ALERT MEMORANDUM

After *Chevron*: What the Supreme Court's *Loper Bright* Decision Changed, And What It Didn't

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The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[1] has significantly changed the law applicable to judicial review of administrative action and rulemaking. Overturning the longstanding doctrine known as "*Chevron* deference," *Loper Bright* expands the judiciary's power to review and reject interpretations of statutes adopted by federal administrative agencies. The significance of the decision, however, should not be overstated.

Chevron deference applied only to agency interpretations of ambiguous law—specifically, to agency interpretations of congressional statutes that are "'silent or ambiguous with respect to the specific issue' at hand."[2] In overturning *Chevron*, the Supreme Court has authorized federal courts to draw their own conclusions about the correct legal interpretation of otherwise ambiguous federal statutes. But *Loper Bright* is not a wholesale rejection of agency expertise or authority. There are many arenas where federal courts are still required to give significant deference to agency action, including discretionary agency action or agency fact-finding. Thus, although *Loper Bright* is one of a series of decisions in which the Roberts Court has pared back the flexibility and power of administrative agencies, it is not a silver bullet for challenging federal agency rulemaking and authority—the decision's application remains limited to specific situations.

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[1] *Loper Bright Enters. v. Raimondo*, No. 22-4751, 2024 WL 3208360 (U.S. June 28, 2024) ("*Loper Bright*").

[2] *Id.* at *14 (quoting *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

Background

Congress passed the Administrative Procedure Act in 1946.[3] In the aftermath of the significant expansion of federal administrative agencies during the New Deal, the APA sought to regulate and codify the activity of these agencies in two ways. First, the APA established procedures for agency rulemaking and adjudication. Second, the APA codified the bases on which federal courts may set aside an agency's action or determinations. Specifically, courts were required to defer to agencies unless their actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[4] including because they were unconstitutional[5] or exceeded the agency's statutory authority,[6] or because the agency had failed to observe requisite procedures.[7] Further, in evaluating agency adjudications, courts were required to accept agency factual findings unless they were "unsupported by substantial evidence."[8] Thus, legal determinations made by agencies are generally more susceptible to challenge than their factual or discretionary determinations.

The APA was passed against a background expectation that federal courts should offer some amount of deference to an agency's understanding of the statute administered by the agency. In *Skidmore v. Swift & Co.*, the Supreme Court held that employees suing under the Fair Labor Standards Act could count some time spent waiting as working time.[9] In reaching its conclusion, the Court relied on guidance that had been issued by the Administrator of the Department of Labor's Wage and Hour Division.[10] While noting that the Administrator's interpretations of the FLSA were "not controlling upon the courts by reason of their authority," the Court said that they were nonetheless a useful guide based on the Administrator's experience applying the act.[11] The Administrator's views "constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[12] However, this did not mean that courts should automatically defer to the legal conclusions of an agency. They were persuasive, not controlling, authority. When deciding the weight to afford an agency's conclusion, the court was to consider "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[13]

This framework meaningfully changed in 1984, when the Supreme Court imposed an important limitation on review of agency legal conclusions. *Chevron v. Natural Resources Defense Council* involved a challenge to the EPA's decision to regulate all of the pieces of equipment in a given facility as a single "stationary source" of pollution under the Clean Air Act, rather than regulating each individual piece of equipment as a separate stationary source.[14] This eased the burden on regulated companies: under this interpretation, a company did not need to obtain a permit before making modifications to individual pieces of equipment within a larger "bubble."[15] The Court

[3] 5 U.S.C. § 500 *et seq.*

[4] 5 U.S.C. § 706(2)(A).

[5] 5 U.S.C. § 706(2)(B).

[6] 5 U.S.C. § 706(2)(C).

[7] 5 U.S.C. § 706(2)(D).

[8] 5 U.S.C. § 706(2)(E).

[9] *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37 (1944).

[10] *Id.* at 138-39.

[11] *Id.* at 140.

[12] *Id.*

[13] *Id*

[14] *Chevron*, 467 U.S. at 839-40.

[15] *Id.* at 840-42.

concluded that the statute did not offer a clear definition of "stationary source." Whether this omission was "inadvertent[] . . . or intentionally left to be resolved by the agency," the Court held that, so long as the agency's interpretation of an ambiguous or unclear statutory provision was "reasonable," it was "entitled to deference."[16] Notably, in reaching this conclusion, the *Chevron* Court did not discuss the APA. Instead, it emphasized more practical considerations—that judges are neither "experts in the field" nor "part of either political branch of the [g]overnment."[17] Agencies, by contrast, both have subject-matter expertise and are ultimately accountable to the executive.[18] Thus, where Congress has not clearly spoken, the Court held it was appropriate for agencies, rather than the courts, to decide which statutory interpretation best reconciles "manifestly competing interests."[19] Importantly, so-called *Chevron* deference was never about agencies' authority to set standards or make policy determinations pursuant to discretion that Congress expressly delegates, which Congress may do so long as it provides an "intelligible principle" for the agency to follow.[20] Nor, as a practical matter, would *Chevron* deference be operative where the court's interpretation of a statute accords with the agency's. Rather, *Chevron* operated only in the relatively narrow class of cases where a court *dis*agreed with an agency's statutory interpretation that was nonetheless "reasonable."[21]

The *Loper Bright* Decision

In the decades after *Chevron*, academic and judicial skepticism to the doctrine grew. Several critics of *Chevron* made their way onto the Supreme Court, and eventually *Loper Bright* presented a vehicle for reconsidering the doctrine. The case specifically concerned the interpretation of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") by the National Marine Fisheries Service ("NMFS"), an agency of the Department of Commerce. A group of fishing boat operators challenged the NMFS's power to require them to pay for onboard observers to monitor the vessels' fishing practices.[22] Although the district court concluded that the statute unambiguously authorized this requirement, the D.C. Circuit relied on *Chevron*: while the statute was ambiguous, the court of appeals concluded that the NMFS had at least offered a reasonable interpretation of the statute that *Chevron* required the court to accept.[23] The Court granted certiorari in *Loper Bright* and a related case specifically to determine "whether *Chevron* should be overruled or clarified."[24]

In a 6-3 decision authored by Chief Justice Roberts, the Court formally overruled *Chevron*: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[25] The Court's reasoning focused on the APA, which instructs "'the reviewing *court*' to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.'"[26] This requirement "cannot be squared with"

[16] *Id.* at 865-66.

[17] *Id.* at 865.

[18] *Id.*

[19] *Id.*

[20] *See Loving v. United States*, 517 U.S. 748, 771 (1996).

[21] Thus, *Loper Bright* noted that "some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another," and that the Supreme Court had not relied on the doctrine since 2016. *Loper Bright* at *4.

[22] *Loper Bright* at *7.

[23] *Id.* at *8 (citing *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022)).

[24] *Loper Bright* at *8.

[25] *Id.* at *22.

[26] *Id.* at *16 (quoting 5 U.S.C. § 706).

Chevron's directive to accept any "permissible" construction of an ambiguous statutory provision.[27] Even when a "statute [is] ambiguous, there is a best reading all the same," and the reviewing court is required to adopt the one that, "after applying all relevant interpretive tools, [it] concludes is best."[28]

The Court rejected the idea, central to *Chevron*, that the resolution of statutory ambiguities involves the application of agency expertise or a policy decision. For *Loper Bright*, statutory interpretation is a purely textual art in which courts actually do have "special competence," whereas agencies do not.[29] In support of this proposition, the Court hearkened back to *Marbury v. Madison*, quoting Justice Marshall's declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[30] According to the Court, "[t]he Framers . . . anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment."[31] "[T]he tools courts use every day" are tools of statutory interpretation that help to "resolve statutory ambiguities."[32] Courts' ability to conduct this analysis is no different simply because the statute in question concerns the scope of agency authority. Even when "an ambiguity . . . implicate[s] a technical matter," the Court reasoned that judges, informed and educated by the parties, are expected to and do "handle technical statutory questions."[33]

For *Loper Bright*, the administrative context does not change a court's ordinary mandate to decide questions of law. The APA's provisions for agency review simply "codif[y] 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."[34]

Loper Bright **in Context**

Legal commentators have long expected the Supreme Court to reconsider *Chevron* deference, both because the specific doctrine has come under attack and because the Supreme Court has become increasingly concerned about the ways that administrative agencies may usurp powers that properly belong to Congress. Five years ago, the Supreme Court decided *Kisor v. Wilkie*, in which it reconsidered so-called "*Auer* deference," a doctrine that required courts to defer to agency interpretations of ambiguous regulations (as opposed to statutes).[35] This superficially similar doctrine only narrowly escaped destruction: a bare majority of five justices declined to overturn it, but only on *stare decisis* grounds, substantially weakening the doctrine's application.[36] Chief Justice Roberts, the deciding vote, declined "to say that *Auer* is lawful or wise," concluding only that the precedent should not be overturned.[37] And he expressly signaled that the outcome might be different for *Chevron*, cautioning that the "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes."[38]

[27] *Id.* at *14, 18.

[28] *Id.* at *16.

[29] *Id.*

[30] *Id.* at *9 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (U.S. 1803)).

[31] *Id.* at *16.

[32] *Id.*

[33] *Id.* at *17.

[34] *Loper Bright* at *12.

[35] *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019).

[36] *Id.* at 590 (Roberts, C.J., concurring).

[37] *Id.* at 592 (Gorsuch, J., concurring).

[38] *Id.* at 591 (Roberts, C.J., concurring).

In a footnote, Justice Gorsuch was even more explicit in inviting challenges to *Chevron*, noting that "there are serious questions . . . about whether [*Chevron*] comports with the APA and the Constitution."[39]

In *Loper Bright*, the Court expressed discontent with the inherent difficulty in articulating criteria for identifying a statute as ambiguous: "One judge might see ambiguity everywhere; another might never encounter it. . . . A rule of law that is so wholly in the eye of the beholder invites different results in like cases and is therefore arbitrary in practice," and it generated a swarm of exceptions and complicating clarifications.[40] But *Loper Bright* should not be understood solely as the product of discontent with a particular unwieldy doctrine. The narrow basis for that decision was the APA: *Chevron* was inconsistent with the APA's requirement that courts, not agencies, decide questions of law applicable to agency action. But the Court's opinion also suggests that, even if it wanted to amend the APA, Congress could not take this power of legal review away from the courts as a constitutional matter. For *Loper Bright*, the APA is consonant with the constitutional principle, expressed in *Marbury*, that courts are uniquely responsible for "say[ing] what the law is."[41] Justice Thomas wrote in concurrence to make this point directly, arguing that "*Chevron* deference also violates our Constitution's separation of powers."[42] For Thomas, proper exercise of the "judicial power" by Article III courts requires judges to exercise "independent judgment," including "to resolve ambiguities."[43] By transferring a power committed to the federal courts into the hands of the executive branch, *Chevron* deference runs afoul of the Constitution "[r]egardless of what [the APA] says."[44]

Loper Bright therefore reflects, at least in part, an increasing sensitivity to administrative usurpation of traditional judicial powers and prerogatives. Indeed, it is notable that *Loper Bright* was decided only one day after *SEC v. Jarkesy*,[45] in which the Supreme Court struck down a statute that authorized the SEC to seek civil penalties under the securities laws through in-house proceedings before an ALJ. This practice violated the Seventh Amendment, the Court found, because it deprived defendants of a jury trial even though they faced claims similar to common-law fraud.[46] In concurrence, Justice Gorsuch also contended that these in-house administrative proceedings both offended Article III, by "withdrawing the matter from judicial cognizance and handing it over to the Executive Branch for an in-house trial" before a politically appointed body, and violated the Fifth Amendment, because the defendants were deprived of "the regular course of trial proceedings with their usual protections."[47] And last year, in *Axon Enterprise, Inc. v. FTC*, a unanimous Court held that litigants mounting a constitutional challenge to the structure of SEC and FTC administrative proceedings could seek relief directly in federal court, without employing the ordinary review process for final agency adjudications.[48]

[39] *Id.* at 628 n.114 (Gorsuch, J., concurring).

[40] *Loper Bright* at *19 (citation omitted).

[41] *Id.* at *21 (citation omitted).

[42] *Loper Bright* at *22 (Thomas, J., concurring).

[43] *Id.* at *23.

[44] *Id.* at *23.

[45] *SEC v. Jarkesy*, No. 22-859, 603 U.S. ___, 2024 WL 3187811 (U.S. June 27, 2024) (cleaned up).

[46] *Id.* at *8-10, 17.

[47] *Id.* at *22 (cleaned up and citation omitted) (Gorsuch, J., concurring).

[48] *Axon Enters., Inc. v. FTC*, 598 U.S. 175, 180 (2023).

The Court has also shown concern for the extent to which administrative agencies may usurp Congressional power. In 2022, in *West Virginia v. EPA*, the Court held that courts should refuse to find that an agency has power to address certain "major questions" of great "economic and political significance," unless there is a "clear congressional authorization for the power [the agency] claims."[49]

Chevron had rested on an assumption that, when there was an ambiguity or gap in a statute, Congress intended the gap or ambiguity to be filled by an agency rather than by the courts.[50] The *Loper Bright* dissent emphasized the practical virtues of this assumption, cataloguing the complex and highly technical determinations *Chevron* deference has historically covered: whether "an alpha amino acid polymer qualif[ies as a] 'protein;'" whether the western gray squirrels of Washington State are a "distinct" population from other western gray squirrels for purposes of the Endangered Species Act.[51] Congress, the dissent argued, cannot prefer that courts are responsible for resolving these uncertainties.[52]

The majority rejected this fundamental assumption as "a fiction."[53] Rather than deliberate efforts to confer authority on an agency, "many or perhaps most statutory ambiguities may be unintentional," and gaps may simply result from the drafters' limited foresight or the limitations of language itself.[54] The majority was unwilling to allow an agency to seize any power based on what may have been an accident of drafting. Thus, *Loper Bright* and other recent decisions reflect a Supreme Court determined to ensure that the judicial branch aggressively polices assertions of authority by administrative agencies.

Limits to *Loper Bright*

Notwithstanding the Court's evident agenda to curb the power of federal agencies, the significance of *Loper Bright* should not be overstated. The decision withdrew *Chevron* deference to agencies' statutory interpretation, while leaving other, more traditional deference principles intact.

First, *Loper Bright* only affects rules or agency action that was based on a statutory ambiguity or silence. Clear grants of power by Congress to an agency remain in place, because these never needed the protections of *Chevron* deference. And, while *Loper Bright* requires a court to exercise its independent judgment when considering an agency's interpretation of an ambiguous statute, it does not require the court to *disagree* with the agency. Courts in the exercise of their own judgment may still conclude that the agency has the best reading of an ambiguous statute. Indeed, courts are expressly directed to afford "due respect" to the interpretation executive branch agencies have given to a statute, especially when that interpretation is longstanding and consistent rather than cynically adapted to new situations.[55] However, as was the case under *Skidmore*, the agency's reasoning will need to persuade the court—it cannot count on automatic deference.

Second, *Loper Bright* does not disturb the traditional judicial deference to agency factfinding. Both before and after the APA, courts have exercised minimal review over an agency properly

[49] *West Virginia v. EPA*, 597 U.S. 697, at 721-23 (2022).

[50] *Chevron*, 467 U.S. at 843.

[51] *Loper Bright* at *41 (Kagan, J., dissenting).

[52] *Id.* at *42.

[53] *Loper Bright* at *17.

[54] *Id.* at *16.

[55] *Id.* at *9.

empowered to make findings of fact. Under the APA, findings of fact in formal agency proceedings can be set aside only if they are "unsupported by substantial evidence."[56] *Loper Bright* affects only agency conclusions of law, and so this extremely deferential standard of review remains in place with respect to agency factfinding.

Third, the decision does not permit courts to reject discretionary determinations made when Congress has conferred upon the agency the power to make that determination. The Court emphasized that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion," and "Congress has often enacted such statutes."[57] The Court cited, for example, statutes "directing [the] EPA to regulate power plants 'if the Administrator finds such regulation is appropriate and necessary'" and allowing the Nuclear Regulatory Commission to define what constitutes "a substantial safety hazard."[58] In these cases, the court must "fix the boundaries" of any delegated authority, but cannot question the exercise of agency discretion within them.[59]

Fourth, the Court stated that the mere fact that a prior case relied on *Chevron* is not a sufficient basis for overturning it now. *Stare decisis* is an especially powerful consideration in the context of statutory consideration, and *Loper Bright* sought to impose limits on a potential flood of lawsuits challenging decades worth of precedents based on *Chevron*. The Court cautioned that "[m]ere reliance on *Chevron* cannot constitute a special justification" that would justify "overruling such a holding."[60] Accordingly, plaintiffs will need to do more than simply point to *Loper Bright* when seeking to challenge an regulation that once relied on *Chevron*.

Life After *Chevron*

What, then, does the end of *Chevron* deference mean practically?

Most obviously, any regulation or legal position that was previously blessed by *Chevron* deference is now a potential target of litigation. Some high-profile recent regulatory action falls into this category. For example, in 2022, the Department of Labor promulgated a rule intended to permit ERISA employee benefit plans to consider ESG factors when selecting investments. That rule was challenged, and in late 2023, the Northern District of Texas held that the rule was based on a permissible reading of ERISA under *Chevron* and granted summary judgment for the defendants.[61] That decision is now on appeal to the Fifth Circuit, creating one of the earliest opportunities for an appellate court to conduct a post-*Chevron* analysis of an agency rule.[62] The SEC and FTC are also both facing suits arguing that recently adopted rules are based on impermissibly tenuous interpretations of their authorizing statutes. The Eighth Circuit will hear a challenge to SEC rules requiring issuers to make disclosures about climate impacts.[63] The Northern District of Texas recently cited *Loper Bright* in granting a preliminary injunction postponing the adoption of an FTC rule

[56] *Id.* at *12 (quoting 5 U.S.C. § 706(2)(E)).

[57] *Id.* at *14.

[58] *Id.* at *13 nn.5-6 (quoting 28 U.S.C. § 5846(a)(2); 42 U.S.C. § 7412(n)(1)(A))

[59] *Id.* at *14 (cleaned up and citation omitted)

[60] *Id.* at *21 (cleaned up and citation omitted).

[61] *Utah v. Walsh*, No. 2:23-CV-016-Z, 2023 WL 6205926, at *4-5, 8 (N.D. Tex. Sept. 21, 2023).

[62] *Utah v. Su*, No. 23-11097 (5th Cir. Oct. 30, 2023).

[63] *Iowa v. SEC*, No. 24-1522 (8th Cir. March 12, 2024).

banning the use of non-compete clauses in most employment agreements.[64]

However, even older rules could also be targeted—three days after deciding *Loper Bright*, the Supreme Court held that the statute of limitations for challenges to agency rulemaking starts to run when the rule injures the plaintiff, not when the rule is adopted.[65] In theory, and subject to the Court's qualification about statutory *stare decisis* even long-established rules could be challenged if they newly affect a plaintiff. The dissent expressed concern about the "jolt to the legal system" that *Loper Bright* might cause.[66] Whether the regulations *Chevron* protected were beneficial or not to a particular party, "private parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge."[67] In some ways, *Loper Bright* could be a double-edged sword: while it offers opportunities to challenge problematic regulations, it may bring uncertainty and rapid change as those challenges succeed and agencies reformulate their regulations in response.[68]

Outside of litigation, agencies can be expected to become more conservative with their rulemaking—they can no longer count on absolute judicial deference so long as a rule is plausibly consistent with an authorizing statute. They may take greater pains to express the reasoning underlying their interpretation, in hope of convincing a reviewing court to more readily adopt their interpretation. And they may also put more effort into lobbying Congress for statutory grants of authority, which are relatively more valuable in a world where *Chevron* deference is gone and the "major questions" doctrine has arrived.

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[64] *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3297524, at *7 (N.D. Tex. July 3, 2024).

[65] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 22-1008, 2024 WL 3237691 (U.S. July 1, 2024).

[66] *Loper Bright* at 52 (Kagan, J., dissenting).

[67] *Id.*

[68] On July 10, 2024, members of Congress sent letters to several federal agencies demanding information about the agency's reliance on *Chevron* deference.