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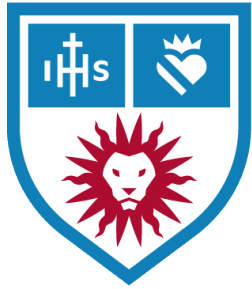
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*Unpacking the Most Important
Paragraph in Loper Bright*

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Unpacking the Most Important Paragraph in *Loper Bright*, by Ellen P. Aprill

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Loper Bright Enterprises v. Raimondo, of course, overruled *Chevron v. NRDC*, ending judicial deference to administrative agencies conferred by ambiguous statutory language. The opinion also acknowledged that in many statutory provisions, Congress delegates discretionary authority to administrative agencies. If so, agencies rather than courts have primary responsibility for interpreting the statutory language. Professor Chris Walker has called the paragraph in the text describing such policymaking delegation as the most important in the opinion. Understanding it calls for careful consideration of the cases and statutes it cites. The examination of these citations demonstrates that they do not offer the kind of guidance for which we may have hoped, much less expected.

Here is the textual language in *Loper Bright* describing congressional delegation to administrative agencies.

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*. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, *Wayman v. Southard*, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, such as "appropriate" or "reasonable" [144 S.Ct. at 2263 (citations and footnotes omitted).]

On first reading, this paragraph appears to give wide swath to the kinds of statutory language conferring such authority. The substance of the case citations and footnote examples, however, undermines confidence in any such conclusion. They present a mix of narrow and broad delegations without explanation for the choices.

Batterton v. Francis the first case cited, held that the Aid for Families with Dependent Children Act gave the Secretary of Health, Education, and Welfare the authority to prescribe standards for what constituted unemployment for purposes of that Act. The footnote to *Francis* in *Loper Bright* offers additional examples:

29 U. S. C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the secretary*)" (emphasis added)); 42 U. S. C. §5846(a)(2) (requiring notification to Nuclear Regulatory

Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act “contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*” (emphasis added)) [144 S.Ct. at 2263, fn 5].

These footnote examples, like the statute in *Francis*, are limited in scope and restricted to a particular set of situations.

The text of *Loper Bright* continues with a reference to a delegation described in *Wayman v. Southard*, an 1825 opinion by Chief Justice Marshall. There the state of Kentucky had challenged the congressional delegation of authority regarding certain judicial processes to federal courts. Chief Justice Marshall upheld the delegation as constitutional. The textual paragraph in *Loper Bright* quotes the phrase “fill up the details” from the “famous discussion” in *Wayman* regarding congressional delegation. This phrase, however, must be understood in its context. Chief Justice Marshall declared:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details [23 U.S. at 42-43].

Later in his opinion, Chief Justice Marshall took an even more expansive view of permitted delegation. He cautioned: “The difference between the departments is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and *the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court shall not enter unnecessarily*. [23 U.S. at 46 (emphasis added)].” This context seems to magnify the kind of “details” that delegation can permit.

For his decision in *Wayman*, Chief Justice Marshall relied on language from a 1792 act, “the law which must decide the question now before the court [23 U.S. at 39].” As the opinion quoted, it provided:

that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said Courts respectively, in pursuance of the act entitled, “an act to regulate processes in the Courts of the United States,” except to far as may have been provided for by the act to establish the judicial Courts of the United States; subject, however, to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such

regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit or District Court concerning the same [23 U.S. at 39, quoting Ch. 36, §2, 1 Stat. 275 (1792)].

This statute delegates broadly as to matters of judicial process.

In his opinion, Chief Justice Marshall also referred to section 7 of the Judiciary Act of 1793 23 U.S. at 42]. Section 7 reads:

That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes . . . and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts, respectively, *as shall be fit and necessary for the advancement of justice*, and especially to that end to prevent delays in proceedings [Ch. 22, §7, 1 Stat. 333 (1793) (emphasis added)].

The delegation here is broad indeed.

The footnote in *Loper Bright* to the paragraph quoting *Wayman* did not supply the context for the quoted phrase from Chief Justice Marshall's opinion. Neither did the footnotes quote the statutory provisions that formed the basis of the opinion in *Wayman*. These sources, particularly Section 7 of the Judiciary Act of 1793, suggest that Chief Justice Marshall might accept a broader range of permissible delegation than the phrase "fill up the details" quoted in isolation in *Loper Bright* implies. Elsewhere in the opinion, however, Chief Justice Marshall does seem to take a narrower view of the permissible delegation to the courts. For example, he also writes, "The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution [23 U.S. at 45]." Thus, the extent to which he viewed delegation as permissible remains uncertain.

Loper Bright next cites *Michigan v. EPA*, a 2015 case holding that EPA acted unreasonably under *Chevron* when it deemed cost irrelevant to a decision to regulate power plants. The textual sentence in *Loper Bright* citing it seems to permit an expansive delegation – approving agency interpretations that are "appropriate" or "reasonable." In fact, these criteria sound very much like the tests for *Chevron* deference, albeit with an express rather than implicit delegation.

The footnote to *Michigan v. EPA* in *Loper Bright* provides two examples [144 S.Ct. at 2263, fn 6], both of which bless broad but not unlimited statutory delegations. The first cites a current provision requiring establishment of effluent limitations: "[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure' various outcomes, such as the 'protection of public health' and 'public water supplies.'" In a part not quoted in the *Loper Bright* footnote,

this statutory provision limits the permitted scope of judgment to “a specific portion of the navigable waters.” Thus, while this statute gives EPA discretion, again, it does so for a particular set of factual situations. The *Loper Bright* footnote ignores that part of the statute, even though its inclusion would have offered guidance as to the scope of appropriate agency delegation.

The second example in the footnote cites the provision applicable at the time of *Michigan v. EPA*, not the current text of 42 U.S.C. §7412(n)(1)(A). (The footnote does not point out this fact.) According to the *Loper Bright* footnote, the cited provision directs EPA to regulate power plants “if the Administrator finds such regulation is appropriate and necessary.” As Justice Scalia wrote in his opinion for the Court in *Michigan v. EPA*: “One does not have to open up a dictionary in order to realize the capaciousness of this phrase [576 U.S. at 752].” Context slightly narrows the breadth of this delegation, however. In section 7412(n)(1)(A), “Congress required EPA to study the hazards to public health posed by power plants [576 U.S. at 753].” That is, the mandated study had to guide the agency’s decision as to whether a regulation was “appropriate and necessary.” Even if so, that is not much of a narrowing. Nonetheless, agency authority is limited to power plants, a particular set of entities.

The *Loper Bright* textual paragraph acknowledges congressional delegation of agency authority, but the examples of statutory authorization cited in *Loper Bright* do not serve as helpful models. The textual and footnote material fails to give the kind of guidance the introductory language of the paragraph had seemed to promise. For example, the textual quotation from *Michigan v. EPA* would authorize a range of discretion far broader than many of the other examples. Does that quotation mean “appropriate” or “reasonable” authorization is generally enough to delegate discretionary authority to an agency? Or does the fact that the statutory delegations cited in the footnotes are limited to navigable waters and power plants, respectively, mean that a very general delegation will not suffice?

To me, the examples most likely support an inference that statutory guidance granting agency authority must point to some particular set of situations – unemployed persons, persons unable to care for themselves, defective nuclear facilities or activities, polluted navigable waters, power plants endangering public health. Such a conclusion, however, is not free of doubt. The text and footnotes offer no certainty. In particular, the footnotes to the citation of *Michigan v. EPA* do not quote the part of the cited statutes limiting the classes to which agency discretion applies.

Reading the *Loper Bright* paragraph discussed here, Professor Adrian Vermeule’s “tentative and uncertain opinion” is that “*Loper* delegations need not be express, although of course they may be.” Cass Sunstein and Thomas Merrill agree. Based on examination of the *Loper Bright* citations in both the text and the footnotes, my tentative opinion comes out the other way, as hesitant as I am to disagree with these leading scholars of administrative law. Of course, examples in court opinions, even those from the Supreme Court, are not exhaustive. None of the examples, however, involves implied delegation. I find it hard to square *Loper*

Bright's overruling of *Chevron* deference to continue to permit implicit delegations. Other examples of express delegations are broad in *Loper Bright*, but all these examples are limited to a specific set of persons or circumstances.

In my view, whether explicit but very general delegations of authority – one without specifying the situations to which it applies – survive *Loper Bright* raises a particularly difficult question. As a tax professor, I would point to section 7805(a) of the Internal Revenue Code as such an express and extremely broad delegation. It is part of a code section entitled “Rules and Regulations” applicable to the code generally. It functions as the authority cited for most tax regulations, although many Internal Revenue Code provisions have their own grant of authority. Section 7805(a) reads in pertinent part: “[T]he 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.”

If such delegations suffice, there could be surprisingly little left of *Loper Bright's* overruling of *Chevron* as a practical matter. Congress could easily add such general delegations to legislation as a matter of course. I doubt that a broad delegation without some limits on the class to which it applies passes *Loper Bright* requirements. That is, my tentative but very uncertain conclusion is that *Loper Bright* permits a broad delegation of agency discretion only so long as the discretion applies to some limited class. To me, such unbridled delegations are too expansive, given both the tenor of the *Loper Bright* opinion and the examples it cites.

Of course, others, such as Professor Vermeule, would disagree as to broad but explicit delegations, and I acknowledge that the examples in the opinion do not give a clear answer to this question. Like academics, some reviewing courts undoubtedly will conclude that unconstrained but explicit delegations meet *Loper Bright* requirements and others will not. Indeed, a recent decision from the Fifth Circuit, Memorial Herman v. Commissioner, relied on *Loper Bright* to invalidate a long-standing regulation defining section 501(c)(4) social welfare organizations promulgated under the authority of section 7805(a). The court, however, did not so much as mention the issue of whether section 7805(a) qualified as a congressional delegation to the agency.

In addition to the general authority of section 7805(a), the Internal Revenue Code displays an enormous variety in the wording of statutory delegations in particular provisions. Many would clearly meet *Loper Bright* requirements for agency delegation. For an example in a provision familiar to many homeowners, section 121 excludes gain up to specified limits upon sale of a principal residence used by the taxpayer as such for 5 years, not including “nonqualified use.” Section 121(b)(5)(C)(ii)(III) bestows authority to issue guidance excluding from nonqualified use a “period of temporary absence (not to exceed two years) due to change in employment, health conditions, or such other unforeseen circumstances *as may be specified by the Secretary*” (emphasis added).

This example from section 121 addresses a very small aspect of the statutory provision. It identifies a particular issue that Congress has already identified. Delegating specific authority for issues already anticipated not so hard. Delegating authority for new developments or issues unidentified at the time of statute's enactment, but which often do occur, is much harder.

Drawing again from my own area of expertise and relying on the statutory provisions cited in the footnote to *Michigan v. EPA*, I think that section 7701(l) of the Internal Code, one provision among a long list under the title "Definitions," would meet the *Loper Bright* requirements for statutory delegation while also anticipating new developments. The provision reads, "The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among 2 or more such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title." I find "to prevent avoidance" no broader than "appropriate" or "reasonable." Moreover, the provision specifies the set of persons to whom any regulations would apply, as did the provision cited in the footnote to *Michigan v. EPA*. Also relying on *Michigan v. EPA*, I conclude, at least tentatively, that the provision in section 897(l)(3) stating that "the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection" suffices. Although both "necessary or appropriate" and "purposes" are broad, this regulatory authority applies to a particular set of entities, certain foreign pension funds. It exempts them from a series of special rules applicable to disposition of investment in United States real property by foreign persons. Thus, it pinpoints the groups to which the delegated authority applies, as I read *Loper Bright* to require.

I suspect that these two provisions exemplify the outer bounds of the kind of delegation *Loper Bright* requires. Others believe they fail to meet the requirements of *Loper Bright*. We must await further case law to know more about the answer to these kinds of questions. Again, different courts will likely reach different conclusions, as Cass Sunstein has predicted. A more detailed explanation from the Supreme Court in *Loper Bright* as to congressional delegation might well have prevented at least some such conflicts.

And, of course, courts may uphold agency interpretations even in the absence of explicit delegations of authority. *Loper Bright* recognizes the persuasive power of the factors enumerated in *Skidmore v. Swift*. Citing *Skidmore*, the Court in *Loper Bright* observed 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 [144 S.Ct. at 2259]. But reliance on *Skidmore* factors, like any multifactor test, is an uncertain and unstable basis for upholding agency interpretations.

Greater clarity in *Loper Bright* as to what constitutes an express delegation could have avoided a great deal of uncertainty. Further analysis, particularly as to whether there is a need to specify a limited set of applications, would have offered welcome guidance regarding congressional delegation. The first set of footnote examples, those in the footnote to the textual citation of *Francis*, offer clear models of sufficient delegation. But the other examples confuse rather than clarify. The second example in the relevant textual paragraph, Chief Justice Marshall's 1825 opinion, *Wayman v. Southard*, involved delegations both narrow and broad. *Loper Bright* did not examine the statutory language at issue in the case. The two EPA examples in the footnote to *Michigan v. EPA* suggest that quite broad delegations are sometimes adequate, but the footnote does not detail whether statutory specification of the entities to which the delegations apply was necessary to render them satisfactory.

A more thorough treatment of the examples cited, particularly in the footnotes, would have gone a long way in pointing to the kind of language is needed for Congress to delegate discretionary authority to an agency. The Supreme Court failed us; its opinion created unnecessary uncertainty. We should be able to expect better from our Supreme Court.

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