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Loper Bright —Chevron Needs a Gravestone, Not Another Exception, by Isaiah McKinney

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The Supreme Court recently granted certiorari in *Loper Bright Enterprises v. Raimondo*, a case where commercial fishers are challenging an agency's statutory authority to issue a regulation requiring the fishers to pay the wages of inspectors on their boats. The Question Presented ("QP") that the Court agreed to hear includes a request to overrule *Chevron v. NRDC* (1984). But that is not all the QP asks. It reads in full:

Whether the Court should overrule Chevron 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.

This QP offers the Court two options: either overruling *Chevron* or continuing to narrow it. As Professor Jonathan Adler explains in a*Volokh Conspiracy* post, the narrowing option gives the Court a chance to revisit *City of Arlington v. FCC*(2013). Although overruling *City of Arlington* would help constrain an agency's ability to interpret statutory silence as an implicit delegation of power to the agency, it would not sufficiently constrain the judiciary as a whole. While the Supreme Court has become more and more hesitant to apply *Chevron*, the lower courts have not followed the high Court's lead. If history is any guide, lower courts are unlikely to accurately apply yet another exception to *Chevron*. That is why *Chevron*needs to be simply overruled.

Professor Adler posits that SCOTUS may have granted cert in *Loper Bright* to effectively revisit *City of Arlington*. Adler suggests that Chief Justice Roberts might view the case as an opportunity to rewrite his *Arlington* dissent as a majority opinion. But if the Court took that route, the result would not leave *Chevron* jurisprudence much better than it stands today. The circuits would struggle to apply a new, strengthened *City of Arlington* test, just as they have struggled to apply other preliminary tests asking whether *Chevron* deference is available.

At issue in *City of Arlington* was the FCC's interpretation of a statutory requirement that local and state governments process zoning applications to build telecom facilities "within a reasonable period of time." The FCC defined "reasonable period of time" as 90 days for new antenna applications and 150 days for all other applications. The City of Arlington, along with other local governments, challenged the regulation, alleging that the FCC did not have the authority to interpret an ambiguous statutory provision defining its own jurisdiction. SCOTUS took the case to decide whether courts can apply *Chevron* deference to an agency's determination of its own jurisdiction.

By a 6–3 vote, the Court held that *Chevron* deference *does* apply to jurisdictional questions, just as it applies to other areas of law. Justice Scalia's majority opinion centered on the lack of a meaningful distinction between jurisdictional and non-jurisdictional agency interpretations. Writing for the Court, Justice Scalia explained that most, if not all, agency interpretations focus on whether the agency had the statutory authority to act. "Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'"

Justice Scalia's majority opinion then pointed out that the distinction between "jurisdictional" and "non-jurisdictional" was really an attack on *Chevron* itself.

The false dichotomy between "jurisdictional" and "non- jurisdictional" agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the "jurisdictional" card in every case.

Setting aside the merits or constitutionality of *Chevron*, the premise of Justice Scalia's analysis about jurisdiction was correct. Every *Chevron* question is about jurisdiction. Justice Scalia was correct that distinguishing jurisdictional from non-jurisdictional interpretations would eviscerate *Chevron* so as to make it almost meaningless. And in classic Justice Scalia fashion, the test set out by the Court has been easy for lower courts to apply: *Chevron* applies to every question of law.

Chief Justice Roberts's dissent proposed an alternative rule that would not have been nearly as simple for lower courts to apply. Compared to the *Arlington* majority opinion, Chief Justice Roberts's dissent was more grounded in first principles of law. Roberts would have required courts to determine if Congress delegated interpretive authority to the agency before deferring to the agency's interpretation. Roberts explained that *Chevron* deference requires Congress to implicitly delegate authority, as noted in the *Chevron* opinion itself. But Roberts went further, stating that each specific provision and particular question requires a delegation from Congress. Before an ambiguity is treated as a congressional delegation, a court must determine whether Congress granted the agency authority to interpret that statutory provision. Broad statutory grants might include this interpretive authority, but statutory exceptions to an agency's authority may also apply.

Thus, according to Roberts, *Chevron* deference did not apply to the jurisdictional question at issue, because Congress had specifically limited the agency's authority to interpret the statute. But the test Roberts proposed would have so undermined *Chevron* as to be almost unworkable as long as *Chevron* remained good law. If Roberts's dissent were adopted, courts would be better off applying *de novo* review rather than deference.

Roberts's test would have been a new form of *Chevron* "Step Zero" review—did the agency have the authority to interpret the statute? Several tests, collectively known as *Chevron* Step Zero, ask whether *Chevron* deference is available at all for the agency's interpretation. The Supreme Court has decided many cases addressing this issue, including *Christensen v. Harris County* (2000), *United States v. Mead Corporation* (2001), *Barnhart v. Wilson* (2002), *King v. Burwell* (2015), and *West Virginia v. EPA* (2022). Before proceeding to whether the statute is

ambiguous, a court asks at Step Zero whether the agency's interpretation carries the force of law (*Mead*) or concerns a question of major significance (*King* and *WV v. EPA*), such that Congress did not implicitly delegate authority to the agency to interpret. Step Zero tests serve as another gatekeeper before agencies can receive deference for their interpretations.

The second half of the QP in *Loper Bright*, like the test from the Roberts dissent in *City of Arlington*, is also a Step Zero question. It asks whether statutory silence about powers narrowly granted elsewhere in the statute is an ambiguity indicating congressional delegation to the agency.

Applying the same rule proposed by Roberts's dissent in *City of Arlington* could resolve *Loper Bright*. Under the Roberts approach, cases of statutory silence are easy cases. The Magnuson-Stevens Act's silence as to whether fishing vessel observers are industry funded is not a delegation of authority to the agency. We know this because Congress *did* explicitly allow industry funding of inspections elsewhere in the statute, demonstrating that Congress knew how to make such a delegation explicitly. Congress did not intend to delegate authority to decide whether the observers at issue in *Loper Bright* were industry funded, as Congress decided elsewhere in the statute when industry funding was appropriate.

Even though this rule would be sufficient to decide the particular legal question at issue in *Loper Bright*, the Court should not adopt this type of Step Zero approach. Although the Supreme Court has created a number of Step Zero analyses, *Mead*, *Barnhart*, *King v. Burling*, etc., my research has shown that the lower courts very rarely decide cases at Step Zero. Step Zero analyses, like Roberts's proposed test, prove unworkable for lower courts.

In a recent study I conducted at the Cato Institute looking at *Chevron* in the circuit courts in 2020–21, I reviewed 142 cases discussing *Chevron* deference. Of these, there were no cases where the agency lost because the court decided not to defer at Step Zero. Not once did an agency's interpretation lose because the court did not defer under Step Zero. There were seven cases where the court determined it could not defer under Step Zero, but the agency's interpretation still won, either under *de novo* review or under *Skidmore* persuasion review. So courts decided not to reach the *Chevron* deference two-step in only 4.9% of potential *Chevron* cases, and the courts still upheld the agencies' interpretation in those cases.

In other words, Step Zero is not very effective at the circuit court level. It is a powerful tool at the Supreme Court—two of the ten Supreme Court cases applying *Chevron* in the past seven years resulted in the agency losing at Step Zero, and another case applied Step Zero. But while 30% of Supreme Court *Chevron* cases include a Step One analysis, circuit courts only apply Step Zero 0.49% of the time.

This disparity shows why the Supreme Court should take the opportunity to overrule *Chevron* entirely and provide clear guidance to the lower courts. As Scalia foresaw in his *City of Arlington* majority opinion, Roberts's approach would have lead to the end of *Chevron* if it were faithfully applied. However, it is not likely that the lower courts would have accurately and forcefully applied the Roberts approach after *City of Arlington*, had Roberts's opinion been the majority. Step Zero tests may seem to have bite in theory, but they have been mostly toothless in practice. That is why *Chevron* should simply be overruled, thus giving the lower courts much needed clarity. As Justice Gorsuch recently urged, it is time for the Supreme Court to give *Chevron* "a tombstone no one can miss."

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