The Future Of Agency Deference After Loper Bright

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Introduction

The Supreme Court's decision in Loper Bright Enterprises v. Raimondo1 has been described as accomplishing a seismic shift in administrative law. Rightly so. In the decision, the Court did away with so-called Chevron deference—a longstanding, across-the-board presumption that whenever a statute a federal agency is charged with administering contains an ambiguity, Congress intended that agency, rather than an Article III court, to resolve the statutory ambiguity. In dispensing with that presumption, Loper Bright seized interpretive authority for courts that had rested with executive branch agencies.

One aspect of Loper Bright, however, has yet to receive sustained attention: even with Chevron now overruled, may courts conclude that Congress, in a particular statute, has delegated an agency discretionary, even interpretive, authority? And if so, how will a court identify such statute-specific delegations? The majority in Loper Bright was quite clear that, within constitutional constraints (more about that below), Congress can delegate such discretionary, and even interpretive, authority to agencies: “In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.”2

This could prove to be an important aspect of the Loper Bright majority opinion, and one that could spawn significant litigation in the future. To see why, it is helpful to recall how Justice Scalia, in his pro-Chevron days, framed the doctrine. In views he expressed in 1989 in a speech at Duke University School of Law, Justice Scalia explained that, in case law prior to Chevron, courts often undertook a “statute-by-statute” assessment into whether Congress intended “to confer discretion upon [an] agency.”3 In the majority opinion in Loper Bright, Chief Justice Roberts seemingly endorsed that same view of the pre-Chevron regime.4

That statute-by-statute approach, Justice Scalia explained, was “assuredly a font of uncertainty and litigation.”5Chevron replaced the statute-by-statute framework with an across-the-board presumption: statutory ambiguity is conclusive evidence Congress intended an agency to exercise discretion to resolve it. That presumption has now been resoundingly rejected by the Court in Loper Bright, a momentous development in administrative law.

But in recognizing that Congress can continue to delegate discretionary authority to agencies, did the Loper Bright majority invite a return to the statute-by-statute approach discussed by Justice Scalia? If so, what does that mean for future claims to agency deference? More specifically, is the battle over agency deference over—or has the terrain simply shifted? Can we expect federal agencies and the Department of Justice in defense of agency actions to take the position that in a particular statute at hand, Congress did in fact intend to delegate interpretive authority to the agency? Must that delegation be express or implied? How do these arguments square with everything else the Loper Bright majority had to say about why Congress ordinarily leaves interpretive questions to Article III courts, not agencies?6

These are important, if not vital, questions that deserve more attention than they have received. In this article, we offer initial thoughts on how battles about agency deference may unfold in the wake of Loper Bright and what that means for administrative law more generally.

Delegated Discretion After Loper Bright?

Loper Bright overruled Chevron, and in critical ways restored the primacy of Article III courts in interpreting the meaning of federal statutes. As Loper Bright resoundingly confirmed, a court's role is to divine the best reading of a statute—a task to which it is well-equipped.

But, perhaps significantly, Loper Bright recognized that a statute's best reading "may well be that the agency is authorized to exercise a degree of discretion."7 That is, writing for the majority, Chief Justice Roberts explained that Congress may delegate discretionary authority to agencies, and courts must defer to an agency's reasonable exercise of discretion within the bounds of those delegations. As he put it, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."8 Or, said differently, a statute's meaning may be that Congress directed an agency to exercise some discretion, even interpretive discretion.

With Chevron's presumption that ambiguity is an implied delegation of discretionary authority now gone, the challenge will be identifying, presumably on a statute-by-statute basis, when has Congress delegated interpretive authority to agencies. Loper Bright provides some guideposts on these questions, if not a fully fleshed out rulebook.

Express Delegations

The somewhat easy case will be statutes where Congress expressly delegates discretionary authority to an agency. As the Loper Bright majority put it, Congress may "expressly delegate[]" gap-filling discretion to an agency,9 and some statutes, it explained, "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term."10 So, where Congress expressly calls on an agency to exercise discretion, including when it comes to interpretive questions, courts may find delegated discretion and defer accordingly.11

One substantial wild card here is the degree to which future Supreme Court cases might restrict the scope of express delegations under the so-called Nondelegation Doctrine. Proponents of a more robust Nondelegation Doctrine would limit Congress's constitutional authority to delegate certain legislative decisions to executive agencies.12 Armed with such arguments, litigants challenging agency action based on express delegations will claim that a particular delegation goes too far, abdicating Congress's legislative authority to agencies by granting broad discretion without cabining it through clear, intelligible principles.13 In light

of Loper Bright's nod to Congress's authority to delegate, subject to constitutional limits, this could well become an important font of litigation in administrative law over the next few years. But unless and until the Nondelegation Doctrine is given more teeth, it seems likely that courts will honor express statutory delegations and an agency's reasonable exercise of discretion within the parameters of that delegation.

Implied Delegations

But what about implied delegations? The Chevron presumption itself was a specific species of implied delegation—statutory ambiguity was assumed to be a delegation from Congress to the agency. Loper Bright did away with that theory of implied delegation. But what about other types of delegation-by-implication theories?

Agencies seeking to identify implied delegations in the post-Chevron world might well point to Loper Bright's recognition that Congress sometimes delegates agencies the authority "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility' … such as 'appropriate' or 'reasonable'" or necessary.14 This statement may well lead agencies to argue in particular statutory settings that "the best reading of a statute" is that the statute impliedly, if not expressly, delegates discretion to the agency.15 For example, the Loper Bright majority cited to statues that "direct[] EPA to regulate power plants 'if the Administrator finds such regulation is appropriate and necessary'"16 or that allow the EPA to establish limitations to "'assure' various outcomes, such as the 'protection of public health' and 'public water supplies'" based on the Administrator's "judgment."17

Based on those passages, agencies might push the boundaries aggressively, and argue that a delegation is implied whenever an agency is tasked with setting a "reasonable," "just," or "appropriate" standard—for example, circumstances in which Congress charges an agency with setting rates that are "just and reasonable."18 After all, agencies might be expected to argue, "[o]rdinarily, what a legislature may do explicitly, it may do implicitly."19 Thus, the argument would go, Congress's use of a broad term that inherently requires making a judgment call implicitly signals that the agency should exercise its discretionary judgment.

Oral argument in Loper Bright suggests at least some Justices agree implied delegations are possible. For example, Justice Sotomayor observed that "[i]t seems like most people agree … if a statute uses 'reasonable,' that Congress is delegating the definition of 'reasonable' to the agency,"20 while Justice Barrett noted that it appeared even Loper Bright "agree[d] that when a statute uses a word that leaves room for discretion, like 'appropriate,' 'feasible,' 'reasonable,' that that is a delegation of authority to the agency.'"21 Loper Bright's counsel similarly distinguished between words like "[r]easonable" that are "term[s] of capaciousness and elasticity" and other terms like "[t]elecommunication service" which "[are] not."22

Undoubtedly, federal agencies can be expected to push the envelope. And we can also expect that those challenging agency assertions of implied discretionary authority will have strong counterarguments. First, Loper Bright emphasized that courts, not agencies, interpret the law. And it created a strong default presumption that Congress intended that outcome.23 Seizing on those instructions, challengers to deference might argue that delegations cannot arise based on weak, tepid interferences from a statute. Rather, the argument would go, to avoid an end-run around Loper Bright, delegations may be found only when it is crystal clear that Congress vested discretion, including interpretive discretion, with an agency.

Second, pointing to the Nondelegation Doctrine and Justice Thomas's concurrence, those challenging implied delegation theories may argue that because such delegations raise serious

constitutional questions, courts should demand clear statements from Congress. Justice Thomas concluded that Chevron violated the separation of powers both by "tying a judge's hands" from "serving as a constitutional check on the executive" and by "permit[ting] the Executive Branch to exercise powers not given to it."24 Litigants may argue that finding implied delegations would violate the separation of powers just the same by unconstitutionally empowering agencies to "unconstitutionally exercis[e] 'legislative Powers' vested in Congress.'"25 And they could argue that if a statute presents a close question as to whether Congress delegated authority, the constitutional issues Justice Thomas identified would favor finding no delegation under the doctrine of constitutional avoidance.26

Further, other canons could be argued to point in the same direction; namely, toward deep skepticism against any "implied" delegations.27 Take the federalism canon, where "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."28 Or the major questions doctrine, where courts should "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"29 Why should we expect Congress to speak any less clearly when delegating interpretive authority to an agency and thus implicating questions surrounding the separation of powers?

Third, even capacious and elastic terms must still be read in their proper statutory context. As Justice Gorsuch emphasized, judges' "lawfinding" requires "focusing their work on the statutory text, its linguistic context, and various canons of construction."30 Litigants could argue that a word like "reasonable" or "appropriate" does not indicate a delegation for a variety of reasons—other, more explicit statutory language; the specific context it was used in; or another canon of construction pointing in the opposite direction. In that case, a seemingly broad delegation of interpretive authority may not actually apply because those other indicators signal Congress's intent to circumscribe the agency's asserted authority.

Michigan v. EPA provides an example. While the Court's opinion cited that case as a potential instance where magic words introduce capacious "flexibility," Justice Gorsuch noted that even in that case "the Court found there were outer boundaries that … can be exceeded."31 Policing those boundaries, litigants will surely argue, requires a court to consider how a broad term is used in a specific statutory context.

The Loper Bright Remand As A Case Study

These very fights over deference in a post-Chevron world could well play out on remand in Loper Bright itself, illustrating the type of debates that may unfold in other administrative law cases for the foreseeable future. The Court's opinion in Loper Bright did not actually resolve the statutory interpretation question at hand: does the Magnuson-Stevens Act allow the National Marine Fisheries Service to require industry-funded monitors on certain domestic vessels?

Presumably that question will be decided on remand. The Magnuson-Stevens Act grants the National Marine Fisheries Service the authority to take "measures 'necessary and appropriate for the conservation and management of the fishery.'"32 The D.C. Circuit previously took that language to suggest that the statute may allow industry-funded monitors—that is, that Congress had delegated that power to the agency.33 The agency will thus surely recycle the D.C. Circuit's statements under the LoperBright framework.

Although ambiguity or silence are no longer a basis for finding a delegation of discretion, the best reading of the statute, the argument would go, is that Congress delegated discretion to

make decisions about industry-funded monitors to the agency. It thus remains possible that the D.C. Circuit could reach the same statutory interpretation under the Loper Bright regime as it did applying the Chevron regime, and that a court could base that decision on a degree of deference to the agency's interpretation about what is "necessary" and "appropriate" in this context.

Loper Bright will very likely have strong responses, and our purpose here is not to predict the outcome of the case on remand. The point is simply that the Loper Bright remand itself may make clear that the debate over agency deference is not over, although its terms have undoubtedly shifted. How the D.C. Circuit resolves these questions on remand—including whether the "necessary" and "appropriate" language in the statute implies a delegation of discretionary authority to the agency—will provide an early test case as to how courts will treat statute-by-statute claims of delegation (express or implied) after Loper Bright.

Conclusion

In his 1989 remarks, Justice Scalia predicted that "in the long run Chevron will endure."34 But it remains to be seen whether his assessment—that a world without Chevron will involve statute-by-statute debates regarding claims of delegation and deference, which he called a "font of uncertainty and litigation," —will prove correct.35 What is clear after Loper Bright is that statutory ambiguity is no longer an implied delegation of authority to an agency. But key questions going forward will be: (1) whether Congress can constitutionally delegate discretionary, including interpretive, authority to agencies; and (2) when courts should read statutes, expressly or impliedly, to have intended that result. How courts ultimately resolve those questions could be just as important as Loper Bright itself for the future of agency deference and the struggle between courts and agencies for primacy in statutory interpretation.

Endnotes

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); see alsoRelentless, Inc. v. United States DOC, No. 22-1219 (a companion case to Loper Bright).

[2] Loper Bright, 144 S. Ct. at 2263.

[3] A. Scalia, Judicial Deference to Administrative Interpretation of Law, 1989(3) Duke L. J. 511, 516 (1989).

[4] Loper Bright, 144 S. Ct. at 2264 (citing A. Scalia, supra note 4, at 516).

[5] A. Scalia, supra note 4, at 516.

[6] Whether and how the Court's apparent approval of deference to an agency's determination of "how a broad statutory term applie[s] to [a] specific [set of] facts found by the agency," Loper Bright, 144 S. Ct. at 2259, may intersect with the questions explored in this article and raise other questions, for example, whether and when agencies have any legitimate claim to deference on "mixed question of fact and law"?

[7] Loper Bright, 144 S. Ct. at 2263.

[8] Id. at 2273.

[9] Loper Bright, 144 S. Ct. at 2263 (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)).

[10] Id. (quoting Batterton, 432 U.S. at 425).

[11] Examples may include: 29 U.S.C. § 213(a)(15) (exempting certain individuals from the Fair Labor Standards Act based on terms "as … defined and delimited by regulations of the Secretary"); 42 U.S.C. § 5846(a)(2) (requirement to notify the Nuclear Regulatory Commission of "defect[s] which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate"); 42 U.S.C. § 7522(a)(5) (limiting enforcement actions "in the case of a clean alternative fuel vehicle (as defined by rule by the Administrator)"); Batterton, 432 U.S. at 419, 425 (stating "Congress … expressly delegated" when "unemployment" was "determined in accordance with standards prescribed by the Secretary" in previous version of 42 U.S.C. § 607(a)).

[12] See Gundy v. United States, 588 U.S. 128 (2019) (Gorsuch, J., dissenting) (outlining constitutional objections to broad congressional delegations); see id. (Alito, J., concurring) (expressing willingness to reconsider non-delegation precedent in a future case).

[13] See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.")

[14] Loper Bright, 144 S. Ct. at 2263 (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

[15] Id.

[16] Id. at 2263 n.6 (quoting 42 U.S.C. § 7412(n)(1)(A)).

[17] Id. (quoting 33 U.S.C. § 1312(a)).

[18] 16 U.S.C. § 824d(a).

[19] Adrian Vermeule, Implied Delegations After Loper, Yale J. on Regul. (July 9, 2024),.

[20] Transcript of Oral Argument at 8, Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. Jan. 17, 2024).

[21] Id. at 45.

[22] Id. at 87.

[23] See Loper Bright, 144 S. Ct. at 2267 ("But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency"); id. ("The better presumption is … that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.").

[24] Loper Bright, 144 S. Ct. at 2274 (Thomas, J., concurring).

[25] Id. at 2275 (quoting Baldwin v. United States, 140 S. Ct. 690, 619 (2020) (Thomas, J., dissenting from denial of certiorari)).

[26] See Clark v. Martinez, 543 U.S. 371, 381 (2005) (stating that the doctrine of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); see also West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (Clear-statement rules "assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds").

[27] See Biden v. Nebraska, 600 U.S. 477, 508 (Barrett, J., concurring) (describing canons like "constitutional avoidance, the clear-statement rules, and the presumption against retroactivity" as "impos[ing] a 'clarity tax' on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends.").

[28] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[29] Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); cf. also King v. Burwell, 576 U.S. 473, 485-86 (2015) (stating if "Congress wished to assign" the question of availability of tax credits under the Affordable Care Act "to an agency, it surely would have done so expressly" because the "question [was one] of deep 'economic and political significance' that [was] central to [the] statutory scheme"); West Virginia, 597 U.S. at 723 ("Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there" (quoting Utility Air, 573 U.S. at 324)).

[30] Loper Bright, 144 S. Ct. at 2285 (Gorsuch, J., concurring).

[31] Transcript of Oral Argument at 56, Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. Jan. 17, 2024).

[32] Loper Bright Enters. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022), vacated and remanded, 144 S. Ct. 2244 (2024).

[33] See id. at 366.

[34] A. Scalia, supra note 4, at 521.

[35] Id. at 516.