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The Receding Tide of Agency Discretion in Environmental Regulation

Review of Important Recent U.S. Supreme Court Cases on Environmental Law

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Overview

1. **Historic Supreme Court Deference to Environmental Agency Determinations**
   - *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
2. **Increasing Supreme Court Scrutiny of Environmental Regulation**
   - *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020)
   - *West Virginia v. Environmental Protection Agency,* 597 U.S. 697 (2022)
   - *Sackett v. Environmental Protection Agency,* 598 U.S. 651 (2023)
3. **End of Deference to Regulatory Agencies**
   - *Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024)
4. **Practical Implications for Environmental Regulation and Cleanups**

Historic Court Deference to Agency Regulation – Including Regulation of the Environment

- Longstanding deference to agency interpretation of statutes and rulemaking.
- Recognition of agency expertise in the areas they occupy, including regulation of the environment.
- Permits agency flexibility to pivot to meet real time changes/challenges without need to wait for Congressional action.
- Codified by US Supreme Court in 1984 in *Chevron USA v. NRDC,* 467 U.S. 837, 104 S. Ct. 2778 (1984) – "Chevron Deference."

Chevron v. NRDC (1984)



What is a " stationary source" of air pollution requiring permitting under the Clean Air Act?

Chevron v. NRDC (1984)

Legal and Factual Background:

- Clean Air Act of 1963 requires any project that would create a major "stationary source" of air pollution to undergo a complex and expensive EPA "new-source review" process.
- EPA initially defined "stationary source" broadly to cover each element of a plant, such as a building, machine, smokestack, boiler, and the like, requiring the new source review when any element of a plant was changed or updated.
- Reagan-era EPA changed the definition to mean an entire plant or factory, allowing plants to make changes without triggering a new source review as long as there is no net increase in air impacts.

Chevron v. NRDC (1984)

Procedural History:

- The National Resources Defense Council filed a petition for review challenging the EPA's new interpretation in the DC Circuit Court of Appeals.
- An opinion authored by then DC Circuit Judge Ruth Bader Ginsburg, the Court acknowledged that the Clean Air Act and its legislative history did not define "stationary source," but found EPA's new interpretation in conflict with the Agency's and the DC Circuit Court's prior interpretation of the terms and invalid.
- Chevron USA, which was affected by EPA's regulation, intervened and petitioned the US Supreme Court for review.

Chevron v. NRDC (1984)

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Supreme Court Review:

- Issue: Whether EPA's new interpretation of the Clean Air Act to allow states to treat all of the pollution-emitting devices within the same industrial grouping or facility as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."
- Decision: In a 6-0 unanimous decision authored by Stevens, the Supreme Court reversed the Court of Appeal siding with the EPA's new interpretation of the statute, stating: "The basic legal error of the Court of Appeals was to adopt a **static** judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition."

Chevron v. NRDC (1984)

Supreme Court Opinion:

- "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."
- "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."
- "Judges are not experts in the field, and are not part of either political branch of the Government."

Chevron v. NRDC (1984)

"*Chevron* Doctrine" – 2-Step Analysis

- 1. Whether Congress has directly spoken to the precise question at issue.
  - If the intent of Congress is clear, "that is the end of the matter."
  - The court and the agency must give effect to the unambiguously expressed intent of Congress.
  - If not qualify under step one, go to step two.
- 2. Whether the agency's answer is based on a permissible construction of the statute.
  - Court evaluates whether the interpretation of the law that the agency proposes is "**reasonable**."
  - Court must "**defer**" to the agency's reasonable interpretation.

Judicial Reliance on *Chevron* Deference

- *Chevron* cited in over 18,000 cases since the opinion was issued.
- 2017 study evaluated over 1,300 court of appeal cases from 2003 to 2013, finding that they applied *Chevron* in close to 75% of cases addressing agency interpretations.
- Study of cases from 2020 to 2021 found that courts of appeal applied *Chevron* in nearly 85% of cases.
- Agencies prevailed in 77% of cases when a court applied the *Chevron* doctrine.

*Source: Congressional Research Service, *Chevron* Deference in the Courts of Appeal, June 8, 2023.

Changing Composition of Supreme Court

- Since 2016, conservative wing of the Supreme Court expands.
- Growing conservative skepticism of expanded agency authority and power of administrative state based on concerns regarding separation of powers and non-delegation doctrine.
- Concern over agency activism/broad interpretation of statutes beyond express statutory language.
- Increased appetite of justices to weigh in on substantive policy considerations.
- Supreme Court had not deferred based on *Chevron* since 2016.

County of Maui v. Hawaii Wildlife Fund (2020)



What is a "point source" for pollution to "Waters of the United States" under the Clean Water Act?

County of Maui v. Hawaii Wildlife Fund (2020)

Statutory and Procedural Background:

- The Clean Water Act regulates discharge of pollutants from "point sources" into waters of the United States, requiring permitting.
- With EPA approval, County of Maui discharged partially treated effluent into a groundwater well distribution network about a half mile from ocean (waters of the United States) without a permit.
- Environmental groups sued the County for failing to obtain the discharge permits, arguing that the groundwater injection wells are effectively point sources to the ocean because a majority of the water discharged from the wells made its way into the ocean.
- The trial court and Ninth Circuit found for plaintiffs, agreeing that the facility needed permits because the pollution in the ocean was "fairly traceable" to the facility.

County of Maui v. Hawaii Wildlife Fund (2020)

Supreme Court Decision:

- The Court held that CWA requires a permit when there is a direct discharge from a point source into navigable waters or when there is the "functional equivalent" of a direct discharge; the Court found the discharge in question to be the functional equivalent of a direct discharge.
- 6-3 opinion authored by Breyer, joined by Roberts, Ginsburg, Sotomayor, Kagan and Kavanaugh.
- The Court adopted a practical interpretation; its purpose is to prevent agencies and local jurisdictions from opening loopholes that bypass statutory objectives.
- While a win for environmentalists, the opinion was **a rejection to EPA's interpretation of the Clean Water Act**.
- Justices Thomas and Gorsuch dissented, favoring a more restrictive/literal interpretation of the statute, CWA only applies to direct discharges to the ocean.

West Virginia v. EPA (2022)



Does the Clean Air Act authorize EPA to regulate power plant emissions by requiring a shift in technologies from higher to lower emitting methods?

West Virginia v. EPA (2022)

Statutory and Procedural Background:

- EPA promulgated its "Clean Power Plan" under Section 111 of the Clean Air Act, which proposed, in addition to enforcing emissions standards on existing power plant technology as expressly authorized by the Act, encouraging energy producers to implement "generation shifting," such as:
  - "within the fence line" emissions technologies to reduce emissions such as shifting from coal to natural gas; and
  - "outside the fence line" shifting to alternate clean energy sources at the grid level such as investment in solar and wind power.
- EPA encouraged generation shifting to new cleaner energy production technologies through implementing "standards of performance" virtually unattainable under the existing technology at the regulated plants.
- The generation shifting elements of the Clean Power Plan were challenged in Federal Court.

West Virginia v. EPA (2022)

Supreme Court Decision:

- The Court held that Congress did not expressly grant the EPA authority under the Clean Air Act to devise emissions caps based on on-site and off-site generation shifting approach advocated by the EPA.
- Opinion authored by Roberts; Thomas, Alito, Gorsuch, Kavanaugh and Barrett joined.
- Opinion invoked the "Major Questions Doctrine" in lieu of *Chevron*, leaving *Chevron* intact (for now)*:*
  - Agency must point to "clear congressional authorization" for the authority it claims; "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"
  - "[B]oth separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."
- Dissent authored by Kagan and joined by Breyer and Sotomayor, lamented the Court stepping into EPA's role: "whatever else this Court may know about, it does not have a clue about how to address climate change."

Sackett v. EPA (2023)



When do wetlands constitute protected waters of the United States under the Clean Water Act?

Sackett v. EPA (2023)

Statutory and Procedural Background:

- The Sacketts purchased unimproved lot near Priest Lake, Idaho, and began backfilling the property to build a vacation home.
- Responding to neighbors' complaints, EPA halted the work informing the Sackets that the backfilling violated the Clean Water Act, which prohibits discharging pollutants into "waters of the United States."
- The Sacketts sued the EPA arguing that the area backfilled was not protected waters of the United States because there was dry land between the wetland on their property and the nearby lake.
- The District Court entered summary judgment for EPA and the Ninth Circuit affirmed, holding consistent with EPA that the Clean Water Act covers wetlands with an "ecologically significant nexus to traditional navigable waters," even if not contiguous.

Sackett v. EPA (2023)

Supreme Court Opinion:

- Court held that waters of United States refers to navigable waters such as streams, oceans and lakes, **and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface water connection**.
- Opinion authored by Alito, which was supported by other "conservative" justices, significantly limited the scope of the Clean Water Act.
- The **Court rejected the EPA and Army Corps of Engineers' expansive reading of the statute** to include wetlands and features with no continuous surface water connections to streams, oceans, rivers and lakes; seasonal connectivity deemed not sufficient.
- Court stated that "exceeding clear language" is required to infer that Congress wishes to alter the federal/state balance or the Government's power over private property or to subject landowners to potential criminal penalties under the Clean Water Act.

Loper Bright v. Raimondo (2024)



- **Does the National Fisheries Service have authority to mandate an industry-wide funding mechanism to pay the cost of federal marine observers?**
- **Should *Chevron* be overturned?**

Loper Bright v. Raimondo (2024)

Factual, Statutory and Procedural Background:

- Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the National Marine Fisheries Service requires fishing vessels to carry marine observers on board to collect data and protect against overfishing.
- The MSA explicitly requires certain fisheries pay the fees and is silent as to others, such as the Atlantic herring fishery.
- While the Fisheries Service initially covered the observer fees for the Atlantic herring fisherman, the New England Fishery Management Council proposed amending its plans to require the herring vessels to pay the observer fees if federal funding becomes unavailable.
- Petitioner Loper Bright and several other family businesses that operate the Atlantic herring fishery sued the Fisheries Service, challenging the fees as applied to them under the MSA.
- The DC District Court applying *Chevron* granted summary judgment in favor of the Fisheries Service and the Appellate Court affirmed.

Loper Bright v. Raimondo (2024)

Supreme Court Decision:

- 6-3 decision authored by Roberts joined by Thomas, Alito, Gorsuch, Kavanaugh and Barrett, held that:
  - *Chevron* is overruled; and
  - the MSA does not authorize the agency to create an industry-funded mechanism for marine observers

Loper Bright v. Raimondo (2024)

Supreme Court Decision:

- *Chevron* deference conflicts with the Administrative Procedures Act and it remains the responsibility of the courts to decide whether the law means what the agency says.
- *Chevron* has proven to be unworkable and unreliable – constant tinkering with rules has diminished any reliance interests that might otherwise be at play for such an established doctrine.
- This "Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016."

Loper Bright v. Raimondo (2024)

Dissent by Kagan, joined by Sotomayor and Jackson (in companion case):

- Agencies have expertise, experience, and are politically accountable while courts do not, making agencies a more logical interpretive actor.
- "The idea that courts have 'special competence' in deciding such questions whereas agencies have 'no[ne]' is, if I may say, malarkey."
- *Chevron* is not about deferring to agencies, rather it is about deferring to Congress.
- Congress prefers that the "responsible agency" resolve gaps or limitations in expressed intent for a given statute.
- Because Congress has not repudiated the doctrine, *Chevron* is entitled to an especially strong *stare decisis*.

Loper Bright v. Raimondo Standard

- "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."
- "Careful attention to the judgment of the Executive Branch may help inform that inquiry."
- "When statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."

Varying Views of the Post *Chevron* Landscape

Court Majority Perspective:

- The *Sackett, West Virginia, and Loper* cases represent examples of clear overreaching by federal agencies.
- It is the role of Congress to define powers of the agencies under statutes; it is not for agencies to define or expand their role in the absence of express delegation by Congress.
- It is the appropriate role of the Court to weigh in on the issues of statutory interpretation, particularly where delegation to an agency is not express; in that regard, no deference is due to the agency's interpretations of law.

Varying Views of the Post *Chevron* Landscape

Dissent Perspective:

- Court is stepping into areas where it lacks expertise; agencies have greater expertise and deserve deference from the Court.
- *Loper* hampers agencies' ability to regulate efficiently under changing circumstances, particularly where Congress fails to act.
- Congress never repudiated *Chevron* and impliedly consented to judicial deference to agency interpretation and implementation in areas of their expertise.

Practical Implications for Environmental Regulation

- Federal agency guidance/interpretation may be less reliable.
- Diminished ability of responsible agencies to re-interpret statutes to address changing circumstances; will need to wait for congressional action, which may not be readily forthcoming.
- Agency interpretation of statutes and rulemaking will likely be more cautious.
- Successful challenges to agency statutory interpretations, rule making, and enforcement actions may be more likely.
- Regulations that challenge property rights, increase business regulations, or carry criminal penalties, are more vulnerable to attack.

Practical Impact on Environmental Cleanups

- Regulated entities will have more daylight to challenge federal regulations and pollution control and cleanup.
- Potentially responsible parties emboldened to challenge cleanup orders.

US air force avoids PFAS water cleanup, citing supreme court's Chevron ruling

EPA says Tucson's drinking water is contaminated but air force claims agency lacks authority to order cleanup



Several air force bases are largely responsible for trichloroethylene (TCE) – volatile organic compounds – and PFAS contaminating drinking water sources in Tucson. Photograph: Andrew Caballero-Reynolds/AFP/Getty Images

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Questions?

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