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What Would Happen to All of the prior Chevron Cases in a Non-Chevron World?

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What would happen to all of the prior Chevron cases in a non-Chevron world?, by Aaron-Andrew P. Bruhl

In *Loper Bright Enterprises v. Raimondo* and its companion case *Relentless, Inc. v. Department of Commerce*, the Supreme Court will decide whether to overrule *Chevron* deference, narrow it, or leave it be. (*Chevron*, if any readers of this publication need to be reminded, is the doctrine providing that courts must defer to reasonable agency interpretations of unclear statutes.) Some commentators predict that the Court will take a cautious approach and tweak rather than overrule, but some members of the Court are set to go bigger, and Petitioner Loper Bright's brief devotes the bulk of its attention to overruling *Chevron*. In the possible future world without *Chevron*, courts would not defer to agencies but would instead attempt to give even unclear agency-administered statutes what the courts determine to be their best meaning. (The exact contours of the alternative to *Chevron* are unclear, and not all of *Chevron*'s opponents have the same alternative regime in mind, but I will use "best meaning" to refer to the potential replacement.)

In determining what the Court should do in these upcoming cases, and perhaps what it will in fact do, we should consider what overruling *Chevron* would mean for prior cases decided under the *Chevron* regime. Although the Court itself has famously been ignoring *Chevron* of late, the lower federal courts, where almost all of the work happens, have used *Chevron* thousands of times, and so it matters what happens to that huge stock of precedents applying it. There are several possible approaches to those existing cases, some more disruptive than others. This comment canvasses the possibilities and reflects on their relative strengths and weaknesses.

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The approach to overruling *Chevron* that would be least disruptive to the stock of existing law is to have the new "best meaning" method apply only to statutes enacted after the change in regimes, leaving *Chevron* to govern extant statutes. In a world that fully embodied this approach, every statute would be interpreted according to the regime that prevailed at the time of enactment. We might call this approach Regime Matching. One attraction of this approach is that it would honor congressional reliance on the interpretive regime that obtained when Congress enacted a statute. The empirical grounds of such congressional reliance are questionable as a general matter, but, as one of the amicus briefs in *Loper Bright* points out, if there is anywhere where Congress has relied on an interpretive regime, *Chevron* may be the place.

Nonetheless, it seems highly unlikely that the Supreme Court would abrogate *Chevron* only for future statutes. That is not how prior adjustments to *Chevron* like the Major Questions Doctrine or *Mead* have worked; they have applied to preexisting statutes. In the somewhat related context of implied private rights of action, the Court has rejected the approach of interpreting statutes according to the rules that prevailed when the statutes were enacted, dismissing appeals to enacting-era congressional expectations. Further, just as a matter of administering a Regime Matching system, affixing a date to a statute is tricky because of amendments, reauthorizations, and regular appropriations, all of which might be thought to "reset" the date to the then-applicable regime. Finally, if the Justices overruling *Chevron* believe that overruling is required at least in part on constitutional grounds, continuing to apply an unconstitutional regime for existing statutes is a tough compromise to demand in the name of change-amelioration.

The prospect of Regime Matching out of the way, more likely is an approach in which courts would no longer employ *Chevron* deference in the future even to statutes enacted during its heyday. But this still leaves on the table two very different possibilities with regard to the prior stock of precedents.

The difference between the two approaches is whether old *applications* of *Chevron* remain authoritative even after the *Chevron* regime is abrogated. Imagine a prior case under a "no vehicles in the park" statute that applied *Chevron* and agreed with the agency that a skateboard is not a "vehicle" within the statute's meaning. Now suppose *Chevron* is overruled, such that courts are to required give statutes their best judicially determined meaning. Is the old ruling that the statute does not apply to skateboards still binding under the normal rules of vertical and horizontal precedent? If so, we could call that approach the Preservation of Old Applications (or just Preservation for short). Or, instead, is the coverage of skateboards now a question for fresh judicial consideration under the new method, as if the prior case never happened? Call this Reexamination.

Current law makes either approach conceivable. Preservation of Old Applications has been used or assumed in some past episodes of interpretive change. In one quotable example, the Supreme Court wrote that "[p]rinciples of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same." Indeed, *stare decisis* is supposed to have particular force in the statutory context, where Congress may change the law.

Yet the contrary view – Reexamination – finds some support too. Probably the most closely analogous scenario to *Loper Bright* is *Kisor v. Wilkie*, which considered whether to overrule the *Auer*/*Seminole Rock* doctrine of deference to agencies' interpretations of their own regulations. The Court ended up trimming and clarifying the doctrine, rather than overruling it. Notably for our purposes, the majority's argument in favor of retaining the doctrine (albeit modified) observed that "abandoning *Auer* deference would cast doubt on many settled constructions of rules," a proposition it said both parties agreed on during oral argument.

And, perhaps surprisingly, given that *Kisor* did *not* overrule *Auer*, a few lower courts have nonetheless decided that pre-*Kisor* precedents upholding agency interpretations have to be scrutinized in order to determine if they comply with the new, less agency-friendly standard; if they don't, they are no longer good law.

It's true that the difference between Preservation and Reexamination will not always matter to bottom-line outcomes. That is particularly so for prior *Chevron* Step One cases. A Step One holding means that the statute has a clear meaning that courts and agencies alike have to honor. Such a holding would likely be a "best reading" under a new regime. So even if scrutiny of old *Chevron* cases under a new standard were required, it would not matter to Step One outcomes.

The difficulty arises with prior Step Two holdings, which deferred to an agency view of an unclear statute that may not have been the best interpretation by judicial lights. Preservation of Old Applications leaves Step Two interpretations intact without plumbing their bestness, while Reexamination means they are up for grabs.

The government and some of its amici emphasize the disruptive potential of overruling *Chevron* by pointing to effects on prior understandings. As the government writes in its *Loper Bright* brief:

> *Chevron* has been invoked in thousands of decisions to uphold an agency's reasonable interpretation of a statute. Private parties have ordered their affairs in reasonable reliance on that settled body of law, making investment decisions and entering into contracts informed by agency interpretations upheld under *Chevron*. . . . Overruling *Chevron* would invite litigants to argue that, even if an agency's interpretation was already sustained as reasonable in a prior case, the court should nonetheless adopt some other purportedly better interpretation—or that the agency's interpretation must be set aside as arbitrary because the agency's reasoning was based in part on its understanding of the interpretive latitude afforded under *Chevron*. And even if specific prior decisions applying *Chevron* could somehow be retained, petitioners fail to address the numerous agency rules and orders that have built upon those decisions but were not themselves challenged in litigation. The prospect of cascading uncertainty is yet another reason to leave any substantial changes to Congress, which could act prospectively.

Petitioner's brief in *Loper Bright*, by contrast, attempts to assuage such worries. (The companion case, *Relentless, Inc. v. Department of Commerce*, was granted later and has not yet been briefed on the merits.) Here is what Petitioner Loper Bright says about the fate of prior cases relying on *Chevron*:

> [T]o the extent that anyone has attempted to rely on a concrete application of *Chevron* in a particular case notwithstanding the looming threat of a *Brand X*-style switcheroo, abandoning *Chevron*'s methodology would not necessarily disturb that substantive precedent. Any case decided under step one will be unaffected by *Chevron*'s overruling. And any case decided under step two cannot generate justifiable reliance given the executive's ability revisit matters under *Brand X*. If anything, those judicial decisions will be entitled to more respect in a post-*Chevron* world. As this Court has explained, "[p]rinciples of stare decisis … demand respect for precedent whether judicial methods of interpretation change or stay the same." CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008). It follows that "[c]oncrete applications of *Chevron*" will continue to "carry a presumption of durability independent of the decision-making approaches that yielded them"—i.e., even if *Chevron* is overruled. Kozel 1161; see Beerman 786 (similar).

A theme here and elsewhere in the petitioner's brief is that the risk of disruption is slight because *Brand X* already undermines reliance by licensing agency-driven change ("switcheroos," as they put it). But that overstates the instability in the current system. New agency heads brought in with a change in administration do not try to change everything and couldn't if they tried. For those things they do want to change, an agency's effort at reversal of a previous position that sought the force of law generally requires consideration of reliance interests and, if the prior interpretation took the form of a regulation, significant process. A change-making agency may well provide transition rules for those who relied on the agency's prior view, ameliorating the disruption.

Pace the petitioner, then, the fate of the thousands of Step Two decisions on the books cannot just be brushed aside as if the cases were always written in sand. As for what would happen to them in a world without *Chevron*, it seems that the petitioner's brief is saying that Step Two holdings would remain authoritative statements of statutory meaning, though some of the language leaves things uncertain on that score (e.g., "not *necessarily* disturb," "*presumption* of durability"). The kind of clarifying question that I hope the Justices will press at oral argument is this: If a court of appeals previously deferred at Step Two and read a statute to mean X, and if X is clearly not the "best" reading (or whatever the new standard is), does the statute still mean X in that circuit as a matter of precedent? Or, instead, may (or must) a future panel of that court or a district court in the circuit consider whether the newly announced *Loper Bright*/*Relentless* standard would generate X – and depart from the prior decision if not?

Note that the question facing the courts is not only how many old cases would come out differently were they decided under the new standard. Given the many, many Step Two cases that have been decided in the lower courts over the last several decades, surely some would come out differently and others would not, the proportion depending on the formulation of the non-*Chevron*regime. Regardless of the ultimate number, though, that means future litigation to sort out which is which. Among other difficulties, courts will confront prior cases

that are hazy on which *Chevron* step they were using. Limitations periods, lack of standing, and other restrictions might insulate some decisions from scrutiny, but probably not many and certainly not all.

I have been explaining how Reexamination could be unsettling, but Preservation of Old Applications has some problems too. According to one logically appealing way of understanding a Step Two holding, Preservation would give old cases *too much*effect, as Step Two holdings never represented final judicial determinations of meaning but only meant that the agency interpretation at issue was within the statute's zone of indeterminacy. From this perspective, the holding that a certain interpretation was plausible is no longer relevant under a new regime of best meanings; the precedent therefore need not be overruled but can just be disregarded. Preservation keeps such interpretations in place even when the prior court did not find them correct and neither courts nor agencies could reach them under the new interpretive approach. One would imagine that a future non-*Chevron* regime would still let agencies change those extant interpretations, albeit only one more time, and only to the judicially "best" one, lest the subpar interpretations become ossified. Yet given that *Chevron*'s challengers aim so much of their criticism at *Brand X* and agency "switcheroos," perhaps one should not take for granted the continued permission for even that limited form of agency reinterpretation. Again, this is worth exploring at oral argument, in my opinion.

At the risk of further complicating the analysis, a future replacement for *Chevron* could tailor the permission for agency dynamism and the associated precedential effect of old cases based on the wording of the organic statutory provision at issue. For example, one could say that prior cases that blessed agency interpretations resolving statutory ambiguity will represent binding accounts of meaning immune from agency revisitation, while agencies retain permission to update when they have express authority to set policy within open-textured bounds of reasonableness. Needless to say, that line would need to be fleshed out over time.

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Here I have set out several options for dealing with *Chevron* cases in a potential future world without *Chevron*, and I have described some difficult choices that interpretive-regime changers face in designing that new world. I cannot help but state by way of conclusion, and admit outright what the reader may have discerned, that one very good way for the Court to ease these difficulties is to reduce the scope of the contemplated change, either by reaffirming *Chevron* or at most tweaking it. Or, admittedly more unusual, the Court could expressly affirm the de facto status quo in which *Chevron* is relatively strong in the lower courts and mostly impotent in the few cases that make it to the Court's docket. In any case, I hope the Court will remember that the doctrine it is crafting will primarily, indeed

overwhelmingly, be applied in the lower courts, with their large, non-discretionary dockets, propensity to split on contentious matters, and huge stock of *Chevron* precedents. How all of this will work out should not be left to be sorted out later.

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