

The image features a dark grey rectangular box in the top left corner containing the text "K&L GATES" in white, sans-serif, uppercase letters. The background of the top half of the slide is a vibrant blue with abstract, flowing, wavy lines in various shades of blue, creating a sense of movement and depth.

K&L GATES

For the Public Affairs Council

Legislative Text in a Post-Chevron World

Prepared by K&L Gates
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Agenda


- 1) Background
 - Chevron
 - Loper Bright
- 2) 3 lessons for understanding/analyzing bill text after Loper Bright
- 3) Conclusions

What Was Chevron?

1. Under the *Chevron* doctrine, first question the court asks is whether the statute speaks directly to the question at issue. If yes, court interprets.
2. If not – if the statute is silent or ambiguous on the question -- the court will defer to a “reasonable” interpretation by the agency



The Core Question in *Loper Bright*



Could the National Marine Fisheries Service charge fishing companies for observers on their vessels in the herring fishery if the law did not specifically authorize it?


Quick Review: What Was Chevron?

1. Under the *Chevron* doctrine, first question is whether the statute speaks directly to the question. If yes, the interpretation takes place.
2. If not – if the statute is silent or ambiguous on the question -- the court will defer to a “reasonable” interpretation by the agency.

SCOTUS Overturns Chevron

On June 28, 2024, SCOTUS overturned the Appeals Court decision and also overturned the 40 year precedent of Chevron, eliminating most agency deference.





WHAT DOES LOPER BRIGHT AND THE DEMISE OF CHEVRON MEAN FOR ANALYSIS AND INTERPRETATION OF LEGISLATION?

Lessons from Loper

1. An agency can only act within the boundaries set by Congress;
2. Congressional delegations of authority must be clear and precise; and
3. Courts will rely on tools of statutory interpretation to determine if an agency acted “contrary to law” with little or no deference to the agency interpretation.

1) Congress Sets Agency Boundaries

LESSON #1 FOR BILL DRAFTERS

In drafting statutes, Congress should recognize that courts will “police” the limits of agency authority.



1) Congress Sets Agency Boundaries

- In *Loper*, SCOTUS said it must look to how Congress has “fix[ed] the boundaries of the delegated authority.” But...
- ...SCOTUS said deference to an agency’s view of its own statutory authority is particularly inappropriate.

1) Congress Sets Agency Boundaries

In *Loper*, the Appeals Court below found that several provisions of the Magnuson-Stevens Act authorized charging fishing companies for independent observers in certain fisheries -- but not in the Northeast herring fisheries, which was the subject of the lawsuit.

2) Delegations Must Be Clear and Precise

LESSON #2 FOR BILL DRAFTERS

- Bill writers who want to authorize agencies to act should do so in the statute with clarity and precision.
- Bill drafters can not longer delegate broadly and vaguely and expect an agency to “fill in the blanks” without specifying language.

Loper: Bad Delegation Language

The National Marine Fisheries Service “may prescribe such other measures, requirements, or conditions and restrictions such as are determined to be necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. 1853(b)(14)

Why Broad Delegation Language?

Maybe Congress:

1. Wants the regulatory agency to fill in the blanks;
2. Doesn't have the expertise;
3. Can't anticipate all the scenarios that might occur in the future; and/or
4. Intentionally write it broadly for political reasons.

SCOTUS Examples of Good Delegations

“Some statutes ‘expressly delegate[]’ to an agency the authority to give meaning to a particular statutory term.” (Loper).

*“any employee employed on a casual basis in domestic service employment to provide companionship services for individuals ... unable to care for themselves (**as such terms are defined and delimited by regulations of the Secretary**).” 29 U.S.C. 213(a)(15)*

SCOTUS Examples of Good Delegations

“Others empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme...” (Loper)

*“[A facility that] contains a defect which would create a substantial safety hazard, **as defined by regulations which the Commission shall promulgate.**” 42 U.S.C. 5846(a)(2)*

SCOTUS Examples of Good Delegations

“...or to regulate subject to the limits imposed by a term or phrase that “leaves agencies with flexibility ... such as ‘appropriate’ or ‘reasonable.’” (Loper)

“EPA shall regulate power plants “the Administrator finds such regulation is appropriate and necessary.” 42 U.S.C. 7412(n)(1)(A).

3) Agencies Cannot Act “Contrary to Law”

LESSON #3 FOR BILL DRAFTERS

- Bill drafters must be precise in their statutes.
- Courts will now rely on the best interpretation of the language, structure, content of the statute, not necessarily the agency’s interpretation.

3) Agencies Cannot Act “Contrary to Law”

- SCOTUS said its job is to “use every tool as [its] disposal to determine the best reading of the statute...”
- By “tool,” SCOTUS was referring to the “traditional tools of statutory construction...”
- And no deference!



“Statutes, no matter how impenetrable, do ...have a single, best meaning.”
(Loper)

Bill Drafter Lessons from Loper

1. An agency can only act within the boundaries set by Congress;
2. Congressional delegations of authority must be clear and precise; and
3. Courts will rely on tools of statutory interpretation to determine if an agency acted “contrary to law” with little or no deference to the agency interpretation.

Memo to All Federal Departments/Agencies

“DIRECTING THE REPEAL OF UNLAWFUL REGULATIONS” (April 9, 2025)

1. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024);
2. *West Virginia v. EPA*, 597 U.S. 697 (2022);
3. *SEC v. Jarkesy*, 603 U.S. 109 (2024);
4. *Michigan v. EPA*, 576 U.S. 743 (2015);
5. *Sackett v. EPA*, 598 U.S. 651 (2023);
6. *Ohio v. EPA*, 603 U.S. 279 (2024);
7. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021);
8. *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023);
9. *Carson v. Makin*, 596 U.S. 767 (2022); and
10. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020).

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