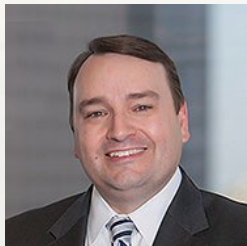


The End of Big Government? *Loper Bright, Chevron* and the Regulatory Tombstone

St. Louis ACC Chapter

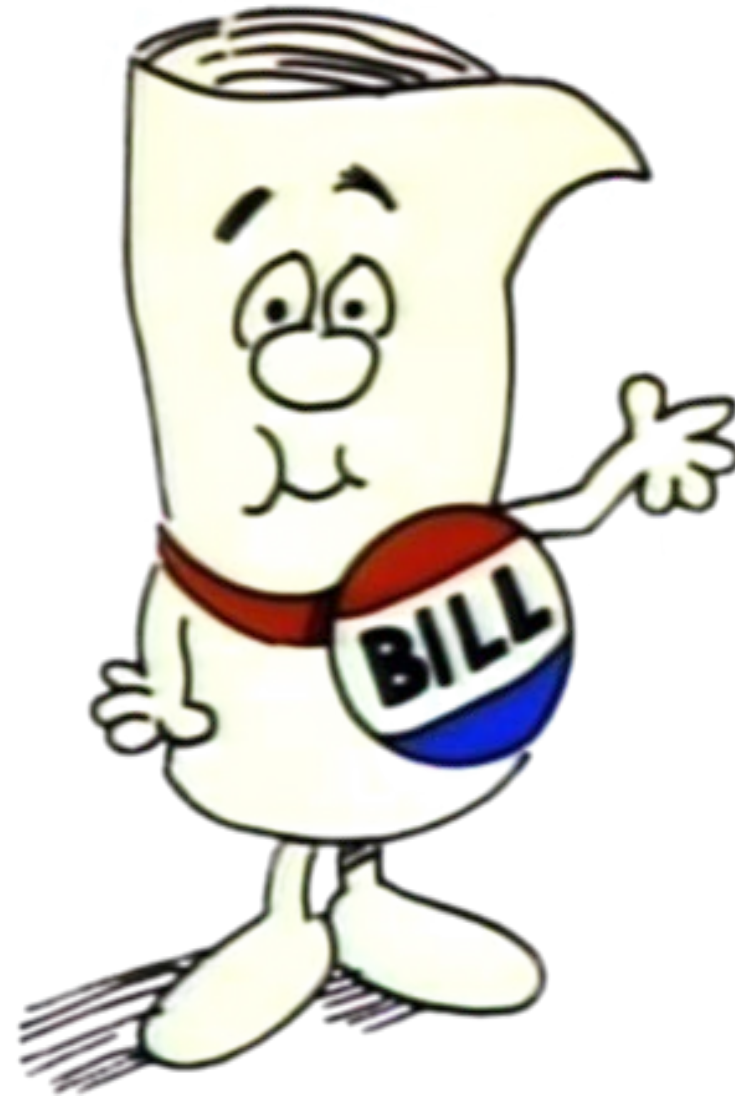


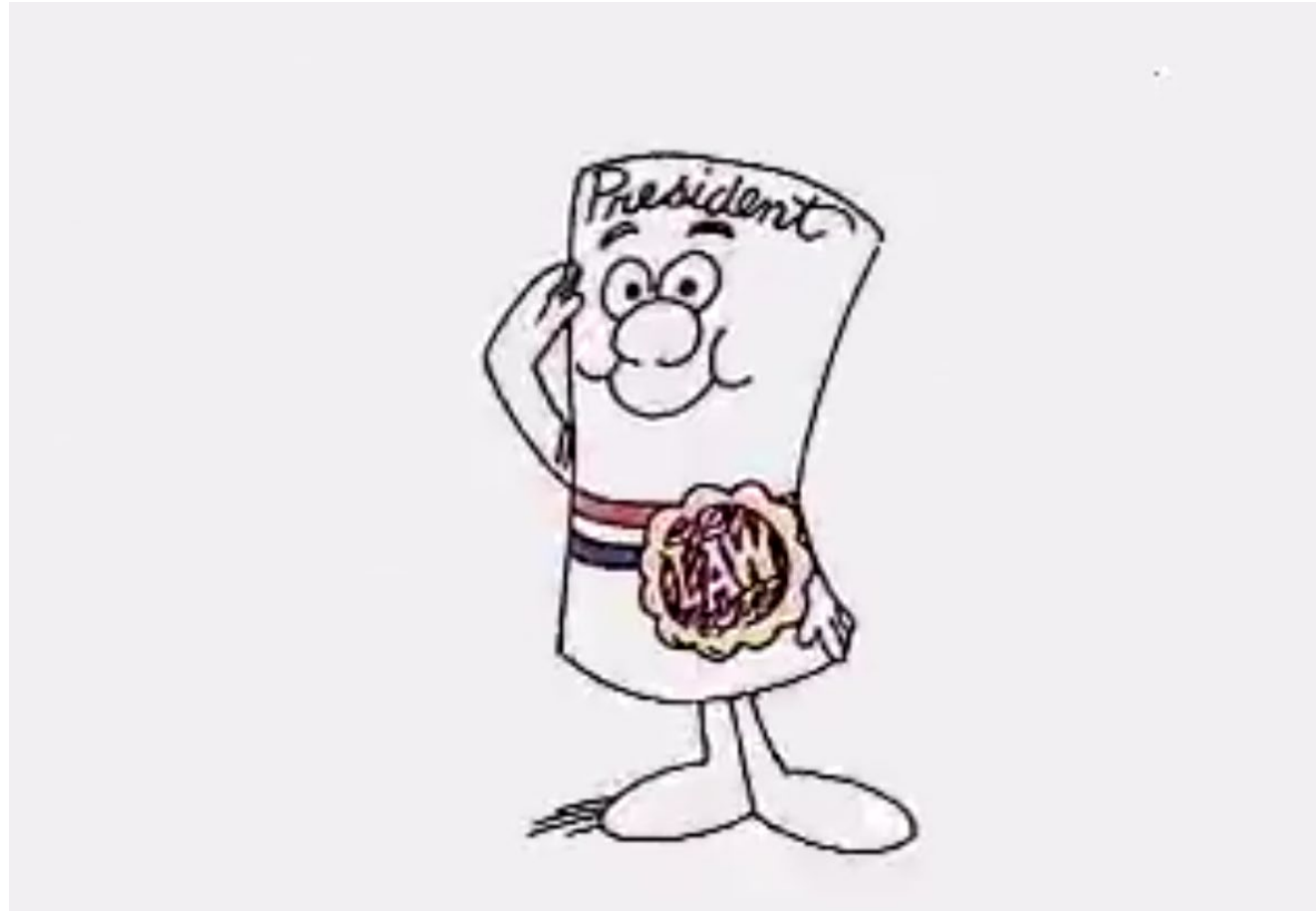
Evan Z. Reid

September 11, 2024

Who Decides?

- Congress
- Agencies
- Courts





But what about the regulations?

What Did Congress Intend?



Pre-Chevron Judicial Review



Marbury v. Madison—Courts decide what the law is



“Great respect” for agency interpretations



New Deal era—some deference to agencies

Administrative Procedures Act of 1946

- “[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U. S. C. § 706.
- Courts must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.” § 706(2)(A).
- *Loper Bright*: “The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment.”

Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.,
467 U.S. 837 (1984)

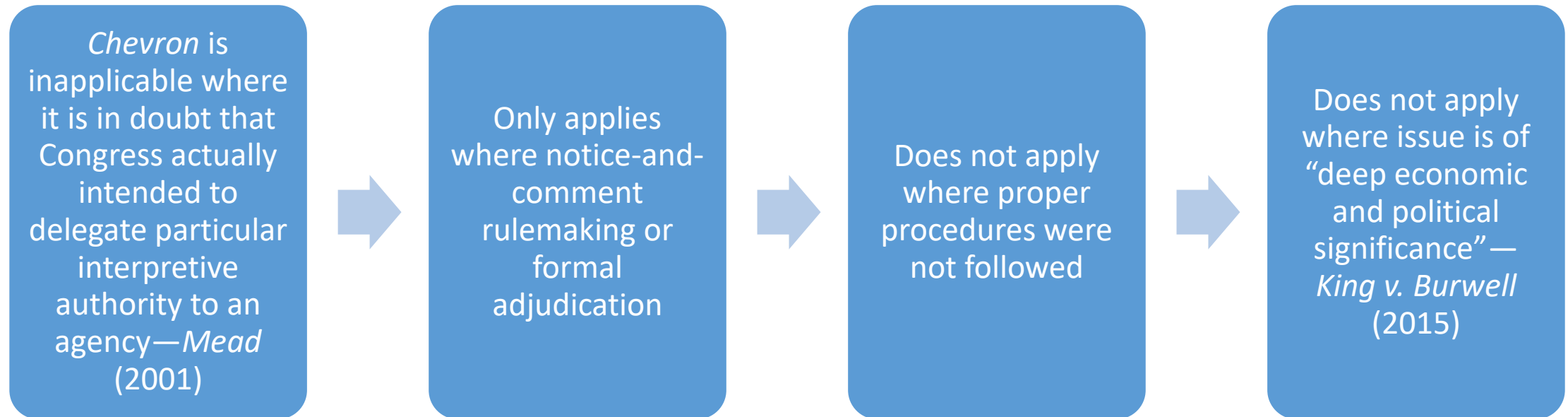
Courts *must* defer and give “controlling weight to” an administrative agency’s interpretation of a particular statute over which Congress has entrusted it to administer and promulgate rules of enforcement *if*:

- (i) the statute is ambiguous or silent; and
- (ii) the agency’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute” but is “permissible” and “reasonable.”

Criticisms of *Chevron*

- Ambiguity and silence are not delegations of law-making power
- Contrary to APA and prior precedent back to *Marbury*
- Leads to inconsistency as administrations change and interpretations change

Limits on *Chevron*



A Tombstone for *Chevron*?

“Rather than say what the law is, we tell those who come before us to go ask a bureaucrat...***At this late hour, the whole project deserves a tombstone no one can miss. We should acknowledge forthrightly that Chevron did not undo ... the judicial duty to provide an independent judgment of the law’s meaning in the cases that come before the Nation’s courts.***”

Buffington v. Dep’t of Veteran Affairs, 598 U.S. ___, 143 S.Ct. 14 (2022), Gorsuch, J., dissenting.

Fishery Observers: Who Pays?



Loper Bright—Question Presented

- Two cases, *Loper Bright Enterprises v. Raimando* and *Relentless v. Dept. of Commerce* presenting the same question:

“Whether the court should overrule *Chevron v. Natural Resources Defense Council*, 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.”

- How to judge the interpretation of the Magnuson-Stevens Act in requiring herring boat owners to pay part of cost for monitors?

Loper Bright v. Raimondo

- By 6-3 majority, *Chevron* is overruled
- Majority cites contradiction with APA and prior precedent, uncertainty caused by changing interpretations
- Cases are remanded to their respective circuits
- Cases decided earlier under *Chevron* are final

Corner Post



Corner Post, Inc. v. Board of Governors of the Federal Reserve System

Regulation II caps the fees that banks can charge for each debit card transaction, originally published in 2011

Corner Post started business in 2018 and joined lawsuit in 2021, saying charges were too high

Six-year statute of limitations

Does a plaintiff's claim under the APA "first accrue" under 28 U.S.C. § 2401(a) when an agency issues a rule, or when the rule first causes harm to the plaintiff?

Corner Post Holding

- Statute of limitations only accrues after plaintiff is injured by final agency action
- Dissent: *Corner Post* was added as a plaintiff only after original action was subject to dismissal on statute of limitations grounds
- Is this the new reality? Renewed challenges in new courts with newly created plaintiffs years after earlier challenges had failed

Is this a “Tombstone” for Regulation?

- The “Yes” argument:
 - Consider the entire body of recent caselaw limiting executive power
 - Major Decisions doctrine
 - *Ohio v. EPA*
 - *Corner Post* is force multiplier
 - Forum-shopping, national injunctions
 - Trading administrative inconsistency for judicial division and circuit splits



The “No” Argument

Loper Bright merely restores the longstanding rule of statutory interpretation

Court recognizes that Congress can delegate rulemaking authority to the agencies

Skidmore: interpretations of relevant agency “based upon specialized experience,” “constitute a body of experience and informed judgment to which courts . . . [could] properly resort for guidance.”

Scientific deference remains

What to Do?

- If there is a regulation that first injured your business in the last six years, consider challenging it
- Cost-benefit analysis necessary
- Be strategic on choice of venue
- Look for help from industry groups

QUESTIONS?