Yes, There Will Be No Loper Bright "Revolution"

SCOTUS Is Taking the Decision's Limits Seriously

ADRIAN VERMEULE
MAY 30, 2025

24 6 4 Share

Share

Type your email... Subscribe

In a forthcoming piece in the Supreme Court Review titled *The Old Regime and the Loper Bright "Revolution,"* itself expanding on a previous post on *The New Digest*, I suggest that there is less, perhaps much less, to *Loper Bright* than meets the eye.[1] Among other reasons for this, the main two that the paper offers are these:

(1) *Loper Bright* relabels a substantial range of *Chevron* deference as "delegated discretion," when statutes expressly delegate interpretive authority to agencies or else use terms that require details to be filled in, or that are inherently flexible. In such cases, the exercise of delegated discretion is reviewed for reasonableness under the rubric of arbitrary-and-capricious review.

(2) *Loper Bright* is best read to preserve the idea, most famously associated with the *NLRB v. Hearst* decision from 1944, that agency application of statutory standards with unclear extensions to concrete factual situations itself represents an exercise of agency discretion, and is thus subject to a test of reasonableness.

Apart from the four corners of the *Loper Bright* opinion itself, it is also significant that in a public lecture, soon after the decision came down, Justice Kavanaugh cautioned lawyers not to "over-read *Loper Bright*, [because] oftentimes Congress will grant a broad authorization to an executive agency." As I put it in the *Supreme Court Review* piece, "Justice Kavanaugh's position as the Court's (frequent) swing voter makes his view, and my view, something of a self-fulfilling prophecy."

We now have a decision from the Court that, I believe, confirms these assertions - a decision written by none other than Justice Kavanaugh, who provided the crucial fifth vote for the Court's analysis (while three Justices concurred on other grounds, and one Justice was recused). Until now, the post-*Loper Bright* evidence from the Supreme Court had been fragmentary and thin. That changed on May 29, when the Court decided *Seven County Infrastructure Coalition v. Eagle County Colorado*, a decision interpreting the National Environmental Policy Act (NEPA). In its first extended, substantial treatment of *Loper Bright*, the Court indicated in strong terms that the lower courts had failed to afford agencies the "substantial judicial deference" required by NEPA. Even more importantly, the Court reached that conclusion by a reading of *Loper Bright* that heavily favors delegated discretion and agency application of law to fact as key elements of the governing framework for review of law.

Here is the nub of the Court's discussion of *Loper Brigh*t and its application to NEPA cases, as relevant for present purposes (with citations to *Loper Bright* and other cases omitted):

> As a general matter, when an agency interprets a statute, judicial review of the agency's interpretation is de novo. But when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard. Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained. In practice, judicial deference in NEPA cases can take several forms. For example, NEPA says that the EIS [Environmental Impact Statement] should be "detailed." Of course, the meaning of "detailed" is a question of law to be decided by a court. But what details need to be included in any given EIS? For the most part, that question does not turn on the meaning of "detailed"—instead, it "involves primarily issues of fact." The agency is better equipped to assess what facts are relevant to the agency's own decision than a court is. As a result, "agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." So the question of whether a particular report is detailed enough in a particular case itself requires the exercise of agency discretion—which should not be excessively second-guessed by a court.

The Court went on to provide a similar analysis of discretion and agency application of legal standards to factual questions for other elements of NEPA's statutory framework, but I see no need to belabor the point; the major elements of the analysis should be clear from the excerpt. The Court underscores the fundamental "delegated discretion" maneuver that underlies the low-temperature reading of *Loper Bright* that I have offered: although the meaning of statutes is a *de novo* question of law for the courts, the best meaning or single correct meaning of statutes themselves may just be that the statute delegates discretion to agencies, and when statutes do that, the agency's exercise of that discretion is reviewable only for reasonableness. And although the Court does not expressly refer to *Hearst*, it says clearly that when agencies apply legal standards to facts, judicial review is for reasonableness and judges should not "second-guess" the agency's application — an approach that is in substance the same as the *Hearst* approach. In short, *Seven County* confirms that the principal elements of the non-revolutionary reading of *Loper Bright* enjoy the support of a working majority of the Court, and supply the operative reading of *Loper Bright*, at least for now. One decision does not a doctrine make, of course, and future cases could yet adopt a stronger reading of *Loper Bright*. But on the best current evidence, there will likely be no *Loper Bright* "revolution."

Type your email... Subscribe

Share

1 Hence the sarcasm-quotes around "revolution," which Justin Driver was kind enough to suggest for the final published version (they do not appear in the SSRN version linked above).

24 Likes · 4 Restacks

24 6 4 Share

Discussion about this post

Comments Restacks

Write a comment...

Jack Townsend Jun 1

Professor Vermeule, I think you conflate the arbitrary and capricious test and the reasonableness of the interpretation test which was the purported domain of Chevron. As Justice Kagan specifically stated in Judulang v. Holder, 565 U.S. 42, 52 n. 7 (2011), the two tests are different. Thus, under that distinction, a regulation could be procedurally invalid (thus violating the arbitrary and capricious standard by, for example, failing to address material comments), but the second test of reasonableness of the interpretation is a different test. The domain of Loper Bright is in the latter category separately tested. Under Loper Bright, there is no longer a reasonableness of the interpretation standard but a de novo determination of the best interpretation by the court.

Having said (or claimed that), I am not sure Loper Bright will have outcome determinative results different than were generally made under the Chevron regime. That is because I intuited from general reading the cases under Chevron and specifically analyzing two large datasets of cases supposedly applying Chevron, I found that the courts may have noised about Chevron but in fact only approved interpretations they agreed with (basically their self-determined best interpretations). (In this regard, best interpretations are "reasonable", too.) There were just too many outs from approving reasonable but not best interpretationos (e.g., text not ambiguous,, agency interpretation unreasonable, MQD, etc.) to the courts having to apply an interpretation that they did not agree with. Other prominent authorities have perceived the phenomenon as well. Basically, in most cases, Loper Bright de novo interpretation will get courts to the same place as did Chevron.

LIKE REPLY SHARE

2 replies

David May 31

I was under the impression that Chevron deference was being read in an over broad manner by courts such that deference was extended to administrative agency decisions even where clear statutory support for an action was lacking, and that the primary effect of Loper Bright was "merely" to require courts to look for a statutory basis related to the decision being taken. In other words, Congress (if such a thing were imaginable) was being placed, kicking and screaming, back in the drivers seat of administrative decision making. Am I wrong?

LIKE REPLY SHARE

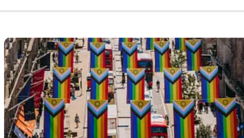
2 replies

4 more comments...

Top Latest Discussions

An Open Letter To My Students
Dear Students:
MAR 30 · ADRIAN VERMEULE

Why I Lost Interest in the Liberalism Debate
On Science-Fictional Political Theory
FEB 3, 2024 · ADRIAN VERMEULE



Chevron By Any Other Name
From "Chevron Deference" to "Loper Bright Delegation"
JUN 28, 2024 · ADRIAN VERMEULE

See all

Ready for more?

Type your email... Subscribe

© 2025 Conor Casey, Adrian Vermeule · Privacy · Terms · Collection notice

Start writing Get the app

Substack is the home for great culture