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Regulation by Adjudication

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In brief…

If the Supreme Court limits or overturns the longstanding Chevron Deference doctrine, it will likely lead to a phase of regulation by adjudication as agencies adapt by building on their authority and expertise in the adjudicatory area.

One of the significant undecided cases of this Supreme Court Term is *Loper Bright Enterprises v. Raimondo*: the challenge to the longstanding *Chevron* deference doctrine. The discourse about the impact of overturning or maintaining the *Chevron* doctrine can be extreme. Proponents of overturning *Chevron* hope it will be a long overdue constraint on regulatory activism, while advocates of maintaining *Chevron* contend it will preserve necessary regulatory flexibility. If the Supreme Court does limit or overturn *Chevron* neither prediction is likely to come true. Instead, we will likely see the next phase of regulation, regulation by adjudication, where even if the Supreme Court overturns or substantially limits *Chevron*, agencies will adapt by making new regulatory policy by building on their authority and expertise in the adjudicatory area.

Background

The judicial doctrine of *Chevron* deference, where reviewing courts grant deference to reasonable agency interpretation of its authority to take a regulatory action when the statute is ambiguous or unclear as to that action, is core to the ability of agencies to make new policy through regulation as agencies must act within their statutory authority. For agencies, statutory authorization provides the clearest authority to make regulatory policy changes yet is the most difficult to achieve. The Constitution made passing legislation purposefully difficult and in today's evenly divided national legislature enacting statutes is particularly challenging. Even under enacted statutes, an agency's authority to take an action may be ambiguous or unclear.

With respect to rulemaking under the Administrative Procedure Act (APA), an agency can only promulgate a particular rule if Congress has granted that agency the statutory authority to do so and the agency's rulemaking process comports with the APA. Under the longstanding *Chevron* doctrine, Courts have deferred to reasonable agencies' determinations of when they have the statutory authority to issue

rules. The *Chevron* doctrine created a two-step analysis to evaluate agency actions. Step one determines whether Congress is ambiguous in its legislative intent, and if it is ambiguous then step two counsels judicial deference to reasonable agency interpretation of the statute.

In recent years the Supreme Court has scaled back agency authority to act on certain high profile matters under its Major Questions Doctrine, which generally holds that Congress did not intend to delegate to agencies the latitude to pass rules addressing major political or policy questions when the statutory to do so is ambiguous or unclear. With Major Questions Doctrine citations now becoming more commonplace, the Court is now considering whether to weaken or overturn *Chevron* in the pending *Loper Bright* case.

The challengers to *Chevron* hope for new limits to administrative authority, and while overturning *Chevron* would be an important step, in many situations those hopes may be over-optimistic (and vice versa for supporters of retaining *Chevron* deference). This is so because of the reality that agencies can achieve many regulatory policy goals in the course of individual adjudications and through the issuance of guidance statements or even informal advice. Agencies' ability to set regulatory policy through adjudications is unlikely to meaningfully curtailed even by overturning *Chevron*. Yet setting policy in individual adjudications raises questions about due process to those not a party to that proceeding and whether an agency's decision to act – or not to act – is itself arbitrary.

Policy Through Precedent

Beyond the rulemaking process, federal agencies are vested with jurisdiction and authority to conduct many kinds of individual determinations – broadly termed adjudications – in the exercise of their statutory authorities. These types of wide-ranging actions include permits, approvals, enforcement actions, agency notifications of no-action, grant applications and many others. Under the APA, agencies must apply their rules governing those actions and adjudicated precedents to similar types of agency determinations. Over time, these actions become de facto policy - stakeholders can evaluate the body of precedent and then assess how the agency will address similar proposals. Agencies can further influence stakeholder actions through "non-binding" policy statements, advisories and guidance documents, which are intended to inform stakeholders how an agency is likely to treat a particular type of matter that may come before it and at times become stand-ins for actual policy actions.

Focusing on adjudications, it takes a few steps to understand how individual adjudicatory outcomes, taken cumulatively, become difficult-to-challenge regulatory policy. While an individual adjudication most likely involves one stakeholder or regulated entity, the issue being adjudicated is often important and applicable to other similarly situated stakeholders. Under the APA, a prior agency finding and holding becomes precedent for the next similar matter, so the outcome of an individual adjudication applying to one stakeholder becomes precedential for other similar stakeholders in similar matters. When considering whether to bring its matter before the agency, that next stakeholder will be aware the agency's earlier decisions and must decide whether to press forward in light of those. Those prior precedents, as a practical matter, have a significant impact on the course of conduct and decisions of stakeholders.

This means that the next stakeholder, if it wants the agency to reach a different outcome in its own adjudication, would need to petition the agency to alter its finding. For the agency to alter its precedent, it would evaluate the facts and circumstances of that next matter after considering its prior decisions and offer a rationale for deviating from that precedent. If the agency desires to maintain its precedent, a stakeholder's effort to convince the agency to deviate from that precedent is unlikely to succeed. That next stakeholder then the choice of accepting that precedent or instituting its proceeding, seeing that proceeding through to conclusion in a final agency action and appealing that action – a lengthy and uncertain course.

A judicial appeal of an individual adjudication is a difficult proposition. Assuming for the moment the decision rendered by the agency is a final agency action (and agencies routinely take actions with practical precedential and outcome-determinative effect that are not final agency actions and therefore unappealable under the APA), then a stakeholder can appeal the final decision in federal court. But an individual stakeholder appealing a decision in an individual adjudication may face more practical difficulties than an appeal made by a coalition or trade association of a final rule issued under notice and comment rulemaking. Adjudications are often by nature fact-specific, and if it is that agency will have likely issued a decision based on an administrative record developed regarding a specific circumstance or set of facts as they apply to that particular stakeholder. That administrative record may involve significant technical analysis and expertise, and the decision on that record will likely be focused on that one set of circumstances. Here judicial deference to agency expertise makes appeals of those types of agency actions extremely difficult, and even overturning the *Chevron* doctrine will not likely have a material impact on practical likelihood of success of an appeal in this sort of matter.

Why? To start, in adjudications there is often only a single party appellant, and that stakeholder may not have the resources of a large company or industry group to support its appeal. The appellant may be trying to alter the precedent from a prior adjudication which may not have been appealed. Gaining outside support for that appeal can be a challenge. Competitors or industry groups may be put in a difficult or uncomfortable position – taking a public position on a competitor's actions – if they decide to support that stakeholder's petition. There is a human element. Beyond the matter being appealed, a party will often have to work with that same agency and staff on other matters; that party will have to evaluate the impact of an appeal of one matter on the pendency of others. An individual stakeholder's relationship with the regulatory agency may be important to maintain and is often of a different character than that of a trade association or think tank.

Then there is time and the uphill nature of the challenge. Appeals are slow and add significant time to any regulatory process. And even in the event an appeal is ultimately successful, the remedy is most likely to remand the matter back to the same agency to reopen the matter. Most importantly, courts will likely remain reluctant to reverse fact-specific determinations that ostensibly apply to just one stakeholder, particularly if those determinations are based on extensive data, technical analysis, or evaluation of safety concerns, and are procedurally fair and documented. Considering all this, a party might weigh the all these considerations and ultimately decide to revise their approach, accept the outcome or drop the action they were trying to take.

To be sure, overturning *Chevron* will force agencies to carefully evaluate and justify their authority to issue APA rules, which is an important and beneficial outcome. Generally reducing judicial deference to agency actions could also lessen the burdens appellants face when challenging agency adjudicatory decisions. However, over time the actual practical impact of overturning *Chevron* is likely overstated. The administrative state has many ways to implement its preferred policies and providing visibility into the precedential effect of adjudications may become the next frontier in the efforts to rein in its reach.