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Overcoming Human-Nature Dualism In The Texas Hill Country: Local Governments And Urban Spaces

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CONTENTS

SEPTEMBER / OCTOBER 2024

"IT AIN'T NECESSARILY SO"- PUTTING *LOPER BRIGHT* IN PERSPECTIVE

By: Norman A. Dupont, Counsel to Aleshire & Wynder LLP, Westlake Village. California

In reversing four decades of what had been settled *Chevron* deference, the Supreme Court's recent *Loper Bright Enterprises* decision promises to radically restrict federal agency authority and replace it with judicial oversight. But that transformation may not be as sweeping at the state and local level.

PAGE 6

FIT FOR DUTY: A MUNICIPAL LAW PRACTITIONER'S GUIDE TO EFFECTIVE AND DEFENSIBLE PHYSICAL ABILITIES TESTING

By: Christoper Towle, City Attorney, Newton, Kansas

It is essential that employees--whether long-time staff or new applicants—are capable of handling the physical requirements of their jobs. At the same time, employers must be alert to tests and measurement criteria that unfairly discriminate against some workers.

PAGE 10

OVERCOMING HUMAN-NATURE DUALISM IN THE TEXAS HILL COUNTRY: LOCAL GOVERNMENTS AND URBAN SPACES

By: AJ Urteaga, Assistant City Attorney, Land Use & Real Estate Division, Austin, Texas

A common perception is that biodiversity has little to do with heavily populated urban areas. But the reality is that cityscapes can be home to a wider array of plant and animal life than most of us would suspect—it just takes a broader awareness of the possibilities and a shift in focus.

PAGE 16

DEPARTMENTS

20 LAND USE
A Brief Look at Land Condemnation
By: Ben Mount, Senior Assistant General Counsel, North Carolina League of Municipalities
Municipal infrastructure and eminent domain.

24 FIRST AMENDMENT
Prayer at Council Meetings - Who Prays and How is that Decided?
By: Julian Grant, Deputy City Attorney, San Marcos, Texas
The constitutional nuances of legislative prayer.

28 INSIDE CANADA
Blocked Drainage, Illegal Tempos, Arson Allegations, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent Canadian cases of interest.

30 AMICUS
Supreme Court: On to the Next Term
By: Amanda Karras, IMLA Executive Director and General Counsel
Another round of transformational cases awaits.

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"It ain't necessarily so"— The Supreme Court's Narrow Ruling in *Loper Bright Enterprises* Means Little to the Municipal Lawyer

By: NORMAN A. DUPONT
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The Supreme Court in June of this year announced what many termed a "blockbuster" bomb of a decision. In *Loper Bright Enterprises*, *Inc.* v. *Raimondo*[1] the Court decisively destroyed the 40-year old *Chevron*[2] doctrine of judicial deference to federal administrative agencies, at least in cases of an ambiguous statutory text. It left behind a ruined foundation of federal court interaction with future federal administrative agencies, a foundation pockmarked by references to "perhaps" an 80-year old doctrine of deference (sometimes) known as the *Skidmore* doctrine.[3]

The Court in *Loper Bright* did not overrule the hundreds, nay thousands, of prior lower court decisions premised on the previously accepted *Chevron* doctrine. In a curious bow of deference to the doctrine of stare decisis that was otherwise knocked about by the majority (with a special 30-page concurrence by Justice Gorsuch), the Chief Justice's somewhat inconsistent opinion ends by stating that: "[W]e do 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 interpretative methodology." A cynic might observe that this invocation of stare decisis, but only in part, resembles the famous observation of the Red Queen (actually Humpty Dumpty—"A word means what I want it to mean, nothing more, nothing less."[4] Cynicism aside, in terms of federal administrative law, the Court's June decision is truly significant by any measure—it destroyed a doctrine used by thousands of lower courts and invoked even outside of a litigation forum in countless citations by federal agencies seeking to justify their positions.

"It ain't necessarily so" is the probing song of Sportin' Life, the complex *Porgy and Bess* character who questions whether some of the stories allegedly based on Biblical lore are in fact literally true. In a jocular fashion, 'Sportin' Life questions whether "little Jonah" really lived in a whale's abdomen, or whether you could call a 900-year old Methuselah "living" when no women would "give in to no man what is 900 years."[5]

So too, the municipal lawyer must question whether the Supreme Court's decision in *Loper Bright* has any "necessary" impact to her or his practice. The practice of many municipal lawyers revolves around not federal but state-based agencies which issue their own rules and regulations. To be sure, some state regulations in environmental areas (and various others) have federal analogues—most states have "Clean Air" statutes that to some degree mirror the federal Clean Air Act. Many states have environmental laws protective of state waters that also mirror federal statutory provisions. Most states have state emergency action agencies akin to the Federal Emergency Management Agency (FEMA). It is, however, not necessarily the case that the state agencies charged with implementing these laws are given the same level of deference as federal agencies are (or at least were until this June).

This article examines the limits of the Supreme Court's holding in *Loper Bright* and then briefly examines judicial deference to administrative agencies in three states—California, New York, and Iowa. The net result shows that deference by judges to determinations in those states is alive and well, notwithstanding *Loper Bright*.

Loper Bright's Holding—*Chevron* style deference is wrong, but it is not unconstitutional

The municipal advocate whose practice with agencies is primarily in state court must first understand the limits of the holding in *Loper Bright*. It was not founded on constitutional prin-

ciples of separation of powers—i.e., that the judicial power to determine the meaning of laws was a "separate" power not subject to administrative agency override. While the majority opinion starts off with some constitutional-sounding observations based on the Federalist papers and citation to the Court's early cases in the 1800s, it then takes a distinct left turn to discuss the expanded federal regulatory world during the New Deal of the 1930s and 1940s. [6] The Chief Justice then appraises judicial review of New Deal agency decisions by suggesting that those cases stand for the proposition that: "as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide. . ." [7]

The Chief Justice's historical narrative omits one telling period of the Court in the early 1930s in which a coalition of conservative justices rejected a number of agencies and agency positions based on the purported restrictions of the commerce clause and "personal liberties," an assertion of raw judicial authority that lead to a "court-packing plan" to expand the number of Supreme Court justices.[8] Given today's scrutiny of the Court, it is perhaps inevitable that the Chief Justice simply omitted earlier examples of judicial overreach that triggered Presidential efforts to rein in the Court.

The Chief Justice's historical narrative, which attempts to shape history to his theme that "judges always decided the law" ran into two cases that arguably went the other way—*Gray* v. *Powell* and *NLRB* v. *Hearst Publications, Inc.* [9] The Chief Justice essentially treats these two cases as anomalies in the greater river of uniform assertion of judicial rights and finally cites a legal treatise and a law review article for the proposition that the deference shown in those two cases was not uniformly applied. [10]

After slogging through the historical swamp of somewhat inconsistent precedents, the majority opinion then takes another sharp left turn. It is not that *Chevron* style-deference defies what the Chief Justice describes as prior (pre-1994) precedent, it is rather that *Chevron* violates a statute—the federal Administrative Procedures Act (APA). The Chief Justice cites to section 706 of the APA as providing that "the reviewing court shall decide all relevant questions of law. . ." [11] He then concludes that this text, combined with legislative history, supports and confirms the "traditional" understanding of a supreme judiciary and that the 1994 decision in *Chevron* cannot be squared with the language of the federal APA. [12]

After dealing with the nettlesome doctrine of stare decisis for a case that had 40 years of support in courts, treatises, and even law review articles, the majority opinion concludes that: "under the APA [courts] may not defer to an agency interpretation of the law simply because a statute is ambiguous." [13]

The alternative path to overturning *Chevron* would have been to reach even further and hold that as a matter of the U.S. Constitution no one, not even Congress in amending the APA, could limit judicial power.

Only one Justice, Justice Thomas, espoused this Constitutional separation of powers argument, citing to many of his own prior dissenting or concurring opinions. Justice Thomas' concurring opinion was a singular one, with no other Justice joining him on those grounds. [14]

The critical take-away for the municipal lawyer is that the Supreme Court's holding was limited to its reading of the federal APA. A number of States have enacted their own "State Administrative Procedures Act[s]", but these statutes may vary significantly in their form and content from the federal APA. [15]

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State Court Deference to Administrative Agencies—A few examples

1. *California-Deference for "Quasi-Legislative" Rules.* A key case in California discussing the scope of deference to administrative agencies in that state arises from an "only in California" context of a seller of musical instruments (Yamaha guitars) who purchased them outside the state, stored them within the state, and then gave them away as promotional items. The California taxing authority, going by the curious name of the State "Board of Equalization," imposed use taxes and cited as authority for doing so one of its own

Continued on page 8



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Loper Bright *cont'd from page 7*

"annotations" to a guidance called Business Taxes Law Guide. There is no evidence that this (or other) annotations were promulgated as formal rules pursuant to California's state administrative procedures act.[16] The California Supreme Court distinguished between two types of agency actions—the quasi-legislative and the "interpretative of a statute." As to the former category, which the California Supreme Court described as "regulations adopted by an agency to which the Legislature has confided the power to 'make law,' those actions "*if* authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves."[17] As to other agency determinations that purport to interpret the legal effect of a statute, those are subject to a more searching degree of judicial scrutiny in California, one the Court in *Yamaha* described in vague terms—"Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation."

This standard of review sounds much like the standard suggested by the U.S. Supreme Court in *Loper Bright*; as the California Supreme Court put it: " 'The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.' "[18] In an almost foretelling of the decision in *Loper Bright*, the California Supreme Court quoted and cited as a "valuable judicial account" the 1944 decision in *Skidmore*, *supra*. The California Supreme Court in *Yamaha* held that the lower courts gave too much weight to the taxing authority's annotation. Then, in an utterly unhelpful conclusion the Court punted on the ultimate issue, stating that it was remanding without expressing an opinion on the merits of the underlying question of the imposition of a use tax on Yamaha's products.[19]

2. Iowa—Deference if the Issue has been "Clearly Delegated" by the Legislature to the Agency.

Iowa is a vastly different state than California, so much so that it one might say in Iowa City: "Dorothy, you're not in Hollywood anymore!" But in the area of judicial review of administrative agencies Iowa is actually quite similar to California. In 2012 the Iowa Supreme Court reviewed the determination of a Workers' Compensation Commissioner as to the meaning of "suitable [alternative] work" because the injured employee's residence was some 380 miles away from the proffered alternative. The Iowa Supreme Court also reviewed the Commissioner's determination of the extent of the disability suffered by Mr. Neal.[20]

As to the first issue of whether the Commissioner had properly assessed the meaning of the phrase "suitable work" as defined by the Iowan Code, the Supreme Court stated a deferential standard as to an agency decision within the scope of its legislatively granted domain as to factual determinations. Such factual determinations are "binding" if supported by substantial evidence.[21] As to the ultimate question of the ultimate meaning of the legislative term "suitable work," however, the Iowa Supreme Court drew a different standard of deference, finding that the legislature did not clearly vest interpretative authority to the Worker's Compensation Commissioner and that: "we accord no deference to the interpretation of the commissioners and will substitute our own judgment if we conclude the commissioner made an error of law."[22] To explain the scope of the Court's own judgment, the Supreme Court then explored the exact statutory text, adjacent words that might modify or give context to the term "suitable work," and also explored the precedents in Iowa and other states considering geographic proximity to be a relevant factor in a variety of employment settings. Only after its own independent analysis did the Court conclude that the Commissioner's interpretation of this phrase was not legal error, and therefore that his conclusion that offering an injured employee a possible job some 380 miles away from his home was not "suitable work."[23]

The Iowa Supreme Court's standard of review of agency determinations, at least as articulated in *Neal*, is a flexible one depending on whether it is a review of fact (more deferential) or issues of law (less deferential). Nonetheless, in much of the discussion of the ultimate role of the judiciary this opinion mirrors portions of the discussion by the California Supreme Court in *Yamaha*.

3. Recent Standard of Deference in the New York Court of Appeal.

The New York Court of Appeal addressed that state's standard of judicial deference to agency decisions in the case of a doctor who rendered possibly deficient medical services at the informal request (but not an express request) by the Department of Corrections was entitled to a statutory indemnity.[24] The agency in question, the New York Attorney General's office, rejected the doctor's request for indemnification against a subsequent medical malpractice suit, finding that he was not covered as an employee of the Department but rather more of an independent contractor. The Court of Appeal considered this ruling and the appropriate degree of deference to be accorded in this context. It stated the general rule that in New York deference is accorded to an agency's interpretation of law when it involves "specialized competence of expertise the agency has developed in administering the statute." On the other hand, where the question "is one of pure statutory reading and analysis. . .the judiciary need not accord any deference to the agency's determination."[25]

In this case, the Court of Appeal determined that whether a service was performed "at the request of" the Department of Corrections did not involve "specialized knowledge or expertise" of the Attorney General. Accordingly, it went on to its own independent statutory interpretation and concluded that the Attorney General

reached the correct conclusion, albeit based on the Court's review of statutory text and history.[26] No doubt the New York Attorney General appreciated the result, despite the subtle inference that her office had no "special expertise" in interpreting New York statutes in general.

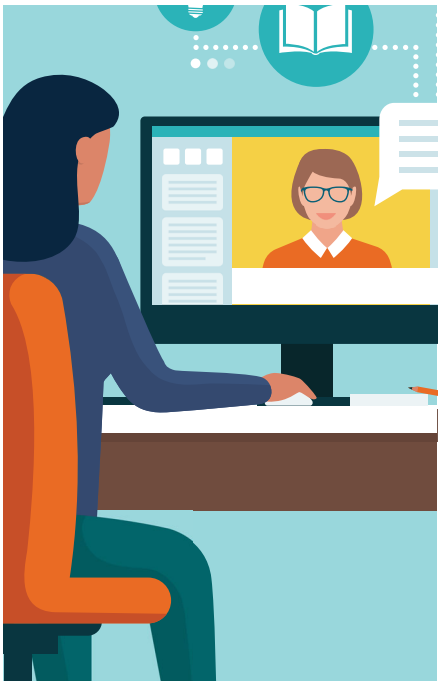
4. It ain't necessarily so. . .

Loper Bright received much publicity as a blockbuster or landmark decision in both the legal and popular press. What it did not do was to reach its decision based on Constitutional grounds. This leaves the City Attorney, or the municipal lawyer advising a City, with the unenviable task of pouring through the judicial decisions of her or his particular state jurisdiction as to judicial deference given in that state. Many municipal matters involve administrative proceedings (zoning decisions, environmental review processes, or the like) as to which the attorney defending the city might well seek to invoke the cloak of judicial deference to fend off attacks by gadflies. For these matters, the core inquiry remains as to the specific expertise that the deciding body had and invoked to resolve a particular issue.

Finally, the municipal lawyer should be alert to changes in precedent as to deference accorded to an administrative agency. Conventional wisdom suggests that *Loper Bright* eradicated judicial deference to agency interpretation in every venue across the nation, but"it ain't necessarily so," and local government attorneys will still need to keep aware of the dimensions of *Chevron*-style deference in their own.

Notes

1. ___ U.S. ___; ___ S. Ct. ____ (June 23, 2024).
2. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
3. Skidmore v. Swift & Co., 323 U.S. 134 (1944). Chief Justice Robert's opinion for the 6-3 majority described Skidmore as "most notably along those lines" (of the majority's preferred style of judicial deference) in his opinion but does not directly hold that lower courts must now follow that standard of deference in lieu of *Chevron*.
4. Lewis. Carroll, *Through the Looking Glass and What Alice Found There (*1871).
5. George Gershwin, *Porgy & Bess* (1935).
6. *Loper Bright, supra*, 603 U.S. ___, ___ S. Ct. ___ (slip op. at 7-9).
7. *Id.*at 9.
8. *See* U.S. Supreme Court Historical Society, "FDR & the Court Packing Controversy: Full Script" available at: https://supremecourthistory.org/films/fdr-courtpacking-controversy-full-script/
9. *Loper Bright, supra*, (slip op. at 10-11).
10. *Id.* at 12.
11. *Id.* at 13-14 (citing 5 U.S.C. Sec. 706)
12. *Id.* at 18.
13. *Id.* at 18.
14. *Id.*(Thomas, J., concurring at 2) .
15. *See, e.g.,* Colorado State Administrative Procedure Act (Title 24, Chap. 4); New York "State Administrative Procedure Act" found in N.Y.Con.Law, Administrative Proc. Sec. 100, et. seq.; Cal. Gov. Code Section 11340 et. seq.
16. Yamaha Corporation of America v. State Board of Equalization, 19 Cal. 4th 1, 5-6, 79 Cal. Rptr. 2d 1 (1998).
17. *Id.* at 7.
18. *Id.* at 8.
19. *Id.* at 15.
20. Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (2012).
21. *Id.* at 518.
22. *Id.* at 519.
23. *Id.* at 519-525.
24. Wang v. James, 40 N.Y.3d 497 (2023).
25. *Id.* at 501-502.
26. *Id.* at 502-503.



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