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Supreme Court Overrules *Chevron*, Creating New Opportunities for Industry Litigants and Targets of Enforcement Action

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Last week, the U.S. Supreme Court overruled its controversial *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, holding that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." Instead, courts must "exercise independent judgment" to reach the text's "best reading." Courts must give "careful attention" to any agency interpretation that was issued contemporaneously with the statutory provision and has remained consistent over time. And when a particular statute "delegates authority to an agency consistent with constitutional limits," such as when the statute directs agencies to define a term, courts "must respect the delegation while ensuring that the agency acts within it." But even when there is interpretive uncertainty, "there is a best reading all the same." And "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."

The Court started by recounting fundamental principles of the Constitution's separation of powers. Article III assigns to the federal judiciary the power to adjudicate cases and controversies. The Framers "appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear." But they envisioned that the "final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'" As the Court put it in *Marbury v. Madison*, "'it is emphatically the province and duty of the judicial department to say what the law is.'" Even "'in cases where a court's own judgment ... differed from that of other high functionaries,' the court was 'not at liberty to surrender, or to waive it.'"

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Then the Court turned to the APA. Section 706 provides courts "'shall decide all relevant questions of law'" and "'interpret constitutional and statutory provisions,'" and shall "'hold unlawful and set aside agency action ... found to be ... not in accordance with law.'" That "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." It "prescribes no deferential standard for courts to employ in answering those legal questions"—"even those involving ambiguous laws." *Chevron* "never attempted to reconcile its framework with the APA."

The "view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts," the Court explained, "rests on a profound misconception of the judicial role." Resolving interpretive uncertainty "involves legal interpretation," and that task is "not ... policymaking." *Chevron* "does not prevent judges from making policy"—it "prevents them from judging."

Legal Implications

Loper Bright will have real impact. As commentators have shown empirically, *Chevron* tipped litigation scales in the government's favor for decades. But now, new agency rules and orders will often be more vulnerable to legal challenge because agencies must now show that their initiatives are justified under the best reading of statutory law. And some existing agency actions may be vulnerable too.

At the same time, three aspects of the *Loper Bright* opinion will cabin its consequences.

First, courts "may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes." Those interpretations, the Court's *Skidmore* case observed, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." In particular, agency interpretations that were "issued contemporaneously with the statute at issue" and have "remained consistent over time" may be "especially useful in determining the statute's meaning."

Second, a statute's meaning "may well be that an agency is authorized to exercise a degree of discretion" through an express delegation. Some statutes delegate to an agency the authority to define a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme. Still others direct agencies to regulate subject only to limits imposed by a term that "leave agencies with flexibility," such as "appropriate" or "reasonable." In those situations, courts fix the boundaries of the delegated authority under constitutional limits and from there, under the *State Farm* doctrine, merely ensure that agency action is reasonable and reasonably explained.

Third, *Loper Bright* "do[es] not call into question prior cases that relied on the *Chevron* framework." The "holdings of those cases that specific agency actions are lawful" "are still subject to statutory *stare decisis* despite [the] change in interpretive methodology." Even if a prior case was "wrongly decided," it will remain good law absent "special justification" for overruling it.

Strategic Considerations

Industry may benefit from vacatur of certain agency actions, but may be disadvantaged by vacatur of others. Regulated entities should consider both the opportunities and risks presented by the changed regulatory landscape.

For unfavorable rules whether long-standing or more recent vintage, the *Loper Bright* decision gives litigants and the targets of agency enforcement actions new arguments for challenging dubious statutory interpretation. No longer will the government be able to demand a court's adherence to a merely plausible statutory reading that is not best.

But that cuts both ways. Many important industry wins and agency actions with deregulatory effects were upheld under the prior *Chevron* methodology. And while *stare decisis* may be enough to protect some of these, others will need to be placed on a more sound statutory footing in order to protect them over the long term.

For all agency actions, regulated entities should be prepared to grapple with the changed landscape in their advocacy before both federal agencies and federal courts.

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