# Life after Chevron

A CCLP issue brief on recent US Supreme Court decisions, their impact on administrative law, and what's next for Colorado

2025-04-02

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# Key findings

- The end of the Chevron Doctrine marks a shift in how courts must rule on interpretations of law by federal executive branch agencies.
- Potential implications for the *Loper Bright* decision must be examined in the light of the *Corner Post* case the Supreme Court also ruled last year, which changes the statute of limitations for claims against federal regulations.
- Regulations affecting every aspect of American life may be upended by these two Supreme Court decisions, as regulated entities may choose to file new claims against even long-standing regulations. However, the outcomes of such challenges are yet to be determined.
- Particular areas of regulation which are relevant in the fight against poverty include health, worker's rights, housing, and disability, and civil rights.
- *Loper Bright* and *Corner Post* do not directly impact state-level regulation in Colorado.
- While these decisions leave much of the administrative state on less stable ground, federal agencies still have key opportunities to influence legislation and continue to maintain their areas of oversight.

# Introduction

A significant U.S. Supreme Court case decided last year — *Loper Bright Enterprises v. Raimondo*[1] — reset expectations about the impact and stability of regulations that touch all aspects of American life. While much attention has been given to the *Loper Bright* decision and its overturning of the Chevron Doctrine, the implications of this decision must be analyzed hand in hand with the *Corner Post, Inc. v. Board of Governors*[2] decision, which addressed the statute of limitations for challenges to administrative rules. And today, there are already signs that the Trump Administration intends to use these decisions to undermine the authority of federal agencies and the expertise of civil servants who staff them.

In *Loper Bright* the Roberts Court (in a decision split 6-3 along ideological lines) overturned the Chevron Doctrine and 40 years of precedent of deference to federal agencies' interpretation of federal law. The Chevron Doctrine, sometimes referred to as the Chevron Deference, refers to the Burger Court's 1984 decision in Chevron v. NRDC[3], acknowledging that agency staff possess subject matter expertise that puts them in a uniquely strong position to interpret ambiguities in federal law.

In *Corner Post*, the Roberts Court redefined the clock for the statute of limitations for challenges to regulations in the administrative arena, allowing lawsuits to be filed based on when a party is first harmed rather than when the regulation was issued. This significantly expands the potential for legal challenges to long-standing regulations.

While we are uncertain how future courts will move forward without deference to Chevron, the potential of these rulings in tandem is concerning, particularly in light of President Trump's unprecedented attacks on federal agencies and their public servants. Mass firings of civil servants and directives to unwind congressionally-established agencies including USAID and the Department of Education indicate a philosophy of governance that rejects the very concept of regulatory bodies.

This hostile environment is likely to play a role in not just how agencies function, but how they respond to litigation brought by businesses against past rules and interpretations. In a Wall Street Journal opinion piece published shortly after the election, Elon Musk and Vivek Ramaswamy invoked, and mischaracterized, *Loper Bright*:

> *The court overturned the Chevron doctrine and held that federal courts should no longer defer to federal agencies' interpretations of the law or their own rulemaking*

[1] Loper Bright Enterprises v. Raimondo, 603 U. S. ___ (2024). Note that though we refer to this case as the Loper Bright decision, the court's decision also included a decision on a companion case, No. 22–1219, Relentless, Inc., et al. v. Department of Commerce, et al., on certiorari to the United States Court of Appeals for the First Circuit.
[2] Corner Post, Inc. v. Board of Governors, 603 U. S. ___ (2024)
[3] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

> *authority… suggest[ing] that a plethora of current federal regulations exceed the authority Congress has granted under the law.*[4]

Executive Order (EO) 14219, *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*[5], issued February 19, 2025, is further evidence of how the administration is doubling down on their mischaracterization of the two Supreme Court decisions discussed here.

EO 14219 directs federal agencies to rescind or modify regulations that conflict with the administration's policies or raise legal concerns. It requires agencies to identify rules that may be unconstitutional, exceed statutory authority, impose excessive costs, or hinder economic priorities, with a required submission of these regulations to the Office of Management and Budget (OMB) within 60 days.

*Loper Bright* directly informs the EO's directive that agencies must identify regulations based on anything other than the "best reading" of statutory authority. However, by ordering the agencies themselves to rescind or modify their own regulations on that basis, the EO goes a step further, effectively preempting legal challenges by rescinding rules before they can be struck down in court. Nowhere in *Loper Bright* was such pre-emptive action contemplated, particularly due to the need for a court to determine a statute is ambiguous to start the analysis.

The EO also capitalizes on *Corner Post*. As agencies publicly list regulations they deem to exceed statutory authority, affected parties can use that action as a basis for legal challenges under the Administrative Procedure Act (APA).

Together, *Loper Bright* and *Corner Post* amplify the EO's impact. By ending judicial deference to agency interpretations and extending the window for regulatory challenges, these cases create a legal environment where more rules are vulnerable to judicial scrutiny. The EO not only facilitates deregulation but also arms private litigants with new tools to challenge existing regulations, increasing uncertainty in the regulatory landscape.

While the concerns regarding federal rule making are legitimate, not all is lost in this new landscape. While courts will be making decisions on challenges to federal agency rules, courts have historically relied on the public record. The public record reflects the views of sometimes tens of thousands of community members, advocates, and businesses, and courts often cite to that record when making determinations about the validity of a rule. Those opportunities will continue, not only for corporations, but for citizens impacted by changes to the regulatory landscape.

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[4] Elon Musk and Vivek Ramaswamy. "The DOGE Plan to Reform Government," *The Wall Street Journal,* Nov. 20, 2024. https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020

[5] Exec. Order No. 14219, 90 FR 10583. https://public-inspection.federalregister.gov/2025-03138.pdf

Upon deeper analysis, there is a basis to believe that these decisions are not the death knell to the administrative state that so many worry — or perhaps hope — they will be.

## The Administrative Procedure Act

Much of the *Loper Bright* decision hinges on the Court's interpretation of the Administrative Procedure Act of 1946 (the APA), a federal act that governs the procedures of administrative law.[6] This act provides the parameters for how federal administrative agencies make rules and how they adjudicate administrative litigation.[7] The passing of the APA stemmed from the need to support transparency and accountability within the federal agencies that carry out laws passed by the legislature. The APA allows for frameworks to be created for executive branch agencies to implement what is passed by the legislature.[8] It also creates the way for administrative agencies to interpret statutes when they are ambiguous.

## The Chevron Doctrine

In 1984 a landmark case was decided: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[9] It was in this case that the Supreme Court created the test for judges to use in determining when the court should defer to an agency's interpretation or action on an issue.[10] It established the following two-step test when determining whether to defer to an agency's interpretation of a statute:

1. Was Congress' intent clear regarding the question at hand? And if intent was ambiguous, then:
2. Was the agency's interpretation "permissible" or "reasonable?"

If both were true, the court would defer to the agency that was empowered to interpret the ambiguity, even if the court itself would have come to a different interpretation. Deferring to the agency was appropriate so long as the agency's answer was not unreasonable and that the issue at hand was left ambiguous by Congress. This deference was deemed appropriate by the Court because agencies were presumed to possess the expertise in subject and policy to make such interpretations.[11] Specifically, the decision meant that the question before a court would be whether the agency's action was based on a permissible[12] construction of the statute, and

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[6] https://www.law.cornell.edu/wex/administrative_procedure_act

[7] https://www.prrac.org/pdf/APA.summary.ProfMetzger.pdf

[8] *Congressional Research Service*, "Chevron Deference: A Primer" (Washington), available at https://crsreports.congress.gov/product/pdf/R/R44954/3

[9] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[10] Id. at 842.

[11] https://www.law.cornell.edu/wex/chevron_deference#:~:text=The%20scope%20of%20the%20Chevron,made%20by%20the%20administrative%20agency

[12] To expand, the agency's interpretation didn't have to be the BEST interpretation so long as it was reasonable.

not a given court's interpretation of said statute. Thus, this framework for judicial deference to administrative action was established and became a vital principle in administrative law for forty years.[13]

## *Loper Bright*

In the summer of 2024, the Supreme Court overturned the Chevron Doctrine in *Loper Bright*, holding that the Burger Court's 1984 decision was inconsistent with the APA, and that it gave unelected government actors too much authority.

The underlying case here, on its face, did not indicate the expansive implications that the decision in the case would hold. The actual case centered on a challenge to the National Marine Fisheries Service's (NMFS) interpretation of the Magnuson-Stevens Fishery Conservation and Management Act, in particular the requirement that commercial fisherman pay for at-sea monitoring. The petitioners had claimed that the NMFS overstepped its authority because these requirements were not in statute, questioning in particular whether statutory silence on specific powers implies ambiguity, and thereby triggers deference.

The Supreme Court agreed with the petitioners. Supreme Court Justice John Roberts wrote that this decision realigns the handling of these issues with a strict reading of the requirements of Section 706 of the APA, which states that "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 Supreme Court determined that the implicit delegation of authority component of *Chevron* was inconsistent with the APA and Constitution — and was therefore wrong, because it made a requirement that the court essentially ignore an interpretation it could have reached, had it exercised its independent judgement, as stated in the APA.[14]

Rather than deferring to an agency's *reasonable* interpretation, the Roberts Court decision asserted that an agency's interpretation of statute now needed to be, what the Court determines is the *single, best meaning*, and if it was not the best, then it would not be permissible. They also reasoned that it ran afoul of the concept of separation of powers in Article III of the Constitution. More succinctly, the Supreme Court in *Loper Bright* rejected the baseline premise that Congress' creation of an ambiguity in a statute did not automatically imply that Congress wanted the applicable administrative agency to fill the gaps with reasonable, but not necessarily the best, interpretations.

Chief Justice Roberts, in his writing of the Opinion, did clarify that this did not mean there would be no deference at all when handling these cases, and that judges are still allowed to factor in a federal agency's interpretation of a statute when determining ambiguity, referring

[13]Id.

[14] *Loper Bright* 2272, 2257, 2265.

specifically to the Skidmore Doctrine, which is an older, World War II era rule that explicitly states the above.

The Skidmore Doctrine arises out of a 1944 decision by which the Supreme Court established that judges must consider a federal agency's interpretation when deciding what a statute or other ambiguous term means.[15] In *Skidmore,* the court held that agency interpretations "made in pursuance of official duty" and "based upon… specialized experience" provide informed judgement to which courts… [can] properly resort for guidance."[16]

To determine the weight given to the interpretation, courts are instructed to look at a variety of factors that include "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade."[17] Chief Justice Roberts also affirms that courts must still defer to agencies if the statute establishes a "clear" delegation of authority by Congress.

## *Corner Post*

*Corner Post* was decided on July 1, 2024, another six to three ruling. It dealt with the statute of limitations for challenging rules. It too looked at the APA, which specified a six-year window to bring a claim, a window that started counting from the moment the rule was promulgated. In this new decision, the Supreme Court held that the six-year window does not start to close until the rule harms someone, even if the rule had been finalized decades earlier.[18]

Specifically, the Supreme Court considered a challenge to Regulation II, which had been promulgated by the Federal Reserve Board in 211, a regulation that established the maximum interchange fee that issuing banks can charge merchants for debit card transactions. The case included a North Dakota truck stop and convenience store that opened in 2018 that joined a suit against the Board under the APA in 2021, alleging that Regulation II was unlawful because it permitted higher interchange fees than was permitted by the underlying statute.

The case was dismissed due to being outside the statute of limitations. That decision was affirmed by a total of six circuits. One outlier, the Sixth Circuit, held that the limitations clock starts when the plaintiff is injured by the agency action, regardless of when the action became final. Due to this circuit split, the Supreme Court agreed to hear the case. Their decision concurred with the Sixth Circuit and held that under the general federal statute of limitations, an APA claim does not accrue until the plaintiff is injured by final agency action.[19]

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[15] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[16] Id. at 139-40
[17] Id. at 140
[18] *Corner Post, Inc. v. Board of Governors*, 603 U. S. ___ (2024)
[19] Id.

The majority explained that when Congress enacted 28 U.S.C. § 2401 in 1948, the definition of "accrue" was settled and it is the same as it is today.[20] Citing Supreme Court precedent, as well as legal dictionaries, the majority determined that when Congress used the phrase "right of action first accrues" in the statute, "it was well understood that a claim does not 'accrue' as soon as the defendant acts, but only after the plaintiff suffers the injury required to press her claim in court."[21] They also said that this understanding of "accrual" as the "standard rule for limitations periods" has precedent, and unless Congress explicitly says otherwise, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."[22]

Also in their opinion was discussion that 28 U.S.C. § 2401(a) acts as a statute of limitations in that it establishes a "time limit for suing in a civil case, based on the date when the claim accrued," rather than a statute of repose, which "puts an outer limit on the right to bring a civil action" that is measured "from the date of the last culpable act or omission of the defendant."[23]

# Implications

While the Supreme Court decided that Chevron was in direct conflict with the APA and Article III, the Supreme Court in 1984 did not determine this when they established it. As has been the crux of much of the discourse surrounding this decision, the ability to interpret statute through formal agency regulations, and permitting the subject matter experts to have their guidance carry weight, which has been a key tool in the administrative arena, appears to have been severely amputated.

While the Opinion states that the administrative state is back to using Skidmore, and that "clear" delegation by Congress should be untouched, the Court did not give a definitive example of what a "clear" delegation would need to look like. This is one aspect of the decision that experts believe will lead to increased litigation, as well as differing rulings across the nation while on the path to articulate "clear." There are also concerns that this decision, which leaves deference to experts as persuasive rather than mandatory, is not a return to the letter of the law — but rather a shift of policy decision-making to the judiciary. This decision along partisan lines is widely interpreted as a reflection of the politicization that has been pervasive in the courts in recent decades.

These decisions, taken together, encourage regulated entities to challenge long-standing rules in courts across the nation. They will likely try to challenge rules that they believe stem from

[20] https://crsreports.congress.gov/product/pdf/LSB/LSB11197
[21] Id.
[22] Id.
[23] Id.

unclear statutes, even if others find them to be clear, leaving those calls up to judges to determine if the foundational question of whether or not a delegation of authority is satisfactorily "clear."

Furthermore, regulated entities may try to take advantage of the change in the statute of limitations for these claims and exercise business decisions — to either partner up with newer organizations to claim injury, or potentially create subsidiaries themselves — to have standing to make such a claim. Generally, legal experts agree that there will also be an increased need for Congress to be more specific and detailed when drafting legislation where they intend a deference to administrative agencies to exist.

Another likely outcome of these decisions is that Agencies will become more risk averse in their interpretations and work generally, to avoid some of this expected increase in litigation. In some instances, agencies may limit the number of regulations they issue altogether.

While taking care not to minimize these valid concerns, it is important to point out some nuanced specifics in these decisions that create limitations for their impacts. First, the doctrine that was overturned only applied to agency action that "carries the force of the law," i.e., notice and comment rulemaking, and formal adjudications. Nevertheless, other types of agency action exist, and not all are implicated by this overruling of Chevron. The Supreme Court's decision here, as stated earlier, is limited to the specific question of when to interpret law that is ambiguous.

The following table from Georgetown Law Center Professor David A. Super summarizes the current lay of the land.[24]

| **Type of Agency Decision** | ***Before Loper Bright*** | ***After Loper Bright*** |
|---|---|---|
| **Determine Facts** | Deference unless is arbitrary and capricious | Deference unless is arbitrary and capricious |
| **Interpret Law** | Deference unless is arbitrary and capricious | Court decides anew |
| **Apply Law to Facts** | Deference unless is arbitrary and capricious | Deference unless is arbitrary and capricious |
| **Exercise Discretion** | Deference unless is arbitrary and capricious | Deference unless is arbitrary and capricious |

Finally, the *Loper Bright* decision explicitly states that it does not "call into question prior cases that relied on the Chevron framework." The holdings of prior cases that underwent Chevron analysis are "still subject to statutory stare decisis," the majority wrote. "Mere

[24] David A. Super, Georgetown Univ. L. Ctr, Power Point Presentation: Public Protections after *Loper Bright* (July 17, 2024).

reliance on Chevron," the Court continued, "cannot constitute a 'special justification' for overruling such a holding."

The reason this decision's impact is felt so far outside of fishing regulations is that the concept of deference to agencies is for *all agencies*. When Congress passes laws, it authorizes different agencies to promulgate regulations and exercise the implementation of the act(s) that specific agency is tasked with. The potential implications of this decision span across every aspect of American life. In later sections we will discuss some of the implications that are relevant to CCLP's mission, but this is by no means an exhaustive list.

*Corner Posts* implications intersect with *Loper Bright* and may arguably amplify its impacts. The decision in *Corner Post* effectively makes way for new and increased litigation challenges to agency regulations. It is highly probable that new claims will make their way to the Supreme Court in the coming years. Challenging older regulations with a less deferential deference framework will also result in circuit splits across the country. It is already a common (if unethical) practice to forum shop — i.e., to pursue a claim in a jurisdiction which is perceived as likely to be favorable to the claim. With this new holding, this strategy will likely now be applied to older regulations, irrespective of how long they have been in place.[25] As Supreme Court Justice Ketanji Brown Jackson stated in her dissent, this decision "could prove to wreak havoc on government agencies business and society at large," because the window for a claim is effectively never closed. Nevertheless, it is important to note that *Corner Post* will not apply to agency regulations that are subject to more specific statutes of limitations.

Both of these decisions have the power to affect every American, but perhaps in unexpected ways. Depending on the individual judges appointed and retained, the landscape may not be as unfriendly to agency interpretations as predicted, or as friendly to regulated entities. New judges may prove friendly to groups representing the interests of communities at large rather than regulated entities. And agency interpretations that came down under prior administrations are as open to litigation as those from the current Biden administration, meaning both ends of the political spectrum may be able to make use of this expanded opportunity for litigation.

Nevertheless, claims regarding certain areas of agency action and rulemaking are highly likely to apply these two decisions in the years to come:

## Health

Health care regulations govern a variety of things, such as Medicaid and Medicare payment rates for hospitals and providers, drug price negotiations, pandemic response,

[25] Corner Post and the Statute of Limitations for Administrative Procedure Act Claims. (2025, April 2). https://www.congress.gov/crs-product/LSB11197.

pharmaceutical regulation, insurance companies, and insurance coverage for mental health services. Health care and health care financing arrangements are highly specialized and rely on extensive study and expertise to address these issues. In addition, the notice and comment rulemaking processes mean regulators must consider financial and scientific impacts from a range of stakeholders.

Furthermore, as facts and circumstances change, new discoveries are made, or health emergencies (like COVID-19) arise, agencies update regulations in order to effectively implement legislation previously passed.

The U.S. Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) have historically enjoyed broad leeway in their ability to interpret ambiguous provisions of the Medicare and Medicaid Acts. For these agencies and their ability to administer these gargantuan programs, these decisions are likely to be highly disruptive.

Some examples of impact in the health sphere include, but are not limited to:

- New or strengthened challenges to agency rulemaking on matters of health policy, particularly from well-funded regulated entities such as hospitals, providers, laboratories, and insurance companies.
- Litigation of everything from Medicare reimbursement decisions to FDA rules.
- Slower, more risk-adverse agencies, promulgating only the guidance they have prepared to persuasively defend to the most unfriendly courts. This higher bar for issuing guidance could in turn lead to slower action during public health emergencies.
- Chilled dialogue between agencies and the health care industry. Historically, regulated entities in the health care space have chosen to collaborate with the relevant agencies to solve issues that arise. However, as deference to agency interpretation is reduced by the courts, industry may favor litigation over collaboration.
- A potentially narrowed scope in services covered by Medicaid, Medicare and CHIP. Public benefit health care programs often involve complex regulations and require CMS to interpret ambiguous statutory terms for coverage decisions. Under *Loper Bright,* courts may interpret statutes differently from the ways in which CMS has implemented them, leading to judicial decisions over medical issues.

## Workers' rights

There are several agencies that protect workers' rights, including the U.S. Department of Labor (DOL), the Equal Employment Opportunity commission (EEOC), and the National Labor Relation Board (NLRB). These agencies interpret laws and issue regulations, many of which have been challenged and upheld for decades using the Chevron doctrine.

Rulemaking regarding minimum wage and other fair labor standards emerges from DOL interpretations of the Fair Labor and Standards Act (FLSA). These long-standing

interpretations will almost certainly be relitigated in the light of these new decisions. The NLRB, likewise, implements federal protections for workers' rights to unionize and participate in collective bargaining without fear of retaliation. Many actions of the NLRB have been upheld in courts under Chevron; however, new claims of injury stemming from the NLRB's actions, despite extensive precedent, could result in the upending of previous decisions, damaging the rights of workers. It is also likely that all future NLRB decisions will be subjected to much higher scrutiny than in the past.

## Housing

The U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture (USDA) rely on federal rulemaking to issue regulations that carry out legislation. There are a number of major legislative acts in the affordable housing arena that resulted in significant HUD and USDA rulemaking. Some of these include:

- The Housing Act of 1937 (Wagner-Steagall Act)
- The Fair Housing Act (Title VIII of the Civil Rights Act of 1968)
- Low-Income Housing Preservation and Resident Homeownership Act of 1990
- Emergency Low Income Housing Preservation Act (part of the Housing and Community Development Act of 1987)
- Multifamily Assisted Housing Reform and Affordability Act of 1997

The Fair Housing Act in particular is broad and fairly general, and is a prime example of how agency rulemaking can flexibly carry out the spirit of a law, in accordance with changing times and perspectives. For example, new rules that were proposed to reduce barriers to accessing HUD-assisted housing, which were just published in April of this year, may be up for debate. These rules change the way applications for HUD housing are screened, with respect to the criminal history of the applicant. Courts may not be inclined to agree with HUD's interpretation that these rules are aligned with their authority. Rules related to evictions, design and construction standards, and others that help to ensure access to affordable, safe housing may now be viewed as an overreach of agency authority, and overturned.

## Civil rights

Congress gives federal agencies broad authority to work out the details to ensure people and organizations avoid engaging in discrimination. This broad authority is paramount, particularly in the civil rights space, because discrimination can take many forms and can evolve at a rate that legislators cannot keep up with. Furthermore, many of these protections do not exist in isolated agencies, but rather are woven across agencies.

For example, rights and protections under the Americans with Disabilities Act (ADA) are enforced across a variety of agencies. Another is the ability for HUD to enforce protections for victims of domestic violence under the Violence Against Women Act (VAWA). The ability to enforce access to safe housing for victims of domestic violence is tasked to HUD by Congress, but VAWA was not specific in the ways victims are protected in the housing space. With the upending of Chevron, current victim protections could come into question.

## What about Colorado?

As noted, these decisions by the Supreme Court impact federal — not state — agencies. However, state courts look to federal courts for guidance in the selection and implementation of various legal rules and doctrines, of which Chevron is one of them. As such, decisions at the federal level can have impacts on state courts' decision-making.

Serendipitously, just last year, Colorado Supreme Court Justice Melissa Hart wrote a piece analyzing the concept of administrative deference in Colorado. In her article, she discusses how Colorado has been described as an "intermediate deference" state and expands upon that description.[26] In her view, Colorado's Supreme Court has articulated its stance on deference to state administrative agencies in "varied and sometimes inconsistent formulations."[27] In fact, in 2021, the Colorado Supreme Court was asked whether the state aligned its law with federal law on the relationship between courts and administrative agencies, through a wage claim dispute. In this case, the Court declined to adopt federal law on administrative deference and instead decided to forge its own path.

In this wage claim case, the Court ruled that it would not take a rigid position on deference to administrative rules and interpretations of ambiguity. In analyzing this case and others, Justice Hart articulated factors of agency interpretation that would persuade courts to agree with them. They include but are not limited to: (1) an agency that is exercising particular expertise in its interpretation, (2) inconsistent agency interpretation, (3) thoroughness and consideration of extensive feedback.

What one might notice is that this approach by the Colorado Supreme Court is aligned fairly significantly with the Skidmore Doctrine described earlier. As such, Colorado does not particularly present as being heavily impacted by these decisions at the Supreme Court level, as our highest court has already decided on a number of occasions to go its own way.

Another factor in Colorado's rule-making process is the work performed by the Office of Legislative Legal Services.[28] They review every rule an executive branch agency puts forth or

[26] Hon. Melissa Hart, *Administrative Deference in Colorado.* Harvard Journal of Law & Public Policy, Vol. 46, Issue 2, pp. 337-347. https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/07/10_46_2-Hart.pdf
[27] Id. at 337.
[28] https://leg.colorado.gov/agencies/office-legislative-legal-services/administrative-rule-review-0

amends, to ensure that it is aligned with and authorized by the statute, as well as whether it falls within that agency's rule-making authority. This system of checks and balances should help ensure that agency rules in Colorado stand up to scrutiny.

It is important to note that there are many federally mandated programs that are state administered, such as Medicaid. Decisions that are made to agency rules regarding these programs federally can have impacts on the state administers them.

# Three paths for agency influence

While the implications of these decisions are still to be felt, the executive branch and its agencies are not completely incapacitated. There are still other means by which the executive branch retains a legitimate role in the lawmaking process. Three identified means by which agencies will still impact the law include: (1) using executive influence to inform legislative agendas, (2) drafting legislation behind the scenes, (3) maintaining a "technocratic advantage" that will withstand judicial scrutiny.[29]

## Influencing the legislative agenda

The executive branch has what one would reasonably argue is the most powerful advocate in the office of the president. The president may use the "bully pulpit" to press Congress to prioritize issues, and to gain national attention on specific issues.[30] However, while the president is a vital advocate, other officials will also have other opportunities to take their agendas to the people:

- Agency heads may continue communication with oversight committees in public hearings and private meetings to advocate for legislation that enables the agency to pursue administration priorities.[31]
- Agencies may continue to seek ideas for legislation from its programmatic and legal offices which then gets sent to Congress via the Office of Management and Budget in a practice referred to as the "annual call."[32]

[29] Chilakamarri et al, *3 Ways Agencies Will Keep Making Law After Chevron*. Law360. July 2, 2024. https://www.law360.com/articles/1854559/3-ways-agencies-will-keep-making-law-after-chevron

[30] Edwards, G. C. III & Wood, B.D., *Who Influences Whom? The President and the Public Agenda*, POL. SCI. REV. 327, 342 (1999).

[31] Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 471 & n.64 (2017).

[32] See https://ogc.osd.mil/Portals/99/DetailedGuidelinesforPreparingProposals-FY19-UPDATED.pdf; Shobe, supra note 8 at 470.

- Entities subject to regulation may increase their activities tracking and engaging in the legislative process, particularly in advocating for what does or does not appear on agendas as well as how legislative debate unfolds.[33]
- In this new post-*Chevron* world, close calls regarding interpretation may be resolved with focus on legislative intent, particularly regarding what Congress chose not to act on through new legislation.[34]

## Influencing statute

The ability for agencies to play an impactful role in advising and informing congress on specific legislation will not go away post-*Chevron* and will likely grow in importance. Critically, agencies may step up their efforts to identify and resolve ambiguities before they are codified.

It is already common for agency staff and political appointees to provide direct technical assistance on draft legislation to members of Congress. Agency technical assistance can range from reviewing bill drafts, redlining and even ghost-writing provisions.[35]

The potential for agencies to offer expertise, and by extension, influence is powerful. Professor Jarrod Shobe of Brigham Young University Law School performed a study and interviewed 54 agency staff members, reporting that almost two-thirds of those members said their agency plays a role in 100% of drafted legislation relating to their area of focus.[36]

It is important to note, however, that drafting legislation is not limited to agencies. Companies subject to regulations may have greater incentive to weigh in as bills are drafted. Companies will likely be growing their teams in this arena to maintain and develop relationships with legislators and agencies alike in their efforts to support and influence outcomes that benefit their interests.

## Maintaining a "technocratic advantage"

Agencies have a subtle yet still potent means to shape the meaning of the law. They define terms, and issue guidance that many use, even if they are not explicitly mandated. Regulated

[33] This can be problematic, however, as certain industries may use this in ways that run afoul of lawful influence over lawmakers.

[34] This dynamic may already be seen in the U.S. Supreme Court's recent rejection of the Bureau of Alcohol, Tobacco, Firearms and Explosives' bump stock ban in Garland v. Cargill, due in part to the lack of explicit congressional action on the matter. *Garland v. Cargill, 602 U.S. __, No. 22-966 (June 14, 2024), slip op. at 4, 14.*

[35] *Id.; Shobe, supra note 8, at 473.*

[36] *Shobe, supra note 8, at 481.*

parties and courts use these definitions and guidance, and this decision does not stop them from doing so.[37]

Despite Justice Roberts's disdain towards the "hundreds of federal agencies poking into every nook and cranny of daily life,"[38] their congressionally delegated authority is not significantly transformed by the decisions he authored and concurred on. Agencies will still largely "write the book" on most issues. They will continue to shape the law as they have been tasked to by Congress. Agencies will also remain the entities tasked with carrying out the laws, and their interpretations and rules will continue to be followed until — and unless — they are successfully challenged and overturned in a court of law.

# Conclusion

These decisions issued by the U.S. Supreme Court — overturning 40-plus years of precedent and redefining the clock for statute of limitations for challenges in the administrative arena — have potential for impacting the federal administrative "state." The decision to roll back *Chevron* deference could impact regulations for policy areas as broad as the environment, workplace conditions, finance, and technology. Taking these decisions in tandem is especially impactful because regulated parties now have the ability to challenge older regulations under a more stringent, less-agency-friendly framework. Because of these changes, legal scholars are unsure how much of the administrative state will be challenged in the years to come.

While the likelihood of future challenges is not insignificant, it is also important to note that the agencies are not out of the game. As discussed above, there are limitations to what parts of agency work these decisions impact. Specifically, *Loper Bright* only impacts rules or agency actions stemming from statutory ambiguity or silence, leaving clear Congressional grants of power intact. It requires courts to exercise independent judgment on ambiguous statutes but does not necessitate disagreement with agency interpretations. Importantly, Loper Bright preserves traditional deference to agency factfinding, as under the APA, allowing courts to set aside findings only when unsupported by substantial evidence. It does not permit courts to reject discretionary determinations granted by Congress to agencies. Lastly, reliance on Chevron in previous cases is insufficient grounds for overturning those decisions now.

Furthermore, there are avenues by which those in the administrative space can combat the concerns these decisions create. Disruptions in this arena will exist and persist, the extent of which remains unclear. The U.S. Supreme Court in its decision emphasized the change from a "reasonable" interpretation to now the "best" interpretation. While one can infer and have concern that the "best" interpretation sought out will be overly favorable to regulated entities,

[37] See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012).
[38] See *City of Arlington v. FCC* , 569 U.S. 290, 323-27 (2013) (Roberts, C.J., dissenting).

this is not inherently the case, and it is not inconceivable that new challenges may reach a "best" interpretation that favors the general populace. Another factor to take note of is that private, regulated industry is not the only potential Plaintiff in these types of cases. Depending on the facts and circumstances we may see litigation from the public sphere making the same type of claims, in a manner that benefits vulnerable populations.

While we wait to see how these decisions play out, agencies will still carry on interpreting the law through their rulemaking and adjudications. They remain the operative rules that regulated entities must follow unless and until a court overturns them. Challenges will abound, but there is only so much room on the judicial docket.

These decisions are directed at federal agencies. Their impact on states will be dependent on their reliance on federal rules and laws to inform how states handle challenges to their level of regulations. Colorado has been described as an "intermediate deference" state, and never exclusively relied on the *Chevron* Doctrine for state judicial review. As such, the impact on state level agency activity is not expected to compare to that on a federal level. Knowing that these rulings in tandem have an unknown potential for increased litigation, and curtailed federal agency rulemaking authority, states and localities not only can, but must forge forward with their own policymaking.

This overruling of Chevron also addresses the flexible nature of interpreting and making policy changes that the U.S. has grown accustomed to. Rather than being reliant on the whims of an administration, where there may have been flip-flopping interpretations based on the administration in the White House, once a court rules on the best interpretation of the law, it logically follows that the interpretation is fixed. For better or worse, once fixed, it will give stability to stakeholders and advocates, knowing an interpretation may not be up in the air once an administration changes. This could also play into a race to the courts as competing interests try to obtain decisions that will be largely binding on future administrations.

One thing experts have pointed out is that this change in view towards deference as a concept may impact other arenas where deference has previously existed. Particularly given the current U.S. Supreme Court, it is not farfetched to imagine that they will hear future challenges that will permit them to set stronger limits on Congress' ability to delegate powers to agencies.

Our analysis, and that of other scholars, have demonstrated that not all is doom and gloom with these two decisions. However, we must not view them in vacuum, but rather in the light of the actions and stated intentions of the second Trump administration. At the outset of the term these decisions were invoked, incorrectly, by leaders in the Presidential Administration, demonstrating the administration's desire to dismantle as many federal agencies and programs as possible. The administration misinterprets these rulings as a sweeping mandate to dismantle agency rules preemptively, bypassing the proper legal and administrative processes. Thus, rather than carefully reassessing regulations in light of the Court's rulings, the administration is aggressively rolling back policies governing environmental protections,

labor rights, and consumer safeguards, treating these decisions as a blank check to undermine the very agencies tasked with enforcing federal law. This overreach threatens to erode vital public protections and further destabilize the rule of law, as it prioritizes political objectives over lawful, deliberative policymaking. While many Executive Orders are being challenged, the spaces where rulemaking occurs are being impacted.

While many view these rulings by the U.S. Supreme Court to be political in nature, and it is true that the conservative right has been on a path to overturn *Chevron* for years, the impacts of the rulings themselves, in a traditional legal sense, may not be as pivotal (or paradigm-changing, or widespread) as some would fear and others would hope. However, these rulings have also been mischaracterized by the current administration and used in an attempt to justify broader powers, despite the decisions' comparatively limited scope. One possibility for the future is that the Court may see fit to further clarify the powers of the executive branch to make policy through administrative action. We will continue to keep an eye on these issues federally as they progress. We will also continue to advocate at the state level to ensure that legislation and rulemaking alike support the needs of Coloradans experiencing poverty.