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The *Loper Bright* Decision and the Future of Artificial Intelligence Regulation

Joseph Mazzarella*

In this article, the author argues that, in the context of artificial intelligence regulation, an unquestionably technical area, the U.S. Supreme Court's Loper Bright *decision does little to hinder regulatory power to ensure safety and mitigate danger.*

Artificial intelligence (AI) is poised to rapidly transform nearly all aspects of society. However, it also brings new risks. As governments work to develop and implement laws that mitigate these evolving risks, expert regulatory oversight will be crucial. While the European Union has already passed a comprehensive AI law that invokes a significant risk-based regulatory regime, the United States has yet to do so. How the United States addresses AI will inevitably involve regulatory oversight due to the complex technical nature of AI, its rapid advancement, and the numerous ways it may be applied.

Against this backdrop looms the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*.[1] On its face, the decision raises serious concerns about the future ability of agencies to exercise their traditional discretion in interpreting statutory ambiguity to address unforeseen or unintended gaps. This issue becomes even more critical in areas where technical expertise is necessary to fully evaluate and assess implications beyond the grasp of the unacquainted.

Loper Bright

In *Loper Bright*, the court held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in determining the bounds of an agency's statutory authority, and courts may not defer to an agency's own interpretation of the scope of its statutory authority merely because the statute in question is

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ambiguous. This marks a reversal of the court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[2] where it held that if statutory ambiguity is present courts should defer to the interpretive judgment of the agency if the agency's interpretation is plausible, even if other plausible interpretations may exist.

Some early commentary suggests *Loper Bright* leaves the administrative state for dead. To paraphrase Mark Twain, the report of its demise is greatly exaggerated. *Loper Bright* neither reverses prior court rulings relying on the *Chevron* doctrine nor eviscerates an agency's authority to exercise powers delegated by Congress through legislation or an agency's reasoned fact determinations.

Addressing the concern over technical competence head-on, the Supreme Court rejected the notion that deference must be given to agencies because they are more technically equipped to handle questions that arise from statutory ambiguity, stating that "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." This does not mean technical competence is irrelevant. Citing precedent, the Court acknowledged that "… 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'" and further expounded that "[s]uch expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'"

AI Regulation

In the context of AI regulation, an unquestionably technical area, *Loper Bright* does little to hinder regulatory power to ensure safety and mitigate danger. Rather, it requires Congress to be more explicit in the scope of the powers it wishes to delegate to one or more agencies. *Loper Bright* concerns what Congress did not specify, whether by accident, lack of foresight, or intention. It rejects the presumption that statutory imprecision means Congress intended to delegate powers when it could have explicitly done so.

Undoubtedly, *Loper Bright* will invite more challenges and slow action. However, adherence to the procedural rigors of the APA should provide agencies with a framework warranting persuasive deference from courts. In its ruling in *Mayo Foundation for Medical Education and Research v. United States*,[3] the Supreme Court relied

on *Chevron* in finding for the Internal Revenue Service (IRS) in a Treasury regulation matter but pointed to the IRS's adherence to full notice and comment procedures as "a significant sign that the rule merits *Chevron* deference." Although *Chevron* is dead in name, it is likely that *Chevron* principles may find new life in *Loper Bright* decision-making, not as a dispositive factor leading to blank check deference but giving special weight to an agency's procedural fidelity to the APA.

Finally, the Supreme Court notionally calls upon Congress to empower agencies through express delegation. This prescription, however, carries its own limitations under Article I, Section 1 of the U.S. Constitution and the non-delegation doctrine. In its decision in *West Virginia v. Environmental Protection Agency*,[4] the Supreme Court attempted to clarify the limits of legislative delegation, invoking the major questions doctrine articulating that "decision[s] of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." Thus, delegations of power require precision especially when important policies are at issue.

Conclusion

Overall, though *Loper Bright* changes the rules of the game, *Loper Bright* does little to change the actual authority of agencies if Congress takes care to authorize agencies and agencies follow the APA. *Loper Bright* is merely a call for Congress to do its work with greater precision, and technical deference remains persuasive when done in accordance with the strictures of administrative procedure.

Notes

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1. Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (June 28, 2024).

2. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3. Mayo Foundation for Medical Education and Research v. U.S., 562 U.S. 44 (2011).

4. West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).