

The New Administrative State: Implications of Recent Landmark Supreme Court Rulings for Federal Regulations, Agency Deference, and State Implementation

August 2024

AGENDA



Overview of *Chevron* and *Loper* Decisions



Discussion of uncertain impacts



Q&A

TODAY'S EXPERTS

Governor Mike Leavitt



Advisor to HMA

Founder, Leavitt Partners

Secretary of US Department of Health and Human Services, 2005-2009

EPA Administrator 2003-2005

Governor of Utah, 1993-2003

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CEO of Food and Drug Law Institute (FDLI)

CEO of Parkinson's Action Network

Director, US Office of Government Ethics

HOW AGENCIES ARE PERMITTED TO INTERPRET STATUTES: BEFORE

In *Chevron v. Natural Resources Defense Council* (1984) the Supreme Court ruled that, when statutes are ambiguous, courts should defer to an agency's interpretation of the law as long as it is reasonable.

- *Chevron* established a two-step process for assessing agency interpretation of a statute, which will inevitably have some nuances and gaps:

1. Is the statute ambiguous?

If the statute is ambiguous, then proceed to the next step.

If not, then the reviewing court must abide by the *unambiguous* meaning of the statute and not defer to the agency's interpretation. If the agency is following the statute, then there is no issue.

2. Was the agency's interpretation of the statute reasonable?

If the agency's interpretation of the statute is reasonable, agency regulation still upheld.

If the court determines that the agency's interpretation is unreasonable, then a court may overturn it.

- Judicial challenges to agency action were often unsuccessful due to “*Chevron* deference.”
- Conservatives have viewed *Chevron* as allowing the “administrative state” to grow, unchecked by the courts or Congress.

HOW AGENCIES ARE PERMITTED TO INTERPRET STATUTES: NOW

Loper Bright Enterprises v. Secretary of Commerce, June 28, 2024

In a 6-3 majority, the Supreme Court overruled *Chevron* and held that, pursuant to the *Administrative Procedure Act* (APA) “courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.”

- APA, enacted in 1946, establishes how federal agencies adopt regulations which have “the force of law.”

Individual judges will decide the “**best single reading**” of the statute (higher standard)

- Agencies **may still interpret the statute** if Congress clearly granted the agency authority to do so
- Courts are directed to “**be informed**” by **agency** interpretation and offer it “due respect”

Decision stated that prior cases which relied **on *Chevron* deference** are not overruled.

Loper must be read in the context **of other Supreme Court rulings** making it easier to challenge federal regulations:

- Major Questions Doctrine
- Statute of Limitations

BOTTOM LINE OF *LOPER*

40 years of weighting in favor of federal agency expertise no longer required of courts

Decision states that “many or perhaps most statutory ambiguities may be unintentional”

Many unanswered legal questions

Loper decision is an instruction to lower courts

Loper decision does not apply directly to state courts or state agencies

LIKELY CONGRESSIONAL IMPACT





IMPACT ON HEALTH AND HUMAN SERVICES (HHS) AGENCIES

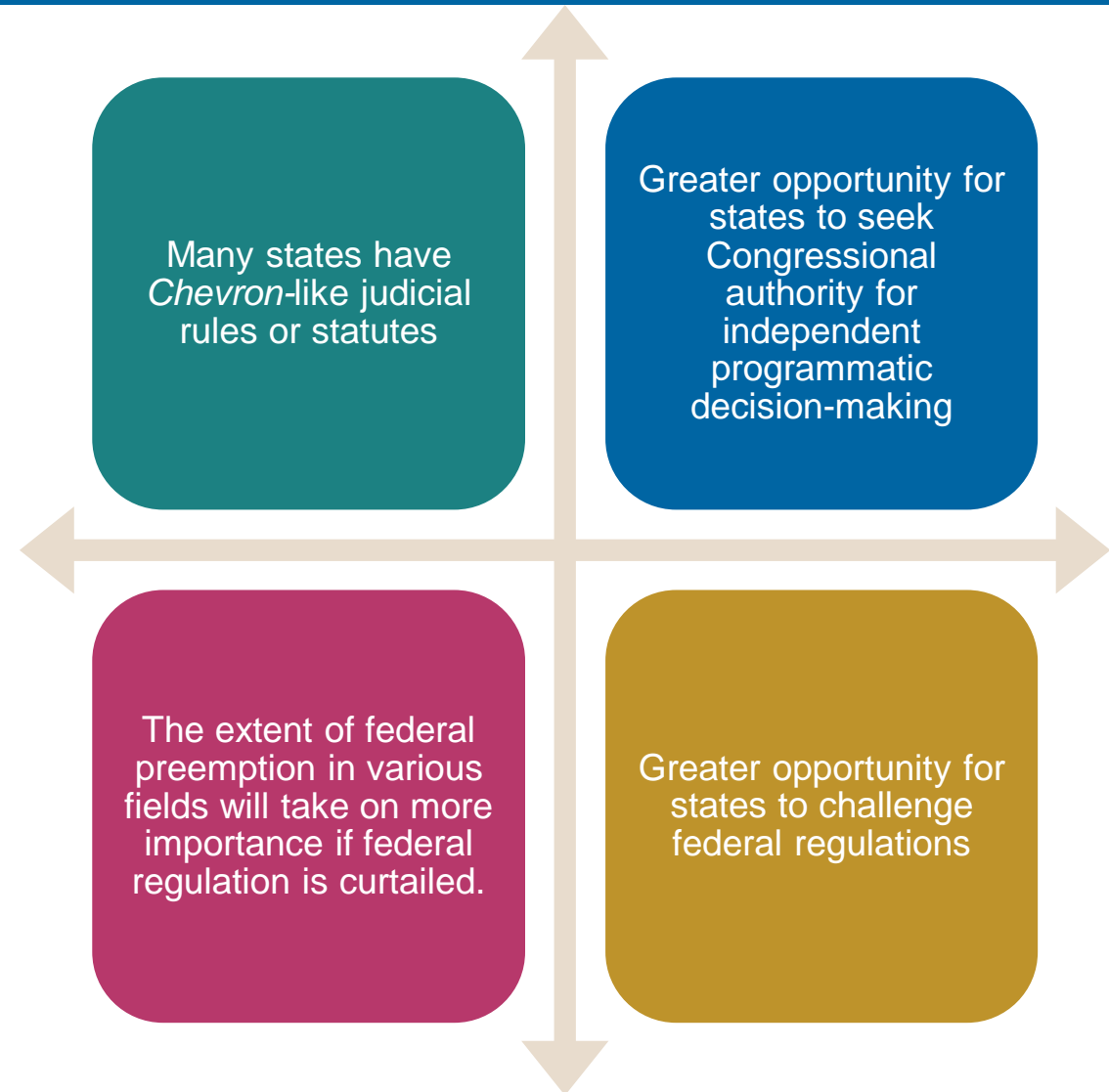
UNITED STATES

Department of
Health and Human
Services

- **Future agency regulations:**
 - More detailed, with greater justification, particularly scientific
 - Potential reluctance to go through regulatory process
 - Regulations closer in time to legislative enactment, more likely to be viewed as consistent with the underlying statute
- **Existing regulations: at risk of being challenged – potential to update now**
- **Election results – Does policy reversal with new administration demonstrate “ambiguity?”**
- **Less inclination to design innovative programs that are not based on explicit statutory direction**
- **Other agency actions:**
 - Enforcement Actions
 - Non-binding guidance
 - Emergency responses



IMPACT ON FEDERAL/STATE PROGRAMS





IMPACTS ON AND OPPORTUNITIES FOR HEALTH SECTOR

Greater opportunity for engagement with Congress and regulators

- Legislative history
- Technical and scientific expertise

New opportunities to challenge regulations

- Strategic litigation
- Forum shopping
- Legislative history

Opportunity to “create” ambiguity

- Legislative history and report language – more valuable
- NPRM comment letters



WHAT CAN WE DO FOR YOU?

Our depth and breadth of experience has helped an incredibly diverse range of healthcare industry leaders.

Questions?



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