The Evolving Landscape of Administrative Law

This article was published in the September 2023 issue of *Insights*.

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Key Points

- The U.S. Supreme Court's October 2023 term may bring fundamental changes to administrative law, including by possibly overruling *Chevron*.
- Decisions in recent years demonstrate the Court's skepticism of administrative power and increasing willingness to question government regulation.
- New limits on agency power may create opportunities for businesses to challenge unfavorable regulations, but they also may open the door to attacks on long-standing rules that businesses find helpful and predictable.

One of the most significant areas of the law for businesses is administrative law. From questions about a new industry-specific regulation to marshaling a defense against enforcement proceedings, any entity that is subject to government regulations has an interest in developments in administrative law.

Key U.S. Supreme Court decisions in recent years have significantly cabined the role of federal agencies and opened the door to new avenues for challenging government regulation. Even more changes may be on the horizon.

Chevron Under Fire

The docket for the Supreme Court's October 2023 term has several administrative law cases, including constitutional challenges to the Consumer Financial Protection Bureau's (CFPB's) funding structure and the Securities and Exchange Commission's (SEC's) in-house court proceedings. But the case with the broadest potential implications is *Loper Bright Enterprises v. Raimondo*, in which the Court will consider whether to overrule *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.

Decided in 1984, *Chevron* is probably the most cited case in administrative law. It provides a framework for determining when a federal court must defer to an agency's interpretation of a statute it administers. If the statute is clear about an issue, the court will interpret the statute according to its terms, no matter the agency's views. But if the statute is ambiguous, the court will defer to the agency's interpretation as long as it is reasonable. The rationale for *Chevron* deference is that Congress at least implicitly intends for the agency administering a statute (rather than Article III judges) to fill in any ambiguities.

Controversial since its inception, *Chevron* has generated criticism from academics, practitioners and the judiciary — including several justices. Justice Clarence Thomas has been most vocal, arguing that *Chevron* raises "serious separation-of-powers questions" by usurping the judiciary's role in interpreting the law and delegating too much legislative authority to agencies. And while sitting on the U.S. Court of Appeals for the Tenth Circuit, Justice Neil Gorsuch lamented that *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."

Other justices have questioned *Chevron*'s conceptual underpinnings. While on the U.S. Court of Appeals for the District of Columbia Circuit (which is known for its heavy administrative-law docket), Justice Brett Kavanaugh wrote in a law review article that *Chevron* "encourages the Executive Branch … to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints" and often leads to situations where "every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law."

Loper Bright Enterprises arises from a challenge by a group of commercial fishing companies to a National Marine Fisheries Service (NMFS) rule that requires fishing vessels to pay the salaries of federal observers who monitor compliance with the agency's regulations. A split panel of the D.C. Circuit rejected the companies' challenge. The majority explained that, although the federal law requiring vessels to carry federal observers does not specify who must pay for those observers, the NMFS' rule interpreting federal fishery law to authorize industry-funded observers was reasonable. The panel accordingly deferred to that interpretation under *Chevron*.

The fishing companies asked the Supreme Court to weigh in on their challenge to the NMFS rule and to overrule *Chevron*. The Court took up only the *Chevron* question.

The Court's decision to grant *certiorari* in *Loper Bright Enterprises* suggests that a majority of the justices may be ready to overrule *Chevron*. Less than two years ago, the Court had several opportunities to limit or jettison the doctrine but ended up ignoring it altogether. That conspicuous silent treatment potentially signaled the doctrine's gradual demise through atrophy. For the Court to now grant a case asking it explicitly to overrule *Chevron* — while denying a second question offering narrower grounds for decision — suggests that the justices might be ready to kill *Chevron* outright.

Broader Trends in Administrative Law

The Court's decisions in recent years demonstrate a growing skepticism of government regulation and an increasing willingness to curtail administrative power. Overruling *Chevron* would certainly fuel those trends. It also would dovetail with the Court's recent invigoration of two other administrative-law doctrines: major questions and nondelegation.

Major Questions

In 2022, the Court expressly approved of the major questions doctrine in *West Virginia v. EPA*. When rejecting the Environmental Protection Agency's (EPA's) authority to impose emissions gaps by shifting electricity production from higher-emitting to lower-emitting producers, the Court explained that an administrative agency has no power to make decisions on "major questions" of extraordinary economic and political significance unless Congress "clearly" gave it such authority.

The major questions doctrine is likely to spur regulatory challenges on a host of issues. While the decision emphasized that the doctrine is reserved for "extraordinary cases," the Court's reasoning could apply to any major policymaking effort by a federal agency. On June 30, 2023, for example, the Court relied on the doctrine in *Biden v. Nebraska* to invalidate the Biden administration's student debt relief plan. But like *West Virginia*, *Nebraska* did not provide much clarity on the contours of what constitutes a major question. Businesses should watch how the capacious and indeterminate standard delineated in *West Virginia* — agency decisions of vast "economic and political significance" — plays out in the lower courts.

Realigning Separation of Powers: Nondelegation

More fundamentally, the major questions doctrine reflects a Supreme Court that is eager to realign separation of powers in ways that minimize the administrative state. The *West Virginia* majority makes clear that "[a]gencies have only those powers given to them by Congress," and courts decide which powers Congress has conferred. Those strict boundaries go hand in hand with the Court's skepticism of Congress' ability to delegate any lawmaking authority to another branch (the so-called "nondelegation doctrine").

Several justices expressed a desire to reinvigorate the nondelegation doctrine in a 2019 case, *Gundy v. United States*. Article I of the Constitution vests all legislative power in Congress. The nondelegation doctrine seeks to ensure that Congress doesn't give away that power to another branch or entity. The question in *Gundy* was whether the Sex Offender Registration and Notification Act (SORNA) violated Article I by authorizing the U.S. attorney general (a member of the executive branch) to specify how SORNA applies to sex offenders convicted before the law was enacted.

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While a narrow majority in *Gundy* found no nondelegation problem with SORNA, four justices — Chief Justice John Roberts and Justices Thomas, Gorsuch and Samuel Alito — expressed a willingness to revive the erstwhile doctrine. Justice Kavanaugh didn't participate in *Gundy*, which was argued before his confirmation, but *West Virginia* demonstrates a majority that is eager to restrict lawmaking to the legislature.

New Procedural Avenues for Challenging Agency Action

Against this backdrop, the Court's unanimous approval in April 2023 of a new procedural avenue for pre-enforcement constitutional challenges to agencies' proceedings is particularly noteworthy. *Axon Enterprise, Inc. v. FTC* allows defendants in regulatory proceedings to bypass the typical administrative process by bringing a constitutional challenge directly in federal court, rather than waiting for the administrative proceeding to play out and then challenging the result in a federal appeals court.

Implications for Businesses

The rise of the major questions and nondelegation doctrines, combined with the potential demise of *Chevron* and new procedural avenues for questioning agency proceedings, creates fresh opportunities for businesses to challenge government action. Take, for example, the SEC's proposed rule requiring climate-change disclosures and its recently promulgated rule on cybersecurity disclosures. Under the major questions doctrine, a court may find that policing climate change or cybersecurity veers too far beyond the SEC's traditional roles of protecting investors from fraud and promoting the financial integrity of securities exchanges.

But even if Congress did clearly give the SEC those powers, there may be a nondelegation problem: If disclosures about climate change or cybersecurity are "necessary and appropriate" for the protection of investors, then almost anything else might be necessary and appropriate — meaning that the SEC's statutory authority lacks any intelligible limit. The Court's recent precedents are likely to fuel a host of challenges to any number of other regulations.

At the same time, the Court's apparent eagerness to rein in administrative power has the potential to become a double-edged sword. While too much leeway for agencies can create unpredictability for businesses, a stronger arsenal for regulatory challenges — such as overruling *Chevron* completely — could have its own destabilizing effects. There are numerous regulatory regimes that businesses have relied on for decades in structuring their operations.

That's why, for example, the U.S. Chamber of Commerce intervened to defend a Department of Homeland Security program that allows foreign students to extend their visas for post-graduate work in the United States. That program, which is consistent with federal policy going back to World War II, increases the pipeline of qualified and diverse workers. A split panel of the D.C. Circuit upheld the program, relying in part on *Chevron*.

Similarly, when several states challenged the joint employer rules promulgated by the National Labor Relations Board (NLRB) and Department of Labor (DOL) under the Trump administration, the Chamber intervened to defend the rules, which it claimed were administrable and predictable. The Chamber also intervened to defend a 2020 EPA rule defining "waters of the United States," arguing that striking the rule would heighten companies' regulatory burdens, seriously impact their use of private land, increase the cost of business, and thrust them back into the regulatory chaos that the 2020 rule corrected.

In other words, while the Court's recent limits on agency power might allow businesses to challenge regulations they don't like, cabining agency power also risks empowering attacks on rules that businesses find helpful and predictable. The administrative-law landscape is likely to continue to shift as the lower courts grapple with recent Supreme Court decisions. This is an area for businesses to monitor closely.

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