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The potential impact of Loper v. Raimondo decision removing agency deference on natural resource management

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ABSTRACT

The recent Supreme Court decision in Loper v Raimondo overturned the long-standing Court ruling establishing novel legal precedents referred to as "Chevron deference," which compels the Court to allow for broad authority to U.S. administrative agencies deference in the interpretation of statutes and regulations. Members of the Court, critical of the prior rule, state that this deference held by agencies grants them a power not authorized by the Administrative Procedures Act or the Constitution, that being the power to interpret the law by defining their meaning where the document's drafting was unclear. Thus reducing authority by an independent judiciary. Critics of the current decision argue that it diminishes the use of technological expertise held by the agencies in interpreting laws. Opponents counter that the decision restores the courts expertise in engaging in the various methods necessary to perform the statutory review, up to and including agency science and interpretation as part of their decision process, without exclusively relying on the agency interpretation as the only permissible one, which is argued to be a more balanced approach. It is hoped that the Loper decision will reduce the potential to abuse deference as they may push interpretations beyond the legislature's goals or fail to interpret vague legislative language appropriately. Furthermore, legislatures may be encouraged to develop statutes that guide agencies that align with the electorate's views and provide the predictability to support business development.

Keywords

Administrative Procedures Act, Chevron deference doctrine, Loper v. Raimondo ruling, separation of powers, USA

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INTRODUCTION

The recent decisions in Loper Bright Enterprises v Raimondo, 144 S.Ct. 2244 (2024) (Loper) overturns the long-standing decision found in Chevron, Chevron U.S.A. Inc. v Natural Resource Defense Council, Inc., et al., 467 U.S. 837 (1984) that eliminated the Court's adoption of agency interpretation, or deference, when interpreting statutes whose statute or regulation is not clear. This recent decision will change how courts interpret agency actions, which can influence natural resources management, as an agency-permissible interpretation of statutes or regulations is no longer the sole criterion for the Court's interpretations and returns the independent review of agency action by the judiciary. This paper will describe the several types of agency deference granted by the courts and how they change with the Loper decision. If proponents of the decision are correct, this will lead to improvements in the legislative process, encouraging lawmakers to draft legislation with greater precision and reducing reliance on agency deference in policy creation.

A REVIEW OF AGENCY DEFERENCE

During President Franklin D. Roosevelt's administration, the administrative state dramatically increased in size and scope with the creation of the New Deal, a series of programs and reforms aimed at providing economic relief to combat the effects of failed monetary policy, stock market speculation, and trade imbalances in the late 1920s. Many government agencies were created during the Great Depression to administer the expanded role of government. Although most agencies are in the executive branch and are involved in enforcing laws, many have limited legislative power, as rulemaking authority is often authorized by Congress through the statutes. Furthermore, some adjudication capacity through administrative courts housed throughout the executive branch.

The general rules of agency governance were further defined with the passage of the Administrative Procedures Act (A.P.A.), 5 U.S.C. §§ 551–559[1], which defines the methods of rulemaking, adjudication, and judicial interpretation of agency actions. A vital piece of the A.P.A. is the evaluation of agency actions, which can be found in § 706, which describes what agencies do and whether they are exceeding their statutory authority as well as how the agency power is exercised through rulemaking, enforcement, or adjudicating these rules (Aman and Mayton 2001). It is the A.P.A. that states that courts have an independent role to review agency actions continuing the distribution of power among the branches of government. The concept of deference did not arise whole cloth out of Chevron U.S.A. Inc. v Natural Resource Defense Council, Inc. It has evolved over the last 80 years; before the Loper decision, three types of agencies deference were developed: Skidmore or Swift, Chevron, and Auer. The names come from the court cases where the judicial doctrine was created.

The three deference types have specific procedures that the courts follow. The creation of the first judicial deference for an agency action was granted in *Skidmore v. Swift & Co., 323 U.S. 134 (1944).* This dispute involves employees trying to recover overtime from being required to wait on-call on the premises without compensation. The Court states that these administrative rules "…are not controlling …" and that the judiciary can hear the facts and will consider the agency enactment of the law based on their experience and informed judgment. The weight of such a judgment in a particular case will depend upon the thoroughness of the agency, its consideration, and the validity of its reasoning. The judiciary grants the long-term use of an interpretation of a statute some weight; however, it does not surrender the decision of a statute's meaning to an agency's interpretations.

The next deference type is Chevron's deference. The particular case granted deference to the Environmental Protection Agency (E.P.A.). to interpret the Clean Air Act (C.A.A.) 42 U.S.C. Ch. 85 (§§ 7401-7671q) by applying their definition of "source of pollution," which the C.A.A. did not define. Thus, the E.P.A. allowed the entire plant to be considered, allowing new projects to be considered within existing plants to not be considered a new project. This interpretation avoided the stricter and costlier "newer source review," as specified by the C.A.A. required for individual new projects. This ruling gave the E.P.A. broad discretion in interpreting the C.A.A. and has been

[1] Refer to https://www.law.cornell.edu/uscode/text/5/551

the basis for wider deference for most agency actions by developing a two-part test for determining deference. The first step is determining whether congressional actions were evident in the statute. If not, any reasonable or permissible interpretation by the agency is accepted as the judicial interpretation of the statute.

The last example of deference, and most recent, is referred to as Auer's deference, which is borne out of *Auer v. Robbins, 519 U.S. 452 (1997).* Auer involves sergeants and lieutenants being denied overtime pay because they were deemed exempt from the city's policy due to their status as salaried workers. The Court used the Chevron approach to accept the Secretary of Labor's interpretation of the Fair Labor Standard Act as a permissible interpretation of the regulation and denied the overtime request for the police officers.

It is similar to Chevron deference, but instead of interpreting the statute, it is applied to the agency's own regulations. It uses a similar two-part test of whether the regulation intent is clear and, if not, whether the interpretation is reasonable. Significant criticism has been given to the Auer approach to agency deference, arguing that the standard grants too much power to agencies in the self-enforcement of regulations. Justice Scalia states, "The canonical formulation of *Auer* deference is that we will enforce an agency's interpretation of its own rules unless that interpretation is "plainly erroneous or inconsistent with the regulation." Seminole Rock, 414, 65 S.Ct. 1215[2]. "But of course, whenever the agency's interpretation of the regulation is different from the fairest reading, it is in that sense "inconsistent" with the regulation." *Decker v. Northwest Environmental Defense Center, 133 S.Ct., 1326 1340 (2013).* There is a concentration of power within the agency to not only write the regulation but also determine its meaning.

APPLICATIONS OF DEFERENCE BY AGENCIES

Many environmental or administrative law cases include examples of deference. Both unfavorable and Favorable Applications of Deference influence natural resource management. Our first case describes the application of the Chevron two-stage procedure where the agency believes they have deference, but the interpreting court does not. In *League of Wilderness Defenders v Forsgren, 309*

[2] Refer to https://scholar.google.com/scholar_case?case=7050770903127516716&q=Decker+NEDC&hl=en&as_sdt=1003

F.3d 1191 (2002), Forsgren, a case from Central Oregon concerning the requirement to obtain a National Pollution Discharge Elimination Permit System (NPDES) under the Clean Water Act for spraying of an insecticide on a tussock moth infestation in Oregon. Due to existing silvicultural regulations, the Forest Service argued that this requirement did not apply to their actions. Their interpretation of the silvicultural regulations was applicable; therefore, it was unnecessary to require an NPDES permit. However, *Auer*'s deference is appropriate where the agency's interpretation of its regulation is "based on a permissible construction of the [governing] statute." *Auer, 519 U.S. at 457*[3], (quoting Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778)[4]. The Court held that an agency may not interpret a regulation in a way inconsistent with a statute. In this case, the requirement of the NPDES permit for point source was the intent of Congress passage of the C.W.A.

An example of the Court granting deference to the agency *is Sierra Club v Mariata, 46 F. 3d 606 (1995),* Sierra Club. In this case, the Sierra Club attempted to forbid the Forest Service from using the principles of conservation biology to prepare its forest plans. The advocacy groups claimed that the agency must use the principles of conservation biology to analyze the diversity component of the forest planning regulations 36 C.F.R. §219.26. However, the Court determined that the diversity statute… did not provide much guidance regarding its execution. The standard is unclear in the statute developed in the National Forest Management Act 16 U.S.C. 1600), NFMA, or the subsequent forest planning regulations 36 C.F.R. §219.26. Stating that the standard used to judge agency actions under the A.P.A. is arbitrary, capricious, an abuse of discretion, or otherwise not by the law, 5 U.S.C. §§ 706(2)(A),706(2)(D). The Court found that the Forest Service was entitled to use its methodology unless it was irrational, as the statute did not require any particular scientific method. *In Lands Council v McNair, 629 F.3d 1070(9th Cir 2010),* Lands Council, environmental advocacy groups challenged the Forest Service's methodologies for ensuring species viability in old-growth forests. The Court applied the well-established law concerning the deference we owe

[3] Refer to https://scholar.google.com/scholar_case?case=10703230932343258283&q=defenders+v+forsgren+clean+water&hl=en&as_sdt=1003

[4] Refer to https://scholar.google.com/scholar_case?case=14437597860792759765&q=defenders+v+forsgren+clean+water&hl=en&as_sdt=1003

to agencies and their methodological choices. If we were to grant less deference to the agency, we would be ignoring the A.P.A.'s arbitrary and capricious standard of review.

Ecology Center v. Castaneda, 574 F.3d 652 Court of Appeals 9th Circuit (2009) illustrates the consequences of failing to grant appropriate deference to an agency. The Court considered the evidence produced by the Forest Service to support its conclusions, along with other materials in the record, to ensure that the Service has not, for instance, "relied on factors which Congress has not intended it to consider, entirely failed to consider an essential aspect of the problem, explained its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. These cases represent a cross-section of examples highlighting the variability in decisions used to grant deference by the courts to agency decision-making.

LOPER DECISION

There are two notable components in the Court's decision in *Loper* to overturn *Chevron*. Both components highlight the judiciary's role in interpreting statutory laws. First, the Constitution assigns the judiciary the responsibility of adjudicating cases and controversies, particularly when disputes involve interpreting congressional or administrative actions [cite]. The Courts will respect executive branch interpretations and may consider them in their decisions, but they should not be given the binding interpretation required by the *Chevron* doctrine would; thus, removing the independent review of the judiciary as they are accepting any permissible interpretation of the agency when the law does not clearly define the requirements.

The second involves the requirements of the A.P.A.; it defines that "the reviewing court" and not the agency whose action it reviews—is to "decide *all* relevant questions of law" and "interpret... statutory provisions." § 706. It requires a court to *ignore,* not follow, "the reading the court would have reached" had it exercised its independent judgment as required by the A.P.A. When the best reading of a statute is that it delegates discretionary authority to an agency, the reviewing Court's role under the A.P.A. is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The Court fulfills that role by recognizing the

constitutional delegation of power among the branches of government, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in "reasoned decision-making" within those boundaries. Neither *Chevron* nor any subsequent decision of the Court attempted to reconcile its framework with the A.P.A. *Chevron* cannot be reconciled with the A.P.A. by presuming that statutory ambiguities are implicit delegations to agencies. Most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities, and Courts do have these skills and are constitutionally authorized to use them.

THE FUTURE

The overturning of the Chevron decision returns an independent judicial review of agency action as required by the A.P.A. and the Constitution. It will end the judicial endorsement of a permissible agency opinion as the interpretation the Court must use. The decision is reducing the agency's unchecked power as they no longer have exclusive determination of a statute or regulation interpretation. The decision returns this power to an independent judiciary and restores the balance of powers between the branches of government.

Some may argue that the agency's technical knowledge is being minimized with the loss of agency deference; however, the courts have said that a consistent interpretation of a statute or regulations will be considered during the judicial interpretation that belongs to the courts.

For example, the USDA Fish and Wildlife Service exploited their deference to redefine critical habitat under the Endangered Species Act. They considered closed-canopy timber plantation forests as critical habitat for the species the dusky gopher frog, which lives in open-canopy forests. Thus, critical habitat was redefined as not actual habitat. During arguments, the Fish and Wildlife Service no longer disputed that critical habitat must be habitat. Still, it attempted to include in its definition as areas requiring some modification to support a sustainable population of a given species as critical habitat how Weyerhaeuser Company v United States Fish and Wildlife Services, 139 S. Ct 361 (2018). Thus, the definition of critical habitat is expanded to include areas not currently considered habitats for the species. This decision was successfully challenged in Court

but required a significant investment in legal fees that many landowners cannot afford, especially non-industrial owners; thus, the loss of the expectation of deference by the Court may discourage this type of agency behavior that expands the definition of critical elements beyond the legislative intent. Thus protecting landowners from agency overreach in the interpretation of their regulations.

One may hope that Congress will involve the agency's expertise in hearings on the statute's development. Additionally, Congress can comment during agency rulemaking, clarifying the legislative intent of much of the public desire's regulatory certainty. The loss of agency deference may restore Congress's leadership role in crafting laws for managing natural resources.

CONFLICTS OF INTEREST

The authors confirm there are no conflicts of interest.

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