BESSEMER TRUST

Loper Bright Enterprises v. Raimondo, (U.S. Supreme Court, June 28, 2024)

July 2024

Overruling of *Chevron* Doctrine Regarding the Validity of Regulations; Possible Practical Implications for Tax Regulations

Steve R. Akers

Senior Fiduciary Counsel
Bessemer Trust
300 Crescent Court
Suite 800
Dallas, TX 75201
214-981-9407
akers@bessemer.com
www.bessemer.com

Table of Contents

July 9, 2024

Important Information Regarding This Summary

This summary is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This summary is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information and disclaims any liability in connection with the use of this information. Views expressed herein are current only as of the date indicated, and are subject to change without notice. Forecasts may not be realized due to a variety of factors, including changes in law, regulation, interest rates, and inflation.

1. Brief Synopsis

The Supreme Court, in a major shift of approach in analyzing the validity of actions of federal agencies (including regulations), overruled a 40-year rule announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* announced a two-step approach: (1) first, determine if a particular statutory provision is ambiguous ("the statute is silent or ambiguous with respect to the specific issue"), and if so; (2) second, the regulation would be upheld if it is a "permissible" construction of the statute, even if a court would have reached a different interpretation. The Court held that approach is inconsistent with the Administrative Procedure Act (APA), which requires "the reviewing court" to "decide *all* relevant questions of law" and "interpret statutory provisions." (emphasis added, as quoted by the Court).

In determining the validity of regulations, the "judgment of [the administrative agency] may help inform the court of the proper interpretation of the statute," but the court will determine the "best" interpretation of the statute.

> … even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. [citation to *Chevron* omitted]. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Statutes sometime explicitly authorize an agency to interpret or provide details about implementation of a statutory provision. If so, the courts will consider if the delegation was within constitutional limits and whether the agency acted within the scope of the delegation. [*Chevron* had noted that a statute may include "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation…. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."]

Prior cases addressing the validity of agency actions that relied on the *Chevron* framework are not called into question. The holdings of those cases are subject to *stare decisis*; they may be overruled only if a "special justification" applies, and '[m]ere reliance on *Chevron* cannot constitute a "special justification….. That is not enough to justify overruling a statutory precedent."

The unofficial syllabus of the Court's decision summarized the holding very briefly:

> The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled.

The majority decision concluded by summarizing its ruling as follows:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And 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. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

The Court remanded the cases to district courts to consider the appropriateness of the regulations requiring paid observers on vessels in light the Court's overruling of *Chevron*.

Tax regulations have been subject to the *Chevron* analysis, and the overruling of *Chevron* may lead to more attacks on the validity of various tax regulations.

Loper Bright Enterprises, et al. v. Raimondo, Secretary of Commerce, et al., 603 U.S. __ (June 28, 2024) (opinion by C.J. Roberts joined by J. Thomas, J. Alito, J. Gorsuch, J. Kavanaugh, and J. Barrett; separate concurring opinions by J. Thomas and J. Gorsuch; dissenting opinion by J. Kagan joined by J. Sotomayor and J. Jackson [but Justice Jackson took no part in the decision as to one of the two cases]); together with *Relentless, Inc., et al. v. Department of Commerce*, et al., Cause No. 22-1219.

2. Summary of Analysis of Majority

a. **Basic Facts.** Petitioners (commercial fishermen) in two separate cases had argued that a 1976 law requiring certain fishing vessels to carry federal observers to collect data to prevent overfishing did not authorize a 2020 regulation requiring that the boat owners pay for the observers. The D.C. Circuit and First Circuit had upheld the rules under the *Chevron* doctrine. The Supreme Court granted certiorari in both cases, "limited to the question whether *Chevron* should be overruled or clarified."

b. **Pre-*Chevron* Brief History.** The Court began its analysis by noting that Article III of the Constitution assigns to the federal judiciary the responsibility and power to adjudicate "cases" and "controversies," and the Framers of the Constitution envisioned that the final "interpretation of laws" would be by the courts. Exercising independent judgment often included affording due respect to Executive Branch interpretations, especially when the interpretation was issued contemporaneously with the enactment of the statute and remained consistent over time. While the views of the Executive Branch could inform the judiciary, they would not supersede it.

The New Deal ushed in a rapid expansion of actions by federal agencies. The courts during that period often treated agency determinations of fact as binding on the courts if there was evidence to support the facts. But "[t]he interpretation of the meaning of statutes as applied to justiciable controversies," was "exclusively a judicial function." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 544 (1940). Executive Branch interpretations, especially when issued contemporaneously with the enactment of a statute, were entitled to "great weight." *Id.* In L*oper Bright* the Court summarized what had come to be known as the "*Skidmore* analysis":

> **...** in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. *Id.*, at 139–140. "The weight of such a judgment in a particular case," the Court observed, would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*, at 140.

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

c. **Express Delegation to Agency.** Statutes sometime give explicit authority to an agency to interpret ("give meaning to a particular statutory term") or "fill up the details" about implementation of a statutory provision. If so, the courts "interpret the statute and effectuate the will of Congress … by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' … and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries." Slip Opinion at 17-18.

The Court discussed express delegation to agencies in the context of responding to an argument about policymaking:

> That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.

Slip Opinion at 26.

[*Chevron*, discussed immediately below, had noted that a statute may include "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron* said "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."]

d. ***Chevron* Approach.** *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), announced a two-step approach for analyzing the validity of agency actions and regulations. First, determine if a particular statutory provision is ambiguous ("the statute is silent or ambiguous

with respect to the specific issue"). If the statute is not ambiguous, the court should reject agency administrative constructions of statutes that were inconsistent with congressional intent. Second, if the statute is ambiguous, the regulation would be upheld if it is a "permissible" construction of the statute, even if a court would have reached a different interpretation.

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, [footnote omitted] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843.

e. ***Chevron* is Inconsistent With APA.** The Court held that *Chevron* deference is inconsistent with the APA, which requires "the reviewing court" to "decide *all* relevant questions of law" and "interpret statutory provisions." (emphasis added, as quoted by the Court).

(1) **No Presumption of Implicit Delegation to Agencies.** Statutory ambiguities are not presumptively implicit delegations to agencies. Statutory ambiguities may arise for various reasons, including unintentional ambiguities, and that does not "reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question." Slip Opinion at 22. Indeed, most ambiguities may be "unintentional," and agencies have "no special competence in resolving statutory ambiguities." Slip Opinion at 23.

> Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. … Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." [Citation omitted]. So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.
>
> In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Slip Opinion at 22-23.

(2) **Purported Reasons That Agency Interpretations Should Be Favored.**

(a) **Subject Matter Expertise.** *Chevron* applies even in cases having little to do with the agency's technical subject matter expertise. Courts will have the benefit of the perspectives of parties and *amici* (both are "steeped in the subject matter") and the agency's subject matter expertise (its "body of experience and informed judgment"). The agency's interpretation may be "especially informative" when it rests on "factual premises" within its expertise.

> For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Slip Opinion at 25.

(b) **Uniform Construction of Federal Law.** "[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong." Slip Opinion at 25.

(c) **Policymaking Suitable for Political Actors.** "Courts interpret statutes. No matter the context, based on the traditional tools of statutory construction, not individual policy preferences." Slip Opinion at 26.

(3) **Many Exceptions to *Chevron* Have Been Applied.** "[W]e have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption …. Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another." Slip Opinion at 27-28.

(4) **Stare Decisis.** Stare decisis does not require persisting with the *Chevron* doctrine.

> The only question left is whether *stare decisis*, the doctrine governing judicial adherence to precedent, requires us to persist in the *Chevron* project. It does not. *Stare decisis* is not an "inexorable command," …, and the *stare decisis* considerations most relevant here—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision," …—all weigh in favor of letting *Chevron* go.

Slip Opinion at 29.

f. **Effect on Prior Cases.** Prior cases addressing the validity of agency actions that relied on the *Chevron* framework are not called into question. The holdings of those cases are subject to *stare decisis*; they may be overruled only if a "special circumstance" exists, and '[m]ere reliance on *Chevron* cannot constitute a "special justification…. That is not enough to justify overruling a statutory precedent." Slip Opinion at 34-35.

The dissent speculates that future courts will find ways to relook at the validity of regulations addressed in those prior cases because of the overruling of *Chevron*:

> The majority says that a decision's "[m]ere reliance on *Chevron*" is not enough to counter the force of *stare decisis*; a challenger will need an additional "special justification." ... The majority is sanguine; I am not so much. Courts motivated to overrule an old *Chevron*-based decision can always come up with something to label a "special justification." Maybe a court will say "the quality of [the precedent's] reasoning" was poor.... Or maybe the court will discover something "unworkable" in the decision—like some exception that has to be applied.... All a court need do is look to today's opinion to see how it is done.

Slip Opinion, Dissent at 31.

g. **Summary.** The very end of the majority opinion has an excellent brief summary of how courts will analyze the validity of agency rules and regulations in the future:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And 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. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Slip Opinion at 35.

3. Concurring Opinions

A concurring opinion by Justice Thomas maintains that *Chevron* deference is constitutionally suspect. "I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers." Slip Opinion, Thomas Concurring at 2. A lengthy concurring opinion by Justice Gorsuch observes that the majority opinion "places a tombstone on *Chevron* no one can miss" and explains his view of "why the proper application of the doctrine of *stare decisis* supports [overruling *Chevron*]. Slip Opinion, Gorsuch Concurring at 1-2.

4. Dissenting Opinion

A dissenting opinion by Justice Kagan, joined by Justices Sotomayor and Jackson (Justice Jackson participated only in one of the two case) gives various reasons why *Chevron* deference is appropriate and criticizes overruling this 40-year doctrine. Some of the reasons given include the following.

a. **Fill Statutory Gaps.** Agency action is needed to fill gaps or ambiguities in statutes.

b. **Subject Matter Expertise of Agencies.**

> [A]gencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a "scientific or technical nature." [citation omitted]. Agencies are staffed with "experts in the field" who can bring their training and knowledge to bear on open statutory questions. *Chevron*, 467 U. S., at 865. Consider, for example … [w]hen does an alpha amino acid polymer qualify as a "protein"? ... I don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer.

Slip Opinion, Dissent at 9.

c. **Experience with Complex Regulatory Regimes.** "Congress would value the agency's experience with how a complex regulatory regime functions, and with what is needed to make it effective." Slip Opinion, Dissent at 10. For example, a statute may require adjusting Medicare reimbursements for geographic wage differences. Many variables could impact that analysis including hard data, the ease of administering approaches on a nationwide basis, how regulators have dealt with similar questions in the past, and what hospitals think would work best. "Congress knows the Department of Health and Human Services can do all those things—and that courts cannot." Id.

d. **Policy Issues.** A regulatory decision may be "less one of construing a text than of balancing competing goals and values… Again, that is a choice a judge should not be making, but one an agency properly can. Agencies are 'subject to the supervision of the President, who in turn answers to the public.'" [citation omitted] Slip Opinion, Dissent at 11.

e. **Summary of Those Issues.**

> [The majority opinion] insists that "agencies have no special competence" in filling gaps or resolving ambiguities in regulatory statutes; rather, "[c]ourts do." ... Score one for self-confidence; maybe not so high for self-reflection or -knowledge. Of course courts often construe legal texts, hopefully well. [Several specific regulatory issues are listed.] The idea that courts have "special competence" in deciding such questions whereas agencies have "no[ne]" is, if I may say, malarkey. Answering those questions right does not mainly demand the interpretive skills courts possess. Instead, it demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice. It is courts (not agencies) that "have no special competence"—or even legitimacy—when those are the things a decision calls for.

Slip Opinion, Dissent at 13.

f. ***Chevron* Deference Has Been Fine-Tuned.**

> None of this is to say that deference to agencies is always appropriate. The Court over time has fine-tuned the *Chevron* regime to deny deference in classes of cases in which Congress has no reason to prefer an agency to a court. The majority treats those "refinements" as a flaw in the scheme, … but they are anything but.

Slip Opinion, Dissent at 11.

g. **APA is Compatible With Chevron Deference.** The dissent addresses the majority's reference to the APA dictating that courts should "decide all relevant questions of law."

> The majority highlights the phrase "decide all relevant questions of law" (italicizing the "all"), and notes that the provision "prescribes no deferential standard" for answering those questions. ... But just as the provision does not prescribe a deferential standard of review, so too it does not prescribe a *de novo* standard of review (in which the court starts from scratch, without giving deference). In point of fact, Section 706 does not specify *any* standard of review for construing statutes. [citation omitted] And when a court uses a deferential standard—here, by deciding whether an agency reading is reasonable—it just as much "decide[s]" a "relevant question[] of law" as when it uses a *de novo* standard. §706. The deferring court then conforms to Section 706 "by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed [the statute it administers] reasonably." [citing a Harvard Law Review article]. [S]ee *Arlington v. FCC*, 569 U. S. 290, 317 (2013) (ROBERTS, C. J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it").

Slip Opinion, Dissent at 16.

h. **Abandonment of *Stare Decisis*.** The dissent, in particular, decries the overruling of *Chevron* as subverting the principle of *stare decisis* and threatening the interests of parties who have relied for years on agency regulations (some of which may have specifically been upheld by the courts under Chevron deference).

> And still there is worse, because abandoning *Chevron* subverts every known principle of *stare decisis*. Of course, respecting precedent is not an "inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But overthrowing it requires far more than the majority has offered up here. *Chevron* is entitled to *stare decisis*'s strongest form of protection. The majority thus needs an exceptionally strong reason to overturn the decision, above and beyond thinking it wrong…. In particular, the majority's decision today will cause a massive shock to the legal system, "cast[ing] doubt on many settled constructions" of statutes and threatening the interests of many parties who have relied on them for years. [*Kisor v. Wilkie*,] 588 U. S., at 587 (opinion of the Court).
>
> …
>
> On the other side of the balance, the most important *stare decisis* factor—call it the "jolt to the legal system" issue—weighs heavily against overruling *Chevron*…. [P]rivate parties have ordered their affairs—their business and financial decisions, their health-care decisions, their educational decisions—around agency actions that are suddenly now subject to challenge. In *Kisor*, this Court refused to overrule *Auer* [which requires judicial deference to agencies' interpretations of their own regulations] because doing so would "cast doubt on" many longstanding constructions of rules, and thereby upset settled expectations. 588 U. S., at 587 (opinion of the Court). Overruling *Chevron*, and thus raising new doubts about agency constructions of statutes, will be far more disruptive.

Slip Opinion, Dissent at 24, 30.

i. **Effect on Prior Decisions.** The dissent responded to the position in the majority opinion "that judicial decisions that have upheld agency action as reasonable under *Chevron* should not be overruled on that account alone" by observing that "courts motivated to overcome an old Chevron-based decision can always come up with something to label a 'special justification.' … All a court need do is look at today's opinion to see how it is done." Slip Opinion, Dissent at 30-31.

j. **No Reliance on *Chevron* For Sixteen Years.** The majority opinion observed that the Supreme Court had not relied on *Chevron* for 16 years. The dissent viewed that as a bootstrap because it reflects an effort over that 16-year period by some Justices ultimately to overrule *Chevron*.

> The majority says differently, because this Court has ignored *Chevron* lately; all that is left of the decision is a "decaying husk with bold pretensions." … The majority's argument is a bootstrap. This Court has "avoided deferring under *Chevron* since 2016" [cross reference citation omitted] because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises" [cross reference citation omitted]; give the whole process a few years . . . and voila!—you have a justification for overruling the decision…. I once remarked that this overruling-through-enfeeblement technique "mock[ed] *stare decisis*." *Janus* [*v. State, County, and Municipal Employees*], 585 U. S., at 950 (dissenting opinion). I have seen no reason to change my mind.

Slip Opinion, Dissent at 27.

5. Observations

a. **Overview Regarding Estate Tax Regulations.** In the much celebrated (at least by taxpayers) case of *Walton v. Commissioner*, 115 T.C. 589 (2000), the Tax Court invalidated the notorious Example 5 in the GRAT regulations (Reg. §25.2702-3(e), Ex. (5)) as being "an unreasonable interpretation and an invalid extension of section 2702." The court applied the *Chevron* deference test to determine whether this "interpretive regulation" was reasonable (as opposed to the stricter "arbitrary, capricious, or manifestly contrary to the statute" test for "legislative regulations" issued under a specific grant of authority in the pertinent statute). The court said that it did not need to reach the issue of whether the regulation was adopted in violation of the APA. The holding in *Walton* allows the full actuarial value of the retained annuity interest in a GRAT to be subtracted in determining the net value of the gift upon the creation of a GRAT (thus almost or perhaps completely "zeroing out" the GRAT). After focusing on the statute's "origin and purpose for further guidance," *Walton* viewed the restriction in Example 5 from netting the gift amount by the value of the reversionary interest passing to the donor's estate as "an unreasonable interpretation and an invalid extension of section 2702." 115 T.C. at 604.

Since that time almost twenty-five years ago, very few cases in the estate planning arena have addressed the validity of Treasury regulations and notices, and very few have addressed the invalidity of regulations for failure to comply with the APA.

b. **Continuation of Recent Trend Attacking Regulations; Statute of Limitations Regarding Attacks on Old Regulations (*Corner Post, Inc. v. Board of Governors of the Federal Reserve System*).** *Loper Bright* is the latest link in a chain of recent attacks on the validity of regulations. See Item 25 of LOOKING AHEAD – Estate Planning in 2024, Current Developments & Hot Topics (June 17, 2024) found **here** and available at **www.bessemertrust.com/for-professional-partners/advisor-insights** for discussion about a number of recent cases beginning in late 2021 that have addressed the validity under the APA of regulations and other IRS guidance (not only for final regulations but also temporary regulations and even subregulatory guidance).

Indeed, the Supreme Court followed *Loper Bright* with an opinion several days later saying that the statute of limitations would not bar attacks on even very old regulations; the statute does not begin to run until a plaintiff is injured by agency action. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. __, 2024 WL 3237691 (July 1, 2024) (J. Barrett writing for majority; Dissent by J. Jackson, joined by J. Sotomayor and J. Kagan). Section 2401(a) of the APA has a six-year statute of limitations to challenge a final agency action. A practical problem with that limit is that the Anti-Injunction Act (§7421(a)) prevents challenges to tax regulations until a taxpayer is affected (i.e., has a notice of deficiency, a refusal of a refund, or other dispute with the IRS). *CIC Services LLC v. United States*, 593 U.S. 209 (2021). That may be far longer than six years after the regulation was finalized. When taxpayers have challenged some regulations, the government has argued that the statute of limitations had run under §2401(a) of the APA on the taxpayer's ability to challenge the regulation's validity. Under *Corner Post*, old regulations may still be challenged, as long as the challenge is brought within six years of when a taxpayer is injured by the regulation. Some commentators suggest that "*Corner Post* is a much bigger deal for tax than *Loper Bright*," with its opening of old regulations to challenges. *See* Sheppard, *Supreme Court Reverses* Chevron *Doctrine*, 184 TAX NOTES FEDERAL 379 (July 15, 2024).

c. **General Application to Tax Regulations.** *Mayo Foundation v. U.S.*, 562 U.S. 44 (2011), regarding the validity of a Treasury regulation that impacted a requested refund of FICA taxes, specifically held that *Chevron* deference applies to tax regulations. "[W]e are not inclined to carve out an approach to administrative review good for tax law only.… The principles underlying our decision in *Chevron* apply with full force in the tax context." 562 U.S. at 55. *Mayo Foundation* rejected an argument that tax matters should be treated differently than other areas of administrative law. That meant that issues that had been raised regarding agency interpretations prior to *Chevron* (such as whether agency interpretation had been consistent, had been promulgated years after the relevant statute was enacted, because of the way in which the regulation evolved, or because the regulation was prompted by litigation) would not apply to the Court's review of the FICA regulation.

d. **Effect of Specific Statutory Authorization for Regulations**. Many Treasury regulations have been promulgated pursuant to the Treasury Department's general authority under §7805 to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code. Prior to *Chevron*, several Supreme Court cases said the Court owed less deference to the Treasury Department's interpretation that is issued under that general authority in §7805(a) than when it is issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision. *Rowan Cos.* v. *United States*, 452 U.S. 247, 253 (1981); *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (quoting *Rowan*). That changed, however, following the *Chevron* case. *Mayo Foundation* stated that the administrative landscape changed significantly after *Rowan* and *Vogel* were decided. 562 U.S. at 56.

> We have held that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." [*United States v. Mead Corp.*], 533 U. S., at 226–227. **Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific.**

562 U.S. at 56-57 (emphasis added).

That statement by the Supreme Court in 2011, drawing no distinction between general or specific delegations of authority to the Treasury Department in tax statutes, appears to be a change in the

position taken by the Court in *Chevron*, which applied a high standard for disregarding "legislative regulations" in response to "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. According to *Chevron*, such legislative regulations were given controlling weight unless they were arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. 837, at 843-844 (1984). Various cases after *Chevron* have drawn a distinction between interpretive regulations issued under the general authority of §7805(a) and legislative regulations issued under a specific grant of authority for a particular statute.

For example, the Tax Court in *Walton v. Commissioner*, 115 T.C. 589 (2000), invalidated the notorious "Example 5" in the initial GRAT regulations by applying a "reasonable manner" standard for interpretive regulations, as opposed to the much stricter "arbitrary, capricious, or manifestly contrary to the statute" standard for reviewing legislative regulations.

> The regulations at issue here are interpretative regulations promulgated under the general authority vested in the Secretary by section 7805(a). Hence, while entitled to considerable weight, they are accorded less deference than would be legislative regulations issued under a specific grant of authority to address a matter raised by the pertinent statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984) (Chevron); United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 [49 AFTR 2d 82-491] (1982). A legislative regulation is to be upheld unless "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra at 843-844.
>
> With respect to interpretative regulations, the appropriate standard is whether the provision "implement[s] the congressional mandate in some reasonable manner." United States v. Vogel Fertilizer Co., supra at 24 (quoting United States v. Correll, 389 U.S. 299, 307 [20 AFTR 2d 5845] (1967)). In applying this test, we look to the following two-part analysis enunciated by the Supreme Court [in *Chevron*].

115 T.C. at 597.

Other cases (prior to *Loper Bright*) have acknowledged that the issuance of a regulation after following the notice-and-comment procedures of the APA are a "significant" sign that the regulation merits *Chevron* deference. *Mayo Foundation*, *United States v. Mead Corp.*, *Long Island Care at Home Ltd. v. Coke*.

The Court *in Loper Bright* did not specifically address the effect of general vs. specific statutory authority for issuing regulations. The Court acknowledged that different types of statutory authority may exist for issuing regulations.

> 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. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. *Batterton v. Francis*, 432 U. S. 416, 425 (1977) (emphasis deleted). Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U. S. 743, 752 (2015), such as "appropriate" or "reasonable." [footnotes omitted]

Slip Opinion at 17.

The Court did not refer to how its analysis would vary depending on the type of statutory authorization other than to recognize that courts should determine the boundaries of the delegated authority and ensure "that the agency has engaged in 'reasoned decisionmaking' within those boundaries." Slip Opinion at 18. The end of the majority's opinion in *Loper Bright* merely observes that "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. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." The only limitations specifically mentioned is that the courts "must respect the delegation" and must determine that regulations that are issued are within the scope of the delegated authority. However, some commentators believe that under *Loper Bright*, regulations issued pursuant to a specific grant of authority will continue to be afforded more weight than mere interpretive regulations issued under §7805's general grant of authority. *E.g.*, Mitchell Gans & Jonathan Blattmachr, *Loper Bright Enterprises v. Raimondo, Where in a Generational Shift, the Supreme Court Overruled the Chevron Doctrine*, LEIMBERG ESTATE PLANNING NEWSLETTER #3130 (July 2, 2024) (hereinafter Gans & Blattmachr, Generational Shift).

All tax regulations are issued under the general authority of §7805, stating that "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." But some regulations are also issued under more specific statutory authority, typically included in the relevant Code provision.

For example, Ron Aucutt (Lakewood Ranch, Florida) points to the "consistent basis" proposed regulations. Section 1014(f) specifically authorizes regulation to "provide exceptions to the application of this subsection." Mr. Aucutt asks: "Does that permit regulations that assign a zero basis to an after-discovered or accidentally omitted asset, even though its value has been neither "determined" under §1014(f)(1)(A) nor reported under §1014(f)(1)(B) and therefore it appears that §1014(f) does not apply to that asset at all? I don't think so." In contrast, §6035 requires providing basis information to recipients, and §6035(b) authorizes regulations that are "necessary to carry out" §6035. Mr. Aucutt points out that Treasury officials have informally cited §6035(b) "to perhaps justify requiring the successive reporting by donors and other transferors in non-realization transfers, but §6035 only requires reporting and does not assign basis like §1014(f) does. Moreover, even §6035(b)'s use of 'necessary' may be viewed as weak compared to the 'necessary or appropriate' standard in §2001(g)(2) (clawback) and §2010(c)(6) (portability)."

Relatively very few of the Code sections regarding estate and gift taxes include specific statutory authorization for regulations. Some exceptions include §2001(g)(2) (clawback, "necessary or appropriate"), §2010(c)(6) (portability, "necessary or appropriate"), §2014(c)(2) foreign tax credit, "regulations prescribed by the Secretary"), §2016 (recovery of taxes claimed as credit, "regulations prescribed by the Secretary"), §2014(c)(2) foreign tax credit, "regulations prescribed by the Secretary"), §2032A(f)(1) (special use valuation statute of limitations, "such manner as the Secretary may be regulations prescribe"), §2037(b)(2) (value of reversionary interest, "regulations prescribed by the Secretary"), §2053(d)(1) (deductibility of certain foreign death taxes, "regulations prescribed by the Secretary"), §2055(e)(H) (estate tax charitable deduction, "as may be necessary to carry the purposes of this paragraph"), §2056A(a)(2) and (e) (qualified domestic trusts, "may by regulations prescribe to ensure the collection of any tax imposed by subsection (b)" and "[t]he Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section"), §2108(d) (application of pre-1967 estate tax provisions regarding taxes paid to foreign country, "necessary or appropriate to implement this section"), §2204(b) (discharge of fiduciary from personal liability, "for purposes of carrying out the provisions of this section as the Secretary may require by regulations"), §§2513 (a)(2), 2513(b), and 2513(c) (split gift election, "such manner as is provided under regulations"), §2522(e)(1)(B) (gift tax charitable deduction limitations for fractional gifts, "may, by regulation, provide"), §2522(e)(2)(A) (gift tax charitable deduction recapture, "Secretary shall provide"). That leaves most of the estate and gift tax Code sections with no specific authorization for regulations. Section 2663 authorizes regulations "as may be necessary or appropriate" regarding all the generation-skipping transfer tax Code provisions (and specifically including three listed topics). In summary, **very few** estate and gift tax regulations have been issued pursuant to specific statutory authority other than the general authority of §7805.

e. **Review Standards Prior to *Chevron* (*Skidmore and National Muffler*).** Before the *Chevron* decision in 1984, courts had typically used the review standards originally announced by the Supreme Court in 1944 in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority; do constitute a **body of experience and informed judgment** to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon **the thoroughness** evident in its consideration, the **validity of its reasoning**, its **consistency** with earlier and later pronouncements, and all those factors which give it **power to persuade**, if lacking power to control.

323 U.S. at 140 (emphasis added).

Factors mentioned by *Skidmore* (in the quotation immediately above) that courts should consider in determining what weight to give to agency interpretations in looking to them for "guidance" are (1)

their thoroughness, (2) the validity of their reasoning, (3) their consistency with earlier and later pronouncements, and (4) all factors relevant to their power to persuade.

The Supreme Court subsequently summarized *Skidmore* as saying an agency's interpretation of a statute is entitled to "respect proportional to its 'power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore*).

The *Skidmore* analysis was applied with more detail by the Supreme Court in *National Muffler Dealers Assn. v. United States*, 440 U.S. 472 (1979).

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation **harmonizes with the plain language of the statute, its origin, and its purpose**. A regulation may have particular force if it is a **substantially contemporaneous** construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a **later period, the manner in which it evolved merits** inquiry. Other relevant considerations are the **length of time** the regulation has been in effect, the **reliance** placed on it, the **consistency** of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during **subsequent re-enactments of the statute**.
>
> …
>
> In short, while the Commissioner's reading of 501(c)(6) perhaps is not the only possible one, it does bear a fair relationship to the **language of the statute**, it reflects the **views of those who sought its enactment**, and it matches **the purpose** they articulated. It **evolved as the Commissioner administered the statute** and attempted to give to a new phrase a content that would reflect congressional design. The regulation has **stood for 50 years**, and the Commissioner infrequently but **consistently** has interpreted it to exclude an organization like the Association that is not industrywide. The Commissioner's view therefore merits serious deference.

440 U.S. at 477-78 (emphasis added).

f. **Does the *Skidmore* Review Standard Apply Following *Loper Bright*?** *Loper Bright* does not specifically address what standard should be used by courts in reviewing whether regulations appropriately interpret statutory provisions. Some commentators have suggested that following *Loper Bright*, courts will consider "the relevant factors under *Skidmore* deference." *E.g.*, Gans & Blattmachr, Generational Shift. Other commentators believe that the standard to be applied after the overruling of *Chevron* is not clear. *See Skidmore Deference: Agency Actions Without the Force of Law*, BLOOMBERG LAW (July 2024) ("The *Skidmore* standard was cited in the briefs in *Loper Bright* and *Relentless*, and was the subject of questions during oral argument as well. It's a frontrunner to be a *Chevron* replacement, though nothing is certain yet.").

One commentator believes that the *Skidmore* framework will be applied, observing that it is not "deference" to agency interpretation (*Loper Bright* emphasizes that courts interpret and construe statutes and should never "defer" to agency interpretations) but is a process for "uncovering statutory meaning."

> … [I]in *Loper Bright* the Court not only cited *Skidmore* with seeming approval, but repeatedly emphasized the "respect" traditionally afforded to longstanding, consistent agency interpretations, especially when offered close in time to the statute's passage….
>
> … But it doesn't want to call *Skidmore* "deference," because it believes the thing called deference is not allowed under the APA. And so we also get some language endorsing de novo review.
>
> … *Skidmore* is really about uncovering statutory meaning. So, the *Loper Bright* majority might say, using it does not constitute deference any more than consulting a dictionary does. *Chevron* was different in that it was premised on the idea that the law had "run out," and the agency simply got to decide the question. *Loper Bright* seems to embrace something like this distinction in footnote 3.

Daniel Deacon, *Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations*, BLOG FROM YALE JOURNAL ON REGULATION AND AMERICAN BAR ASSOCIATION ADMINISTRATIVE LAW AND REGULATORY PRACTICE SECTION (June 30, 2024).

The contrast between the "uncovering statutory meaning" approach of *Skidmore* and the "deference" approach of *Chevron* was explained in Ryan Doerfler, *How Clear is "Clear"?*, 109 VA. L. REV. 651, 709 (2023) ("unlike *Chevron*, however, *Skidmore* appears to treat an agency's views as evidence of statutory meaning…. Again, under *Skidmore*, an agency's views are evidence of

statutory meaning. Under *Chevron*, by contrast, those views constitute a legal basis for deciding a case if statutory meaning is unknown.").

g. **Possible Practical Implications of *Loper Bright* on Tax Regulations Going Forward.**

(1) **More Attacks on Validity of Regulations.** The overruling of *Chevron* deference will allow much more flexibility to courts in reviewing the validity of regulations and whether they correctly reflect the "plain language…, … origin, and … purpose" (quoting *National Muffler*) of pertinent statutes, likely leading to more attacks on the validity of regulations. "No longer will the IRS be entitled to a near-automatic win if it can establish that the statute is ambiguous. No longer is it a *fait accompli* that a court will uphold a challenged regulation." Thomas Sykes, Loper Bright: *A Tax Litigator's Quick Take*, 184 TAX NOTES FEDERAL 451 (July 15, 2014) (hereinafter Sykes, Tax Litigator's Quick Take). (In addition, the recent court attacks under the APA on a conservation easement tax regulation will likely lead to more litigation about the validity of regulations under the APA. See Item 25 of LOOKING AHEAD – Estate Planning in 2024, Current Developments & Hot Topics (June 17, 2024) found **here** and available at **www.bessemertrust.com/for-professional-partners/advisor-insights**.)

Examples of tax regulations that may be subject to attack (or that already are under attack) include the Bipartisan Budget Act's partnership audit regime, conservation easements, the partnership anti-abuse rule in Reg. §1.701-2, the "blocked income regulation" (Reg. §1.482-1(h)(2)) under §482 (the reflection of income statute in the international context), and the repatriation regulation (Reg. §1.965-5(c)(1)(ii)) that denied credit for some foreign income taxes. *See* Sheppard, *Supreme Court Reverses* Chevron *Doctrine*, 184 TAX NOTES FEDERAL 379 (July 15, 2024); Sapirie, Chevron *is Dead. Long Live* Skidmore *and the APA?*, 184 TAX NOTES FEDERAL 393 (July 15, 2024). If the forthcoming proposed regulations described in Notice 2024-54 regarding partnership basis-shifting transactions are issued and finalized, they may be subject to attack. *See Business Group Says No Authority for Basis-Shifting Transaction Rules*, TAX NOTES (July 16, 2024) (comments to IRS regarding Notice 2024-54 from Alliance for Business Partnerships).

Another example is the regulatory requirement of the timing for updating information on beneficial ownership reports under the Corporate Transparency Act. Updates or corrections of reports must be made within 30 days of changes (not within 30 days of when the reporting company learns of a change). However, the statute merely requires that updating of reports must be filed "in accordance with regulations prescribed by the Secretary of the Treasury, … in a timely manner, and not later than 1 year after the date on which there is a change." 31 U.S. CODE §5336(b)(1)(D). Courts may address whether a 30-day timeline is the "best reading" of the statutory requirement of "a timely manner, and not later than 1 year after the date on which there is a change," and that decision would include an analysis of the scope of the authorization for regulations.

> Obviously, the foreshortened deadline, however helpful to Treasury's Financial Crimes Enforcement Network, is a trap for tens of millions of small business owners just trying to stay afloat — owners who perhaps have little contact with professional advisers. That is dubious public policy and antithetical to the textually expressed congressional intent.

Sykes, Tax Litigator's Quick Take.

(2) **Procedural Details for Challenges.** Procedural details regarding challenges of the validity of a regulation are summarized.

> If a practitioner concludes that a Treasury regulation is possibly invalid under *Loper Bright*, it might make sense to file a refund claim, depending on the amount of tax involved in open and future tax years. A taxpayer ordinarily has three years from when a return was filed, or two years from when tax was paid, to file a timely and sufficient refund claim detailing the facts and grounds on which the taxpayer is relying. [Footnote citing §6511.] Both the Internal Revenue Manual and case law provide that a taxpayer who wishes to have the IRS take no action on a refund claim that is premised on the outcome of pending litigation (perhaps brought by others) may file a protective claim for refund within the applicable limitations period.
>
> If the IRS has disallowed a refund claim, a taxpayer generally has two years within which to file suit in U.S. district court or the Court of Federal Claims, [footnote citing §6501] unless the taxpayer previously signed a

> Form 2297, "Waiver of Statutory Notice of Claim Disallowance," in which case the two years begins to run when that form is signed. A taxpayer who has received a notice of deficiency from the IRS has only 90 days to file its petition in Tax Court, and that deadline may not be extended. If the taxpayer wishes to challenge a dubious regulation, the challenge should be teed up in the taxpayer's petition.
>
> Any original return, refund claim, Tax Court petition, or similar document that is premised on a position that contradicts a Treasury regulation should, out of an abundance of caution, be accompanied by a Form 8275-R, "Regulation Disclosure Statement," disclosing the conflict and detailing the basis for the taxpayer's position. This will help protect the taxpayer from possible penalties if the challenge is rejected.
>
> Tax practitioners should not overlook the recent activity around the six-year "outer limit" limitations statute found in 28 U.S.C. section 2401(a). If a taxpayer could have, but did not, mount a court challenge to a regulation within six years after its promulgation, a court challenge may be barred. That is, taxpayers sometimes don't bother to challenge a regulation because the tax liability stemming from its application is insufficient to warrant the expense and effort. If, however, the tax at stake increases sharply in a future tax year, a challenge at that time might make financial sense. But at that point, if the six-year limit of section 2401(a) has passed, would the IRS assert that section 2401(a) bars the challenge, despite the various other tax-specific limitations periods found in the code? [Footnote citing *Corner Post* (six-year limit starts to run when a litigant is adversely affected by the regulation).]

Sykes, Tax Litigator's Quick Take.

(3) **Attacks on Regulations Previously Found to be Valid Under the *Chevron* Standard.** The majority in *Loper Bright* attempted to clarify that prior cases addressing the validity of agency actions that relied on the *Chevron* framework are not called into question. The dissent, however, expressed that courts would still find a way to re-examine prior cases by finding the existence of some "special circumstance" to overcome the *stare decisis* doctrine. See Item 2.f above.

(4) **Less Changing of Agency Interpretations in Regulations.** Courts may be much less inclined to give weight to agency interpretations that are inconsistent with prior interpretation. Inconsistency is a negative factor under *Skidmore*. At oral argument in *Loper Bright*, some Justices were particularly concerned with the power that *Chevron* gave agencies to "change their minds."

> It's evident from the opinions (as well as oral argument) that what perhaps most bugged some of the justices about the *Chevron* regime was the ability it gave agencies to change their minds. This aspect of the new doctrine may dissuade agencies from doing so, even if they think they have pretty good support for the new interpretation.

Daniel Deacon, *Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations*, Blog from Yale Journal on Regulation and American Bar Association Administrative Law and Regulatory Practice Section (June 30, 2024).

Agencies may be less inclined to rewrite or eliminate prior regulations "when a new administration takes office." Gans & Blattmachr, Generational Shift (observing that *Loper Bright* reiterated that "every statute's meaning is fixed at the time of enactment").

(5) **Perhaps More Emphasis on Revenue Rulings Than on Regulations.** The Gans & Blattmachr article notes that regulations enjoyed substantial deference under *Chevron*, whereas revenue rulings enjoyed much less deference under the *Skidmore* standard.

> With Chevron now overruled and regulations and rulings both subject to Skidmore, perhaps the IRS will decide to issue more revenue rulings and less regulations though the IRS's argument in favor of a regulation will be somewhat stronger, even under Skidmore, given the notice-and-comment procedure.

Gans & Blattmachr, Generational Shift. *See also* Slowey, *The Ripple Effect of Chevron Doctrine: Tax Fallout, Explained*, BLOOMBERG DAILY TAX REPORT (July 15, 2024) ("The agency may decide it's not worth that regulation if the rule will be in the hands of the courts anyway.").

(6) **Less Declaring Victory by Regulation Following Court Losses.** The Gans & Blattmachr article also points out that the issuance of a regulation in the heat of litigation is a negative factor regarding regulation validity under *Skidmore*.

(7) **IRS Position in Administrative Proceedings.** *Loper Bright* may have an impact on the IRS's stance in an administrative proceeding regarding an issue governed by an existing regulation and its position regarding settlement. *See* Sykes, Tax Litigator's Quick Take.

(8) **Taxpayer's Approach For a Position in Tension With Existing Regulation.** Taxpayers will consider how they will move forward (or abandon) a position in conflict with an existing regulation regarding the taxpayer's position (1) on a return, (2) in an administrative proceeding, or (3) in litigation. *See Id*.

(9) **Treasury's Approach in Issuing New Guidance.** Treasury may reassess how it will proceed regarding a position in new regulations that may be questioned as to whether it is the "best meaning" of the approach contemplated by the statute. *See Id*.

(10) **Congress's Approach in Structuring Legislation.** *Loper Bright* may place more focus on structuring legislation to provide implementation details rather than risking how courts may interpret details as to the "best meaning" of a statute and how it should be implemented. Special attention will be devoted to any express delegation to Treasury in tax statutes to provide "needful rules and regulations" (§7805(a)). Courts will carefully analyze the scope of any such express delegation of rulemaking authority and whether Treasury has engaged in "reasoned decisionmaking" within those boundaries. See Item 5.d above.

The Joint Committee on Taxation may play an even larger role going forward in crafting tax legislation and producing detailed legislative history.

> The decision in Loper Bright Enterprises v. Raimondo holds big implications for tax policy, as Congress often gives the IRS and the Treasury Department leeway to fill in gaps in tax laws when crafting final regulations.
>
> Now, the House Ways and Means and Senate Finance committees may need to be more specific in delegating authority to the agencies and produce more detailed legislative histories for the courts to understand what Congress intended. Some lawmakers have said they may need backup from key partners like the Joint Committee on Taxation, which works closely with tax writers analyzing the impact of tax proposals.
>
> "The bulk of that is going to go on the Joint Committee staff, if Congress is serious in writing bills that they actually want to do and not letting the courts rewrite it," said George Yin, who served as the chief of staff at the JCT from 2003 to 2005.
>
> …
>
> Depending on how courts approach the legal challenges, there may be a greater emphasis on the legislative history and committee reports that the JCT is a key player in drafting, said Steve Rosenthal, a senior fellow at the Urban-Brookings Tax Policy Center who previously served as a legislation counsel at JCT.
>
> Congress will need help from JCT in choosing how to delegate authority to the IRS and Treasury and explaining the context, but JCT is prepared to take on that task, Rosenthal said.

Handler, *Congress's Tax Scorekeeper Gets Spotlight After Chevron Ruling*, BLOOMBERG DAILY TAX REPORT (July 23, 2024).

h. **Summaries of Transformative Effect of *Loper Bright* on Administrative Law.** The Gans & Blattmachr article concludes with an observation about the transformative effect of *Loper Bright*:

> Loper is a transformative decision. It will dramatically alter administrative law, severely diminishing the interpretive authority of the agencies and giving it to the courts instead. The impact will be substantial on all manner of regulation. In the tax area, taxpayers faced with problematic regulations will now have a stronger argument in terms of their validity.

A summary of *Loper Bright* by Miller & Chevalier (a law firm headquartered in Washington D.C. with substantial experience in legislative and administrative law matters) concludes with a discussion of the unsettling and dramatic impact of *Loper Bright*:

> The impact of *Loper Bright* on federal courts and agencies, Congress, and parties challenging agency action cannot be underestimated. The opinion will surely give rise to an increase in legal challenges to agency regulations and administrative actions and in forum shopping by litigants wishing to get those cases before their desired judges and circuit courts. Federal agencies will lose the significant advantage in those cases that *Chevron* deference afforded them and they will likely take additional steps in issuing guidance and rulemaking to shore up the foundation and persuasiveness of their regulatory actions.

It will take years for the rebalancing of federal government power over the administrative state to fully take shape following *Chevron*'s demise. Because district and appellate courts will exercise independent judgment when

interpreting ambiguous legislation and undoubtedly will not see eye to eye on many issues, some laws federal agencies are charged to implement and enforce will be more unsettled for both regulated parties and those agencies. This uncertainty will create both burdens and opportunities for regulated parties.

i. **Proposed Legislation to Codify *Chevron* Doctrine.** Eleven Democratic Senators on July 23, 2024, introduced the Stop Corporate Capture Act to codify the *Chevron* doctrine. The 35-page bill includes a wide variety of detailed requirements. Following are links to the **press release** describing the legislation, the **bill text**, and a **section-by-section description** of the bill. Very similar proposed legislation was introduced as H.R. 1507 in March 2023.