Tightening the Reins on Administrative Agencies

by Kenneth J. Warren*

At the end of its most recent term, the U.S. Supreme Court issued several opinions that shook the foundation of modern administrative law. In *Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024) (*Loper*), the Supreme Court overruled its decision in *Chevron U.S.A. v. National Resources Defense Council,* 467 U.S. 837 (1984) (*Chevron*), that instructed judges to defer to agencies' reasonable interpretations of ambiguous provisions of statutes they administer. In *Securities and Exchange Commission v. Jarkesy,* 144 S.Ct. 2244 (2024), the court recognized a defendant's constitutional right to a jury trial in federal court to contest a civil penalty for securities fraud even though Congress authorized the enforcement action to be tried before an administrative tribunal. In *Corner Post v. Board of Governors of the Federal Reserve System,* 144 S.Ct. 2440 (2024), the court held that the six-year statute of limitations applicable to suits under the Administrative Procedure Act (APA) challenging administrative agency regulations does not begin to run when the regulations are published but rather when the plaintiff was injured by final agency action.

So, what accounts for this sea change? In combination, these decisions have curtailed the authority of administrative agencies, increased the role of the judiciary, and made agency regulations easier to challenge. It appears that a majority of the court believes that agency regulations have gone too far, and that agencies require further control by the court. Regulations issued by environmental and resource management agencies emerge most clearly in the court's bullseye.

The court's opinion in *Loper,* written by Chief Justice John Roberts for a six-justice majority, illustrates the court's efforts to constrain agencies. As I described in my October 2023

column for The Legal Intelligencer titled "The Chevron Doctrine in Peril," *Loper* involved a regulation promulgated by the National Marine Fisheries Service (NMFS) requiring owners of regulated fishing vessels to hire third-party observers to monitor certain herring fishing trips at the owners' expense. The vessel owners contended that the Magnuson-Stevens Fishery Conservation and Management Act did not authorize NMFS to impose these costs.

The reviewing courts analyzed the case through *Chevron*'s lens. Utilizing traditional tools of statutory analysis in what is commonly called step 1 of the *Chevron* framework, they concluded that the statute was ambiguous. Rather than exercising their independent judgement to interpret the statute, the courts affirmed the agency's decision under *Chevron* step 2, which required courts to defer to an agency's reasonable interpretation of an ambiguous regulation. The Supreme Court granted certiorari on the question of whether *Chevron* should be overruled. In a majority opinion authored by Roberts, the court explained that the framers of the Constitution envisioned that the interpretation of the laws would be the province of the courts. Although courts may defer to agency findings of fact, judges historically resolved questions of statutory interpretation. The *Loper* court cited approvingly the statement in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), that the weight given to an agency's interpretation of a statute it is authorized to administer depends upon its power to persuade based on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements" and other factors such as the agency's experience and expertise. This framework is known as "*Skidmore* deference."

Against this background, the *Loper* court viewed the direction in Section 706 of the APA requiring the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency

action" to preclude affording binding deference to an agency's reasonable interpretation of ambiguous statutory language. Instead, when reviewing a challenge to agency action, a reviewing court must exercise its independent judgment regarding what the law is, although consistent with *Skidmore* it may afford whatever weight to an agency's interpretation may be warranted by the agency's experience and informed judgment. Under *Loper,* the reviewing court's role is to determine the best interpretation of an ambiguous statutory provision. "In the business of statutory interpretation, if it is not the best, it is not permissible." See *Loper,* 144 S.Ct. at 2266.

The court also concluded that the doctrine of stare decisis cautioning courts to adhere to precedent did not preclude overruling *Chevron*. In the court's words, the difficulties of applying *Chevron* and subsequent court limitations on its use created "a dizzying breakdance." The court was particularly troubled that the *Chevron* framework would allow an agency to change a statutory interpretation upon which the public had relied.

In addition to joining the majority opinion, Justices Clarence Thomas and Neil Gorsuch each penned concurring opinions. Thomas argued that *Chevron* deference violates the Constitution's separation of powers. In his view, *Chevron* infringes on the judiciary's Article III powers by requiring deference to administrative agencies and preventing it from serving as a constitutional check on the executive. In his concurrence, Gorsuch expanded on his reasons for concluding that stare decisis should not apply.

In a vigorous dissent, Justice Elena Kagan joined by Justice Sonia Sotomayor, and in a companion case also by Justice Ketanji Brown Jackson, strongly disagreed.
The *Chevron* doctrine is based on the presumption that Congress would want the agency it authorized to administer a statute to resolve statutory ambiguities. No fixed single best meaning

for any ambiguous statutory provision exists. Many interpretative issues involve scientific or technical subjects within the scope of agency expertise. Others require an understanding of complex and interdependent regulatory programs or involve policy issues. In the dissent's view, administrative agencies and not courts are best qualified to resolve these issues.

The dissent noted that Section 706 of the APA is indeterminate on the matter of deference; it does not require the court to perform a de novo review, nor does it establish a standard for reviewing an agency's statutory constructions. In the years before enactment of the APA, courts often deferred to agency statutory interpretations. When enacting the APA, Congress intended to codify then-existing practice.

The dissent also emphasized the importance of following the doctrine of stare decisis. It found the *Chevron* doctrine workable and preferable to affording agency views only "respect" under the *Skidmore* doctrine. It emphasized the likelihood that overruling *Chevron* will incentivize new challenges to agency statutory interpretations. Although the majority opinion stated that "special justification" is required to upset a ruling previously made under the *Chevron* framework, the dissent predicted that courts adjudicating challenges to regulations will readily find sufficient justification to revisit prior decisions.

Years of experience resolving cases under the principles established by the court's decisions this term will be necessary to learn precisely how the administrative landscape has changed. Several predictions seem well-grounded. The dissent appears correct in anticipating that challenges to agency actions will increase now that reasonable agency interpretations of statutes will not be upheld unless a court concludes that they are the "best" interpretations.

Where a case turns on technical or scientific questions, courts following the *Loper/Skidmore* framework are likely to give an expert agency's views great weight. Where policy questions control, some courts will defer to an agency with experience and consistency in administering the statute. Other courts may make their own policy choices purportedly grounded in the statutory language and history but potentially influenced by the judge's own leanings. The risk increases that different judges will reach different results, creating a patchwork of interpretations throughout the country.

After *Loper*, agencies are likely to draft regulations supported by administrative records that emphasize the factors identified in *Skidmore*. If the technical and scientific support for a regulation is appropriately documented and persuasive, *Skidmore* deference may produce the same result as *Chevron* deference.

Pennsylvania state courts will be asked to determine the effect of *Loper* on state law administrative challenges. To date, Pennsylvania has followed the lead of the U.S. Supreme Court by applying the *Chevron* framework to regulations properly adopted through the regulatory process and applying Skidmore deference to agency guidance documents. After *Loper*, litigants challenging regulations are likely to request Pennsylvania courts to abandon use of the *Chevron* doctrine.

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