

JAMES B. SPETA

The Changing Federal and Wisconsin Law of Judicial Deference to Administrative Agencies

The matter of judicial deference to administrative agencies' interpretations of law has seen notable developments both in Wisconsin and at the federal level in recent years. James B. Speta, the Elizabeth Froehling Horner professor at Northwestern University's Pritzker School of Law, recently participated in a panel on the topic at the State Bar of Wisconsin's Annual Meeting and Convention and developed his remarks into this guest post appearing on the Marquette Law School Faculty Blog on October 1, 2025.

Very near the end of its term last year, on June 28, 2024, the U.S. Supreme Court handed down one of its most significant administrative law decisions ever. *Loper Bright Enterprises v. Raimondo* (2024) overruled one of the Court's own precedents, which it had relied upon for 40 years in more than a hundred decisions and which had been cited in nearly 20,000 lower court decisions. Yet not only was *Loper Bright* not a great surprise in federal administrative law, but it was in many ways anticipated by a decision issued by the Wisconsin Supreme Court interpreting that state's administrative law six years earlier, *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue* (2018).

At this summer's annual meeting of the State Bar of Wisconsin, I was privileged to join a panel with former Wisconsin Supreme Court Justice Daniel Kelly, author of the lead opinion in *Tetra Tech*; retired Dane County Circuit Court Judge Shelley Gaylord; and Quarles & Brady appellate litigator James Goldschmidt, to discuss the connections between *Loper Bright* and *Tetra Tech*. It was a wide-ranging and vigorous conversation, with great questions from the floor.

Let me offer some of my thoughts

from that event: first, a bit of background on the federal and state cases; second, some connections and differences between them; and, last, some reflections on the hard questions that both cases raise and what, at the federal level, we are already seeing as changes wrought by *Loper Bright*.

1. Some Background on *Loper Bright* (and *Chevron*) and *Tetra Tech*

Though properly described as an administrative law decision, *Loper Bright* constitutes a major change in the way federal regulation works in almost every field—from transportation and energy, to health and safety, to the environment and labor relations, and more. Specifically, the Court held that its so-called “*Chevron* doctrine” was overruled.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council* (1984), in an opinion by Justice John Paul Stevens, the Court had said that, where Congress delegated to an agency authority to administer a statute, the agency also was empowered to interpret any ambiguous provisions of the statute. Of course, at what came to be called “step one” of a court's process under *Chevron*, if Congress had been clear in a statute, courts always



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ensured that agencies followed such clear instructions. But where there was ambiguity in the statute, in “step two” of the process, courts must defer to agency interpretations so long as they were reasonable.

The doctrine that emerged—*Chevron* deference—was initially promoted by Justice Antonin Scalia and other, largely conservative judges, and it supported what at the time (particularly under the Reagan and Bush administrations) were significant changes in agency regulation, mostly in a deregulatory direction. Its deference rule was based on three ideas: (a) that, in using an agency, Congress had delegated authority to the agency to resolve ambiguities in its governing statutes, (b) that resolving such ambiguities was usually an exercise in policymaking, as to which agencies would have more expertise than would courts, and (c) that agencies were more politically accountable (through both presidential and congressional oversight) than courts, allowing more democratic oversight of that policymaking.

Loper Bright overruled *Chevron* and placed principal authority for all statutory interpretation in the courts. Judges are to consider views of agencies on their governing statutes,

but judges must exercise “independent judgment” in interpreting statutes and always determine the best interpretation of a statute. The only exceptions, *Loper Bright* noted, are where Congress has specifically delegated to the agency the power to “fill up the details” or where the agency action was really limited to factfinding. And even then, courts are to rigorously ensure that agencies stay within the bounds of their delegated authority.

The result of *Tetra Tech* in 2018 for Wisconsin administrative law was very much the same. Before that case, the Wisconsin Supreme Court had developed an elaborate three-tier deference regime, which in some instances required courts to defer to an agency’s reasonable interpretations. *Tetra Tech* eliminated that regime, requiring courts to interpret statutes, and the Wisconsin legislature confirmed that outcome through amendments to the Wisconsin Administrative Procedure Act. “Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.” Wis. Stat. § 227.57(11). The statute also says that, while not deferring, courts should give “due weight” to the agency’s views. *Id.* § 227.57(10).

2. Some Connections and Differences Between the Cases

Loper Bright and *Tetra Tech* thus similarly transfer interpretive authority over a vast collection of regulatory statutes from agencies to courts. Both decisions emphasize judicial expertise in statutory interpretation, as opposed to agency expertise over their own statutes and agency expertise in policymaking. And both decisions emphasize that legislatures decide policy and courts enforce those policy choices. According to these decisions, statutory interpretation, even in highly technical areas, is not policymaking and therefore is the realm of courts.

Although the results are similar, *Loper Bright* and *Tetra Tech* reach their conclusions in fundamentally different

ways. The U.S. Supreme Court based its decision on the language of the federal Administrative Procedure Act (APA), which says that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. This language, which Congress passed in 1947 in part in response to the New Deal’s growth of the administrative state, *Loper Bright* says, is fundamentally inconsistent with *Chevron* deference—and the Court said it had never previously considered whether *Chevron* deference was consistent with the APA.

By contrast, the lead opinion in *Tetra Tech* based its decision on separation of powers grounds. And, although the lead opinion had only Justice Kelly’s signature for all of its propositions, a majority of the court thought that judicial deference at least raised such issues and that the deference doctrines should be eliminated.

Similar separation of powers arguments were presented to the U.S. Supreme Court in *Loper Bright*, with parties and amici arguing that *Chevron* deference violated both Article I’s vesting of legislative power in Congress and Article III’s vesting of judicial power in the courts. Yet, although it began its opinion with the famous language of *Marbury v. Madison* that “it is emphatically the province and duty of the judicial department to say what the law is,” the *Loper Bright* court did not embrace those constitutional arguments

(though it is also clear that some individual justices find them persuasive).

This difference in grounding is important. Because *Loper Bright* is based on statutory and not constitutional grounds, it preserves to Congress the ability to clarify or change standards of judicial review, generally or in specific cases. Indeed, as noted above, *Loper Bright* says that in instances in which courts find that Congress has clearly delegated interpretive authority to administrative agencies, courts need only find that the agency’s interpretation is reasonable.

3. The Questions Raised by *Loper Bright* and *Tetra Tech*

Loper Bright and *Tetra Tech* have raised several difficult questions. Those include: How are judges to interpret complex regulatory statutes, especially those involving scientific or other technical questions? How will courts determine under *Loper Bright* whether agencies have been delegated authority? How should lawyers respond to the changes in standards of review?

The first of these is perhaps the easiest to answer and the hardest to operationalize. As both Justice Kelly and Judge Gaylord emphasized in the state bar panel—and as Chief Justice John Roberts’s opinion for the Court in *Loper Bright* said—judges interpret complex statutes all of the time, in cases not involving administrative agencies. *Loper Bright* requires courts to consider the agency’s views, which bring along the agency’s expertise, and courts will be aided by advocates and amici (and

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expert testimony where appropriate). The “mood” (if you will) of *Loper Bright* is that judges should be confident in their ability to find a meaning in every statute and not to doubt their (superior) ability to determine whatever policy or other matters go into a best interpretation of a statute.

Here, there is something of a difference between the mood of *Loper Bright* and *Tetra Tech*. Chief Justice Roberts refutes the idea that “language runs out” (again, a paraphrase) in agency statutes, making necessary agency policymaking. By contrast, Justice Kelly’s discussion on the state bar panel indicates that he can imagine such cases, but if they occur, that simply means that the legislature has not done its job to set policy and the proposed regulation fails. To some degree, this echoes the U.S. Supreme Court’s recent “major questions doctrine,” which requires a clear statement of congressional delegation where an agency interpretation would have significant regulatory, economic, or other (as yet not fully defined) consequences.

To turn to the instances in which a court is evaluating a delegation (an issue principally arising under the federal approach, given *Tetra Tech*’s constitutional grounding), *Loper Bright* makes clear that ambiguity in a statute is not enough, even if the agency administers the statute. Similarly, authority to engage in general rulemaking and in adjudication is probably not enough to infer that the agency has been granted sufficient interpretive authority to support a form of deference. Rather, the Court seems to be looking for specific words of delegation: statutory instructions that an agency will define a term, or the use of broad language, such as “reasonable” or “appropriate,” that implies that the agency will have broad discretion.

While we do not yet have a complete answer, even from a year of lower court decisions since *Loper Bright*, it does seem obvious that the U.S. Supreme

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Court will not embrace the previously understood and permitted model that Congress sometimes does create an agency with the explicit intent that the agency will supervise a significant industry or problem and will largely determine regulatory policy as facts and circumstances change over time. The Court has also made clear that it will take a dim view of novel agency interpretations, especially those that change previous and longstanding agency positions. The flexibility that agencies had under *Chevron* to change their mind on the interpretation of a statute was, in fact, one of the Court’s main reasons to overrule *Chevron* as unworkable and wrong.

Notwithstanding the need for further development, I do think we can see some trends in how agencies and lawyers are responding to *Loper Bright* (and, as I understand from the state panel discussion, to *Tetra Tech*). Agencies and advocates are focusing more energy on establishing the scope of delegations, seeking to secure (or deny) the greater deference that such a showing might permit. And agencies and advocates are working much harder to show that their preferred interpretations are the “best” interpretations of the statute. Courts are writing more detailed and comprehensive opinions on statutory interpretation issues. Under *Chevron*, an agency defending its interpretation had to show that the statute was ambiguous and that its interpretation was reasonable. A court was required to affirm even if it would not have interpreted the statute in the same manner.

A recent Sixth Circuit decision is a good example of these developments. *In re MCP No. 185—Federal Communications Commission* (6th Cir. 2025) involved a challenge by broadband internet access providers to the FCC’s most recent application of nondiscrimination rules to their services. If you have followed the “net neutrality” debate, you know that the FCC has changed its mind several times (corresponding with changes in administrations) on whether such internet access service is a common carrier service. Under *Chevron*, the Supreme Court and the D.C. Circuit had said the statute was ambiguous and therefore upheld each of the FCC’s different decisions.

But not this time. The FCC itself wrote extensively in its order to say that its decision to regulate internet services was not a major question and was in all events the best interpretation of the statute. And the briefs of the parties (and amici) similarly reflected that, under *Loper Bright*, the court would delve deeply into every corner of the Communications Act. Ultimately, the Sixth Circuit decided that the Act was best interpreted to not permit common carrier regulation of internet services (again, to be clear, notwithstanding the Supreme Court’s prior holding that the Act did not clearly do so). Thus, it set aside the FCC’s ruling.

Much is ahead. As *Loper Bright* unfolds, it will continue to be interesting to look to Wisconsin’s experience under *Tetra Tech*. ■