidmore as a Chevron Alternative*, Bloomberg (Jul. 29, 2024, 5:05 AM), https://news.bloomberglaw.com/ip-law/courts-show-little-interest-in-skidmore-as-a-chevron-alternative.

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