If you're confused about the Supreme Court's ruling, you're not alone. Scholars will be discussing the recent ruling for years. It clearly will limit the leeway that agencies have to interpret statutes, meaning less flexibility to deal with new problems. But unlike many commentators, I don't think the sky is falling. I was teaching environmental law before *Chevron* was decided, and I can testify that agencies like EPA were able to succeed in that setting.

I'll try to explain how we got here, then what the Court said and where we go from here.

The *Chevron* Test: A Quick Explainer

The *Chevron* doctrine was a rule about court review of agency actions that was considered a pillar of modern administrative law. It called for judges to accept reasonable interpretations of a statute by an administrative agency, even if the judges might have favored a different interpretation themselves. The Supreme Court offered two reasons to give agencies the power to interpret ambiguous statutes: (1) agencies are more democratically accountable than courts, and (2) Congress has given agencies the main responsibility for implementing statutes.

Even before *Chevron*, courts agreed that an agency's statutory arguments were entitled to respectful consideration, given an agency's expertise about the statute it administers and the practical and technical issues involved in implementing the law. (This is now known as *Skidmore* deference.) But Chevron upped the level of deference to agencies. It created a two-step test:

> Step One. Is the statute's meaning clear? If so, that is the end of the analysis.
> Step Two. If the statute is ambiguous, the agency's interpretation will be upheld by the court provided it is reasonable, even if the court would have chosen an alternative interpretation.

Later decisions added a lot of bells and whistles, changing the *Chevron* two-step to something like a waltz. Since Chevron is gone, I'm not going to describe those refinements, but they did tend to reduce the likelihood that courts would defer to agencies.

One later change does deserve a mention, however. It largely limited *Chevron* to cases where the agency had formally adopted a regulation. In a lot of other situations, agencies decide on a case-by-case basis, sometimes following general guidelines. Agencies may need to interpret statutes in making those decisions. Instead of *Chevron*, courts applied the *Skidmore* deference to those agency decisions. Under *Skidmore*, the court gives weight to

the agency's view of the statute. How much weight depends on a variety of factors, like how technical the issue is, whether the agency has been consistent in its view of the statute, and how seriously the agency has considered the issue.

The Current Cases

The Court agreed to consider overruling *Chevron* in two related cases, *Loper Bright* and *Relentless*. Both cases involved a statute that requires fishing boats to select neutral observers to ensure they're following fishing restrictions at sea. The statute doesn't say who pays for the observers. The agency said it had the power to require the boat owners to pay. Applying *Chevron*, the lower courts found the statute to be ambiguous and upheld the agency's interpretation as reasonable.

The Court had four options:

#1 Retain *Chevron* unchanged

#2 Modify *Chevron*

#3 Replace *Chevron* with some other form of judicial deference, perhaps like *Skidmore*, or

#4 Eliminate any deference whatsoever to agency interpretations of statutes.

And the Court chose . . . .

The Court's Decision: Door # 3

The Court chose option 3, repeal and replace Chevron. It's going to take time to fully digest the Court's opinion. My verdict is that deference to agency interpretations will be more limited but will still be significant.

One thing that seems clear is that *Skidmore deference is* still *in place.* It now applies to all agency decisions, including rule making. As Chief Justice *Roberts said,*

> "In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal [quoting *Skidmore*]. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors

> which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control."

In addition, the Court, quoting earlier decisions, says Congress can delegate authority to an agency to interpret a law, explicitly or implicitly:

> [T]he statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable."

In addition, the Court says, it is not calling into question the outcomes of prior decisions that used the *Chevron* test. Those remain valid precedents.

What Does this Mean for the Future?

One way of looking at the change in the law is this: The rule under *Chevron* and today is that *Skidmore* applies except when Congress has given the agency discretion to interpret ambiguous statutes. Before, the agency was presumed to have that discretion whenever it was engaged in rulemaking. Now, the agency will have to point to more specific evidence of Congress's intent.

The *Loper Bright* decision is one of a series of decisions that cut back on the power of federal agencies. The trend is more ominous than any individual decision. I also think that the Court was wrong to overrule *Chevron*. But we shouldn't lose all sense of perspective.

While the Court is moving in what I think is the wrong direction, we should not buy into the idea, on both the Left and the Right that the Court will abolish the regulatory state. What I want to say at this point is that we do have a very conservative Court, but it's not a Court that has wildly taken leave of its senses. Control is largely in the hands of three Justices — Roberts, Kavanaugh, and Barrett — none of whom is crusading to end government as we know it.

Chevron helped promote a power shift from agencies trying to figure out how to follow their statutory mandates to agencies focused on carrying out White House directives. Scholars have called this "presidential administration." There is something to be said for this approach, but my sense is that it had gone too far in empowering White House staff over the

agencies themselves. *Loper Bright* could help restore the balance. The irony is that the Court's majority favors a unitary executive but may actually be making the executive branch more pluralist.

If you look at the Biden EPA's recent regulations, you can see that they weren't counting on *Chevron* to win cases. instead, EPA has carefully explained how its decisions match up to the language of the statute and the delegation of authority to the agency, how they fit longstanding interpretations of the law, and why they involve the kinds of complicated factual questions that only agencies can answer. EPA's reasoning in those regulations may be a good model for the future.