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# Supreme Court Decisions Curtail Regulatory Agencies' Powers, Making It Easier To Challenge Rules

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## Key Points

- The U.S. Supreme Court's decisions this term continued to shift power away from administrative agencies and into the hands of courts.
- The Court overruled the doctrine of *Chevron* deference in *Loper Bright*, held that decades-old federal rules and regulations are open to challenge under the APA in *Corner Post*, and concluded that SEC civil enforcement proceedings must proceed in an Article III court before a jury in *Jarkesy*. The 6-3 wins for the regulated parties in these cases suggest that the environment is favorable to challenge agency rulemaking and adjudication.
- Two other decisions are also important. In *Ohio v. EPA*, the Court reaffirmed that agencies must follow procedural requirements and that courts must meaningfully apply those requirements. And *Cargill* suggests that courts need not defer to agencies on mixed questions of law and fact.

The U.S. Supreme Court's 2023 term is another chapter in the Roberts Court's trend of shifting power away from administrative agencies and into the hands of courts.

The Court overruled the doctrine of Chevron deference in *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*, held that decades-old federal rules and regulations are open to challenge under the Administrative Procedure Act (APA) in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* and concluded that SEC securities fraud actions seeking civil penalties must proceed in an Article III court before a jury in *Securities and Exchange Commission v. Jarkesy*.

In *Ohio v. EPA*, the Court also gave real teeth to the procedural requirements that agencies must follow. And *Garland v. Cargill* suggests that courts need not defer to agencies on mixed questions of law and fact.

# Supreme Court Decisions Curtail Regulatory Agencies' Powers, Making It Easier To Challenge Rules

## *Loper Bright* and *Corner Post*

*Loper Bright* and *Corner Post* are two of the biggest decisions this term that, together, could upend administrative law.

### *Loper Bright*

In a 6-3 opinion by Chief Justice John Roberts, the Court in *Loper Bright* overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., a case that established a doctrine requiring a court to defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers, even if the court thinks there was a better interpretation.

Before *Loper Bright*, the Court limited *Chevron*'s reach in a number of decisions. But *Loper Bright* dealt the final blow by formally overruling *Chevron* and holding that courts must interpret statutory text without deference to the agency. The courts' role is to provide the final interpretation of the law, the Court explained, and *Chevron* deference is inconsistent with that fundamental principle.

Even though an agency might have subject matter expertise, interpreting statutes falls "more naturally into a judge's bailiwick than an agency's," according to the majority. *Loper Bright* thus makes it easier to challenge regulations and harder for agencies to change their positions.

That said, the Court limited its holding in a few ways:

- Although courts must decide legal questions themselves, some statutes may delegate authority to agencies to define terms, fill up statutory details or regulate within limits.
- The Court stated that it was "not call[ing] into question prior cases that relied on the *Chevron* framework."

It may be difficult to determine in particular cases whether and how much discretionary authority Congress has delegated. Thus, courts are likely to confront arguments that Congress did not or could not delegate authority.

For example, the major questions doctrine presumes that Congress delegates authority over economically or socially significant issues only when it speaks clearly and expressly. And in the wake of *Loper Bright*, courts are already beginning to explore the constitutional limits, under the nondelegation doctrine, of Congress' ability to assign legislative power to an agency.

### *Corner Post*

Just days after *Loper Bright*, the Court held in *Corner Post* that the six-year statute of limitations for certain APA claims challenging an agency action begins to run only when the action injures the plaintiff, not when the agency finalizes the rule or regulation.

The 6-3 opinion authored by Justice Amy Coney Barrett means that a plaintiff who has suffered injury only recently from a regulation enacted more than six years ago can sue to challenge the regulation's validity within six years of being injured by the rule.

### Combined Effects of *Loper Bright* and *Corner Post*

The two rulings likely ensure that regulatory challenges will be a major area of litigation for years to come. Indeed, in her dissent in *Corner Post*, Justice Ketanji Brown Jackson predicted that *Corner Post* and *Loper Bright* authorize a "tsunami of lawsuits against agencies."

Together, the cases mean that even long-standing regulations can be vulnerable to new challenges, and this time around, the agencies will not receive the same deference they did under *Chevron*.

With courts rather than agencies getting the final word, there is a greater possibility of circuit splits the Supreme Court may be asked to resolve.

## *Cargill* and Mixed Questions of Law and Fact

The majority in *Loper Bright* focused on pure questions of law. But both Justice Neil Gorsuch's concurrence and Justice Elena Kagan's dissent suggest that the majority's reasoning extends equally to mixed questions of law and fact.

In fact, two weeks before *Loper Bright*, the Court held in *Cargill* that bump stocks do not fall within the statutory definition of "machineguns." The Court split 6-3, with Justice Clarence Thomas authoring the opinion, and with the same vote lineup soon to come in *Loper Bright* and *Corner Post*.

The case previews what regulatory litigation may look like following *Loper Bright*.

- Judges may disagree strongly about the best reading of a statute, like the majority and dissent. The majority thought the text was clear, but so did the dissent.
- It is unclear how much the concept of ambiguity will matter after *Loper Bright*, since courts now must decide the best reading of even difficult-to-parse statutory text. The U.S. Court

of Appeals for the Fifth Circuit judges in *Cargill* disagreed not just about the statute's meaning, but also about whether it was ambiguous or clear.

- Courts might be inclined to decide how a statute clearly applies to facts, even when other jurists would disagree. *Cargill* thus also suggests that one of the likely outcomes after *Loper Bright* will be circuit splits, both over new regulations and over old regulations challenged under *Corner Post*.

## *Jarkesy* and Agency Adjudication

*Jarkesy* dealt another blow to agencies' power by constraining the Securities and Exchange Commission's (SEC's) ability to secure civil penalties for securities fraud — traditionally a potent tool for the Commission.

In *Jarkesy*, the Court held in a 6-3 decision by Chief Justice Roberts that, if the SEC wants to pursue civil penalties for securities fraud violations, the Seventh Amendment requires it to do so before a jury in federal court, not before in-house courts.

Beyond the SEC, and as Justice Sonia Sotomayor's dissent cautioned, the decision may create uncertainty for other agencies that typically pursue civil penalties through in-house agency proceedings if those penalties are akin to common law remedies and the claims have common law analogues.

## *Ohio v. EPA* and Classic APA Challenges

Regulated parties are likely to continue raising classic APA arguments, like the charge that an agency has not engaged in reasoned decision-making. In *Ohio v. EPA*, a 5-4 decision by Justice Gorsuch, the Court reinvigorated that doctrine under analogous provisions of the Clean Air Act.

The Court stayed the enforcement of an EPA rule, concluding that the challengers were likely to prevail on their argument that the rule was arbitrary or capricious given the EPA's failure to reasonably explain the rule and address an important issue raised during the comment period.

## In Sum

The decisions this term solidify the Roberts Court's trend of reining in the administrative state and realigning the separation of powers. Businesses will want to closely watch how the recent decisions play out in the lower courts.



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