



The Future of Chevron Deference and Administrative Law

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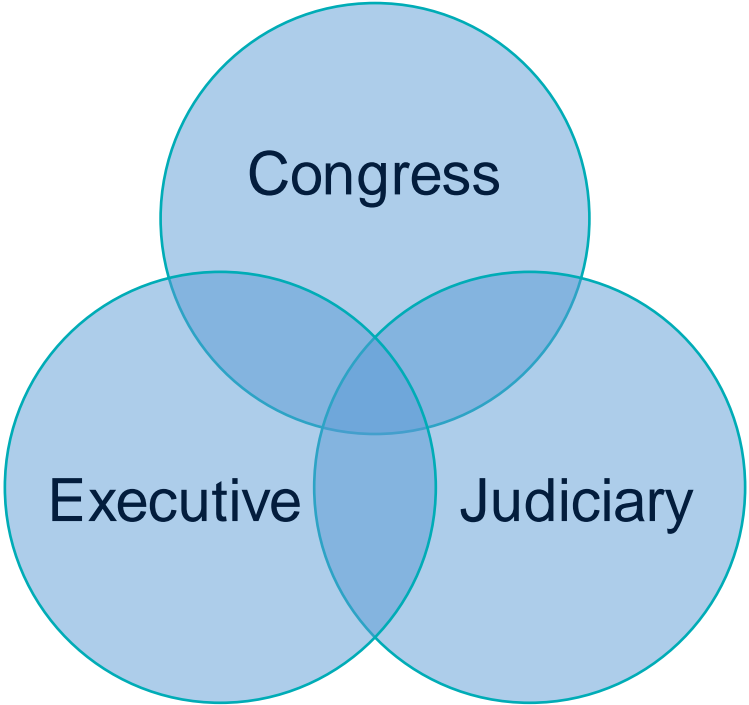
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Congress' Legislative Power vs. Agency Policymaking

Article I, Section 1: All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.



Where to Draw the Line?

- When can an agency promulgate legislative (general and prospective) rules of economic and political significance?
- Answer not in the Constitution
- Courts have to draw a line to preserve Separation of Powers.
- Toothless Non-Delegation Doctrine

Major Questions Doctrine

- Under *West Virginia v. EPA* (2022), a court asks whether the agency is seeking to regulate in a manner that presents a “major question” of “economic and political significance,” and if so, the agency only has power to regulate where there is a “clear statement” by Congress conferring such authority.
- In the absence of a clear statement from Congress, the agency will most likely be held to have exceeded the scope of its authority.

The *Chevron* Test – How to Handle Ambiguous Delegations?

When an agency's assertion of authority under a statutory text that is ambiguous.

- *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#) (1984):
 - If Congress, through statutory text, has not spoken directly to the issue, is the agency's construction of an ambiguous statute "reasonable," even if the court would have construed the statute otherwise? If so, a reviewing court will defer to the agency's interpretation.
 - Two steps: (1) Is the statute ambiguous as to Congress' intent? (2) If so, is the agency's interpretation reasonable?
- *City of Arlington v. FCC*, [569 U.S. 290](#) (2013):
 - *Chevron* deference applied to an agency's interpretation of the scope of its authority where the statutory text asserted for the delegation is ambiguous.

Tension Between Major Questions vs. *Chevron* Doctrines

Under *Chevron* and *City of Arlington*, an agency has the power to determine the dimensions of its regulatory mandate *unless* it is clear that Congress has *not conferred* authority on the agency to act.

- **In the absence of a clear statement from Congress, the agency will most likely be held to have acted within the scope of its authority.**

Under *West Virginia*, a court asks whether the agency is seeking to regulate in a manner that presents a “major question” of “economic and political significance,” and if so, the agency only has power to regulate where there is a “clear statement” by Congress conferring such authority.

- **In the absence of a clear statement from Congress, the agency will most likely be held to have exceeded the scope of its authority.**

Loper Bright Enterprises v. Raimondo

- Commercial fishing companies challenged rule from National Marine Fisheries Service
- D.C. Circuit decision upheld the NMFS rule, deferring to the agency's interpretation of federal fishery law
- SCOTUS accepted fishing companies second question addressing *Chevron* deference

Question Before the Supreme Court

“Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.”

Likely Outcome Favors At Least Some Retraction of *Chevron*

- Emphasizing Step 1's statutory-interpretation toolkit (compare *Kisor v. Wilkie*)
- Silence versus ambiguity (narrower part of question granted)
- *Chevron* is a failure: theory versus practice (overruling)

Questions for Us to Discuss

- Given this likely outcome, what will be the impact on federal agencies?
- Will federal agencies be doing anything differently?
- How will you be affected?

Additional Questions for Us to Discuss

- How will the lower courts respond?
- Do we predict an impact on the Hill?
- Will state agencies be stepping in to address issues that traditionally are addressed by federal agencies?



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