One thing about the *Loper Bright* decision is obvious: it overruled *Chevron*. So much for past law. What about the future.? How should courts review agency regulations now that *Chevron* is gone?

This post tackles a key paragraph in the *Loper* opinion where the Court discusses congressional delegation of authority to agencies. The Court discusses three types of statutes, and it will be crucial for judges in future cases to identify which type is present.

The first type involves legislative grants of definitional powers. Many of these should be relatively easy to identify. The examples that the Court gives actually involve the use of the word "define", although presumably closely related terms such delimit, describe, or interpret would also work. One trickier issue may involve grants of general rule-making power. For instance, the Clean Air Act authorizes the EPA Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." Defining statutory terms seems reasonably necessary to carrying out EPA's responsibilities. It's not clear, however, whether this would be considered explicit enough to qualify for category 1.

The second category involves laws giving agencies the power to issue rules "to fill up the details" of a statutory scheme. For instance, many provisions of the Clean Air Act grant explicit rule-making powers to EPA. Moreover, as noted above, the statute also contains a general grant of rule-making power.

In defining category 2, the Court refers to "carrying out the details" of a law. It quotes that phrase from a case involving Congress's delegation of power to the courts to make procedural rules a general grant of rule-making authority to carry out EPA's functions. The major questions doctrine seems to be built into this category: a major question seems to be the opposite of "filling in the details." Only non-major questions get category 2 treatment.

Category 3 contains laws using broad terms which leave agencies with flexibility. The Court cites a previous case where EPA could take certain actions if if found them to be "appropriate and necessary." A footnote then gives an example of a statute authorizing EPA to issue certain rules that it finds to be necessary to protect public health and public water supplies.

Once a court decides that a regulation fits into one of these three categories, the court's job is to be sure that the discretion was exercised within the limits granted by Congress and that the agency gave a reasoned explanation of how it exercised the discretion. The court is supposed to make an independent assessment of whether those requirements were met.

The main difference between this test and Chevron is that *Loper* calls for a more focused analysis into just what authority was delegated to the agency. Also, instead of saying that the court is deferring to the agency's interpretation of the statute, the court will say that it is making an independent assessment of whether the agency's rule was within the scope of discretion allowed by the statute.

This approach could end up looking more than a little like *Chevron* in practice, but that will depend on how generously courts define the categories and how much statutory discretion they find for agencies to clarify statutes and fill gaps. Overruling *Chevron* may make courts more interventionist, but *Loper* gives agencies room for arguing their cases.

Coming on Wednesday: Loper & Skidmore Deference