
Chevron Deference Decisions and Its Implications on Businesses

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A win for business. The Supreme Court ends *Chevron* Deference in a spate of recent decisions limiting administrative authority and assisting regulated parties in challenging agency rulemaking.

***Loper Bright* and *Relentless*- curbed agency discretion.**

On June 28, 2024, the Supreme Court announced decisions in a pair of cases-- *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* --that curtailed the power of federal agencies to regulate beyond constitutional limits. In the 6-3 ruling, written by Chief Justice John Roberts, Jr., the Court overruled a long-held doctrine of administrative law established in the 1984 decision of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council* that required courts to defer to agency interpretations of ambiguities in statutes. In overruling this *Chevron Deference* doctrine, the Supreme Court held that courts, not agencies, rightfully have the power to interpret ambiguities in statutes. This decision likely will rein in agency discretion, giving judges the primary role in determining the meaning and applicability of any ambiguities in statutes, and place the onus back on Congress to draft more precisely worded statutes and address necessary updates to and gaps in statutes.

This decision was issued with a spate of other Supreme Court decisions that limit agency discretion and provide litigants with a far better opportunity to resist agency rulemaking than before in seeking to resist what they believe amounts to an overreach of agency authority.

***Corner Post*- expanded statute of limitations for challenging agency over-reach.**

On July 1, 2024, the Supreme Court held in *Corner Post v. Board of Governors of the Federal Reserve System*, that agency regulations are no longer exempt from legal challenges six years after going into effect. Rather, the Supreme Court ruled that the limitations period for claims arising under the Administrative Procedures Act does not begin to run until the plaintiff sustains an injury from final agency action. In so holding, the Supreme Court rejected the governments argument that the six-year statute of limitations period begins once the agency action is finalized, which, of course, made it very difficult to challenge longstanding regulations. This decision suddenly exposed decades-old regulations to new challenges, and likely will lead to an uptick in litigation.

***Ohio v. EPA*- rigorously scrutinized agency action and indicated strong interest in protecting industry.**

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In addition, on June 27, 2024, in *Ohio v. EPA*, the EPA's promulgation of a federal implementation plan for ozone regulations under the Clean Air Act was successfully challenged. The Supreme Court applied a strong version of the arbitrary and capricious test to examine the actions of the agency, where it failed to adequately discuss and address comments that criticized the proposed rule. Interestingly, the Supreme Court took the case in an emergency posture, and rigorously scrutinized the claims brought against the EPA. It would appear that the Supreme Court's willingness to consider challenges to agency action in an emergency posture such as this indicates a strong interest in protecting industries from the potentially onerous burden of complying upfront with costly agency regulations that once examined may prove to be unlawful.

***SEC v. Jarkesy*- protected the right of regulated parties to jury trial in enforcement cases.**

On that same day, the Supreme Court held in *SEC v. Jarkesy* that a defendant's Seventh Amendment right to a jury trial applies when the Securities and Exchange Commission seeks civil penalties for violations of the antifraud provisions of the federal securities laws. The SEC is thus now compelled to bring contested enforcement cases alleging securities fraud in federal court. This decision likely will severely constrain the SEC from relying on administrative adjudications, will dramatically increase the SEC's costs in pursuing such civil penalties in the context of a jury trial rather than an administrative proceeding, and will force the agency to factor litigation costs into their decision-making process. On the other hand, regulated parties defending against such civil penalties will now have a far better chance of a fair and successful adjudication.

These decisions show a Supreme Court trend in protecting businesses from potential agency overreach by sharply limiting administrative discretion, empowering regulated parties to successfully challenge unfavorable and overreaching agency rulemaking in federal court, and restoring constitutional rights to regulated parties in a manner that will level the playing field between the regulators and the regulated. Proponents of agency regulation fear these decisions will have a profoundly chilling impact on such regulation, as federal agencies now know that they will face far greater judicial review of their rulemaking and enforcement actions, as well as the prospect of costly litigation expenses. Opponents believe this will limit agency abuse and overreach.

What is the *Chevron* Deference doctrine?

The *Chevron* decision required courts to defer to an agency's interpretation of any ambiguities in the federal statutes the agency implements. The decision implemented a two-step process. The first step required courts to assess whether Congress had directly spoken to the precise question at issue. If the Congressional intent was clear, that would end the inquiry. If the statute was silent or ambiguous, however, the court would defer to the agency's interpretation so long as it was a permissible construction of the statute; even if not the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Many environmental groups supported retaining *Chevron*, even though it was initially regarded as a defeat.

At the time it was handed down, the *Chevron* decision was regarded as a loss for environmental groups, including the Natural Resources Defense Council, and a win for the Reagan administration.

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The case involved a rule that the Environmental Protection Agency had issued that allowed manufacturing plants to install or modify one piece of equipment without obtaining a federal permit.

Environmental groups challenged the rule, on the grounds that it violated the Clean Air Act and would lead to more pollution. However, in a unanimous decision, Justice John Paul Stevens wrote that the court should defer to the EPA's interpretation of the Clean Air Act, as well as to the interpretations of other statutes by other federal agencies.

Though not initially seen as a historic ruling, the *Chevron* decision soon became a major precedent.

Ironically, many environmental groups urged the Justices not to overturn *Chevron* in *Loper Bright* and *Relentless*. The Environmental Defense Fund and The Natural Resources Defense Council both submitted amicus briefs pressing the Supreme Court to this end, and Earth Justice also filed a joint brief in defense of the doctrine on behalf of the environmental groups Conservation Law Foundation, Ocean Conservancy, and Save the Sound.

Background on *Loper Bright* and *Relentless*.

In *Loper Bright* and *Relentless*, a challenge was brought to a rule promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by the National Marine Fisheries Service (NMFS) that required certain fishing boat operators to pay for third-party, private observers to conduct federally mandated compliance checks on their vessels.

Though the MSA, signed into law back in 1976, did mandate that fisheries operating within 200 nautical miles off the U.S. coast must allow federal observers onboard their vessels to collect data essential to preventing overfishing, it did not explicitly authorize NMFS to impose financial obligations on the fishing industry to cover the cost.

The fishing companies thus contended that the NMFS exceeded its statutory authority by requiring them to bear this cost, and the Supreme Court agreed.

In the opinion, the majority found that *Chevron* conflicted with the Administrative Procedures Act, which mandates that "[t]o the extent necessary to (sic) decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The Court noted that the APA was "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices," and interpreted the APA as codifying the vision of the Framers of the Constitution that interpretation of laws is the duty of the federal courts. This is set forth in Article III, which vests the judicial power in the courts to decide legal questions by applying their own judgment.

In reaching this opinion, the Supreme Court rejected arguments that the *Chevron* Deference doctrine promoted uniformity in decisions, harnessed the technical subject matter expertise of agencies, and rightfully kept courts out of policymaking on the grounds that judges are ill-suited to assess the policy considerations that underpin statutory interpretation.

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The Supreme Court further explained that agency expertise on technical subjects is not sufficient to salvage *Chevron*, as courts, not agencies, have the expertise to interpret *statutes*, which is the correct inquiry. The Supreme Court's words on this were: "*Chevron's* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." Moreover, the Supreme Court noted that courts routinely interpret highly technical statutes, and agencies will have the opportunity to brief and argue the policymaking considerations underpinning the statutory interpretations in question.

The Supreme Court also noted that the *Chevron* Deference Doctrine allowed for flip-flops in agency rulemaking, because it allowed agencies to reinterpret statutes and alter rules inconsistently with each new administration. The Court referenced in this regard the Federal Communications Commission's numerous flip-flops regarding the classification of broadband internet access service under the Communications Act.

The Supreme Court did acknowledge that there are times when an agency is authorized to exercise a degree of discretion, however. In those situations, the Court held that the courts must respect the choice of Congress to give the agency discretion. In doing so, however, the Court held that under *Skidmore v. Swift & Co.*, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. In this regard, the Court noted that careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."

What is the expected general impact of these recent Supreme Court decisions?

These recent Supreme Court decisions likely will lead to a shift in the balance of power between agencies and the industries they regulate.

Federal agencies now will have to ensure that they are not overreaching and exceeding the authority set forth in the statutes they administer, in order to be sure that their actions will survive judicial review. This will likely lead to more conservative activity by agencies, and more careful rulemaking. Future rulemakings and enforcement actions will have to be more carefully considered, as they will now face the potential for judicial scrutiny and costly litigation for over-stepping their authority.

Certainly, any attempt by a federal agency to impose undue financial burdens on regulated industries that is not explicitly authorized by statute is now in question.

Indeed, we expect to see that federal agencies will authorize fewer restrictions or requirements that are not specifically authorized by statute.

Though the Supreme Court held that the specific holdings of prior cases that applied *Chevron* (including *Chevron* itself) remain in force, there will almost certainly be new challenges to rules that had been previously upheld based on the *Chevron* Deference doctrine.

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Importantly, businesses subject to burdensome or expensive regulations will now have an opportunity to successfully challenge and free themselves of them with litigation. (This means that such businesses should monitor agency enforcement activity and seek the assistance of counsel to help them identify regulations that may now be invalid, and worth the cost of the litigation necessary to challenge them.)

Agencies will most assuredly face an increase in legal challenges, especially to older regulations previously sheltered by *Chevron* that are rife with ambiguities and have not been updated to keep current with the times. This will especially be true for regulations that impact the environment and health care. In this regard, the EPA and the Centers for Medicare and Medicaid Services have many older regulations on the books that are now vulnerable to legal challenges. This will also be true for digital security regulations, because many federal regulations involve interpretations of older statutory authorities that predate modern cybersecurity practices and threats. Digital security regulations will be vulnerable to court challenges where agency interpretations have unclear statutory backing.

These rulings will also place pressure on Congress to legislate more and with greater specificity, and to clarify statutory ambiguities (or make express delegations of interpretive authority where possible).

The expected impact on tax issues.

Speaking at the New York University School of Professional Studies Tax Controversy Forum in June, Judge Elizabeth A. Copeland of the United States Tax Court stated that *Loper Bright* is unlikely to impact how the Tax Court views deference to the Internal Revenue Service. To be sure, the statement does not reflect the view of the court as a whole, although the position itself is supportable in light of the Supreme Courts decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which pre-dated *Chevron* by forty years and held that courts may rely on agency interpretations insofar as they have the power to persuade:

We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140.

We shall see how this shakes out.

The expected impact on the aviation industry.

These Supreme Court decisions come at an interesting time for the aviation industry, given that President Biden signed the FAA Reauthorization Act of 2024 into law on May 16, 2024. The 2024 Act makes several important changes to federal airport policy, but calls into question many aspects of the FAA's Land Use Policy adopted on December 8, 2023. Among the changes in the 2024 Act is the elimination of the former Section 163 regarding the FAA's jurisdiction pertaining to non-aeronautical property and its replacement with a new

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Section 743. Many airports believe the FAA interpreted the former Section 163 in a way inconsistent with the intent of Congress. Should the FAA do the same regarding the new Section 743, the FAA can expect legal challenges as it attempts to justify its interpretation in light of Chevron.

The 2024 Act has also sought to streamline the environmental review process, and creates two new categorical exclusions under the National Environmental Policy Act (NEPA). These NEPA exclusions do not apply to projects that involve extraordinary circumstances however, and such projects will still require a stringent environmental review.

The 2024 Act also prescribes monetary penalties for airport sponsors who violate a new grant assurance regarding the availability of leaded aviation gasoline.

It is unclear at present how all of these changes will shake out, and the full implications of these recent Supreme Court cases for the aviation industry will only start to take shape as challenges to FAA actions are brought in federal court. Certainly, more guidance will be needed from the FAA regarding the 2024 Act. Given the recent Supreme Court decisions limiting agency power, however, the FAA will now have less flexibility and discretion. This will likely result in more legal challenges and delays in regulatory processes, as the FAA, like all other agencies, will have to move at a more considered pace to ensure that it does not exceed its authority and that its actions will survive judicial scrutiny.

Certainly, we expect to see more legal challenges to FAA regulations overall; particularly those related to contentious matters such as airport land use and the economic regulation of air carriers. *Corner Post* will create opportunities for challenges to longstanding FAA policies. In addition, *SEC v. Jarkesy* will most assuredly implicate the FAA's efforts to impose civil penalties.

The expected implications on environmental law.

Prior to this recent spate of Supreme Court decisions limiting agency authority, the Supreme Court had already ruled in the 2022 decision in *West Virginia v. EPA* to limit the power of federal agencies to act on climate issues.

In *West Virginia v. EPA*, the Supreme Court gave its blessing to the Major Questions Doctrine, in striking down the EPA's Clean Power Plan for reducing carbon emissions from power plants. The Major Questions Doctrine provides that agency rules that may have broad economic and political significance must be authorized by a clear statement from Congress.

The EPA has largely turned to the Clean Air Act, enacted in 1970, to address climate concerns, though it does not speak directly to greenhouse gas emissions or climate policy. In addition, President Biden's climate law gave the EPA more authority to curb planet-warming emissions. This climate law, known as the Inflation Reduction Act, defined greenhouse gases as air pollutants that the EPA can regulate under the Clean Air Act.

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Because of the age of the Clean Air Act, the Supreme Court decision in *West Virginia v. EPA* may mean that any new regulation seeking to address pollution or the like would probably satisfy the Major Questions Doctrine criterion. Thus, most of rulemakings in this area likely will be at risk. Certainly, the Supreme Courts ruling in *Corner Post* will most assuredly create opportunities for challenges to EPA actions under the Clean Air Act, and we will likely see increased litigation in this area of law.

The combination of the Major Questions doctrine and the demise of the *Chevron* Deference doctrine make some worry that without new legislation, the Supreme Courts decisions to weaken agency power will make it less likely that the US will meet its stated climate goals. However, it was never supposed to be the role of agencies to operate in a vacuum of legislation to decide on their own how to address climate change. Rather, it is the role of Congress to enact appropriate legislation for this need.

Of course, the statutes that the EPA regulates are highly technical. Applying them to complex problems, such as climate change, requires the exercise of expert judgment. However, federal Judges are also not required to operate in a vacuum in examining such technical statutes; rather, in a litigation context, they have expert witnesses to render reports and testimony to explain technical matters including those submitted by the agency in question-- as well as the testimony of fact witnesses who can also aid the Judges decision making process and facilitate a thorough examination of even the most complex of matters.

Impacts of the overturn of *Chevron* on Energy.

The practical effects of the Supreme Court decision to overturn *Chevron* on Energy will likely develop more gradually than in other business sectors. It is possible that the major advances in science that have taken place over the 40 years since *Chevron* was decided may provide grounds for challenges on agency decision making. However, the Nuclear Regulatory Commission has been delegated unique discretionary authority from Congress which has led courts to grant it broad discretion even prior to the *Chevron* decision.

In Summary.

These recent Supreme Court decisions are certainly a win for business. Many industries long burdened by agency overreaching are cheering them. For example, the Auto aftermarket has long complained about the overreach of the EPA on the confines of the Clean Air Act on hot rods and the businesses that create and distribute products for hot rods and for modifying vehicles to a more high-performance standard.

Though these recently Supreme Court decisions do create some uncertainty, they demonstrate a concerted effort on the part of the Supreme Court to reign in agency abuse of power and protect businesses from unduly burdensome regulations that are unlawful.

These decisions will also affect the way agencies undertake rule making. They will allow courts to scrutinize far more closely the basis of agency decision-making, and likely will make agencies more careful, and require that their be more transparent.

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Though some worry that the rulings may make it more difficult for the federal government to address climate change, such critics of the Supreme Courts recent rulings overlook the fact that the EPA has long been operating under a statutory scheme that was enacted many decades ago, long before climate change was perceived to be a problem. Thus, Congress should enact any legislation that is needed to address this issue, rather than passing the buck to agencies to, in effect, do its job.

Though some commentators worry that these rulings will overburden the courts, which may cause delays and potential inconsistencies, it also is possible that they will instead eventually lead to a reduction in litigation, because agencies will be under pressure to avoid going outside the bounds of their authority and thus attracting expensive litigation.

Finally, it is anticipated that these decisions will reduce the problems created by the flip-flopping in agency rulemaking with each new administration. This flip-flopping is a product of our extremely polarized political environment, and is bad for American businesses, because it makes it difficult for them to plan for regulatory compliance in the long term.

How can we help?

These recent Supreme Court decisions are expected to have broad-reaching implications for every business and industry subject to federal regulation.

Flaster Greenberg has assembled a task force of practice group leaders who are closely monitoring agency enforcement and rulemaking activity in the wake of these recent Supreme Court decisions, as well as relevant judicial challenges. We are prepared to advise you of the projected short term and long-term implications of these decisions on your specific business sector. We can guide you or your industry group in identifying regulations that may now be invalid, and worth the cost of the litigation necessary to challenge them. We can also help you determine whether you should change any of your practices or policies, as well as whether you should re-examine any current or planned litigation or agency investigations.

We will continue keep you advised of important developments for you and for your industry. Let us know if you have any questions about the impact of these recent Supreme Court rulings on you or your business sector.

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