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AS COMPARED TO WHAT?

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When my students tell me that they do not like a particular result in a case, I ask them, "As compared to what?" meaning that if you do not like this outcome, what is your alternative? The U.S. Supreme Court has been on a crusade to tear down the federal administrative state as it has operated at least since 1946 when Congress passed the Administrative Procedure Act (APA). But the Court seems to be doing so without providing a workable way to administer the laws that Congress has enacted to solve serious problems in our society.

Let's start with the recognition that getting Congress to legislate has always been a high hurdle to surmount, largely because the system of checks and balances enshrined in our Constitution was designed to make lawmaking difficult. A bill must pass both the U.S. House of Representatives, whose members are allocated among the states on a population basis, and the U.S. Senate, where every state, no matter its population, has two Senators, and then be signed by the President.[1] In theory, Congress can override a presidential veto by a two-thirds vote in each chamber, but given the sharp partisan divide in our country today, veto overrides are almost as extinct as dinosaurs. Thus, unless there is a significant consensus that a problem exists and that a proposed law is a reasonable way of alleviating it, no bill will become law. Indeed, in its recent attacks on the administrative state, the Supreme Court does not claim that the ends of federal legislation are unconstitutional or otherwise improper, but that the means chosen are flawed.

The Court also does not disagree with three other statements about the problem of legislating. First, laws are forward looking, meaning that Congress must be able to see ahead and predict how technological as well as sociological changes will affect what it writes. How could legislators in the 1970s possibly take into account the impact of the internet or artificial intelligence, not to mention the COVID-19 pandemic? Yet the Court seems to say, if

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[1] U.S. CONST. art. I, §§ 2–3.

there really is a new problem, agencies should await instructions from Congress.

Second, although each bill proposing a new or amended policy is important, members of Congress are spread very thin among committee work, helping constituents, and focusing on annual appropriations battles, as well periodic reauthorizations of programs and agencies. And in the Senate, the confirmation of executive branch officers and judges is both a vital check and time consuming. Moreover, the Court has mainly found fault with the details of implementing the laws that Congress passes, which require expertise that only a few members can realistically hope to attain.

Third, in a closely divided country such as the United States, agreement on the big picture is difficult, but obtaining consensus on the details is even harder. As a result, to pass a bill addressing a significant issue often means leaving questions unanswered, either intentionally or because of constraints on members' time, inability to predict the future, or simply the price of passing a bill at all.

For these reasons, it should not be a surprise, although it sometimes seems to be to the Court, that Congress fails to anticipate, let alone resolve, every issue that federal agencies confront when trying to implement legislation assigned to them. The Court's response has two prongs that mutually reinforce each other in making it increasingly difficult for federal agencies to find solutions to new problems in a changing world.

The first is the "major question" doctrine under which the Court precludes agencies from attacking a problem that is different from the one that Congress originally addressed in laws passed many years ago. Under this doctrine, the Court denies agencies the ability to solve new problems using old statutes, especially when the consequences of the remedy are significant.[2] The apparent theory is that Congress would have wanted to reserve for itself the decision on whether a major question needs to be addressed at all and, if so, by what means. Given the barriers to enacting any legislation and our collective inability to predict the future, that assumption seems dubious at best.

The second is last term's ruling in *Loper Bright Enterprises v. Raimondo,*[3] in which the Court overruled its 1984 decision in *Chevron v. Natural Resources Defense Council,*[4] under which agencies were given deference when interpretating ambiguous laws that they administer. *Chevron* was literally a two-way street: It benefited administrations that wanted to de-regulate as well as regulate, but it has generally been thought to be a pro-regulation approach, as evidenced by the lineup of amicus briefs in *Loper Bright,* with the business community solidly favoring the overruling of *Chevron*.[5] The decision in

[2] *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697 (2022).

[3] 144 S. Ct. 2244 (2024).

[4] 467 U.S. 837 (1984).

[5] The docket in *Loper Bright* shows more than four times as many briefs supporting overruling of *Chevron* than retaining it, although not all of those briefs supporting overruling were business briefs. *See* Loper Bright Enters. v. Raimondo, No. 22-451, 144 S. Ct. 2244 (Nov. 14, 2024).

Loper Bright may not be a major barrier to agencies on its own because it contained a number of hedges that appears to give agencies some room to use their expertise to support their decisions. However, combined with the major questions doctrine, the clear message from the Court is "go slow" in both approaching new problems and in seeking solutions to them. If more needs to be done, according to the Court, it is up to Congress to do it.

There is one way for Congress to respond to the Court's insistence that its laws be read in a parsimonious fashion: Write a very broad law and make it clear that Congress intended it to be read expansively. Congress has done that in the area of trade, where it has given the President incredibly broad powers to impose tariffs (and other protective measures) on imports when "the national security" (also read broadly) is threatened.[6] Acting under Section 232 of the Trade Expansion Act of 1962, President Trump imposed a 25 percent tariff on all imported steel and a 10 percent tariff on all imported aluminum, even though the U.S. Secretary of Defense opined that there was plenty of steel for the United States' defense needs. The amount chosen was not set by statute. Indeed, the government admitted that the President could have chosen any amount he wanted, for whatever period of time he preferred, and that he could treat different countries differently, as he did when he temporarily doubled the tariffs on steel from Turkey because of an unrelated dispute with that country. And on top of this, the law precluded any court from determining whether the President had complied with the conditions provided in the statute.

A consortium of companies that use or sell imported steel sued, arguing that the unlimited powers given to the President violated the constitutional doctrine forbidding Congress from delegating this level of unconstrained discretion.[7] The U.S. Court of Appeals for the Federal Circuit agreed with the Court of International Trade that a case from the 1970s approving the law in the face of a nondelegation challenge decided the delegation issue. The Supreme Court declined to hear the case, even though in other contexts it has been quite willing to overrule prior decisions of much greater significance than the one relied on by the lower courts. For now, then, the Court seems unwilling to cut back on this aspect of congressional power, at least when doing so results in giving the President more authority.[8] However, the Court never asked whether our democracy is better served by allowing Congress to expressly delegate vast powers, so that agencies are able to deal with a changing world. Nor did the Court ask whether it would be better for our democracy to allow agencies to go beyond the express limits

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[6] 19 U.S.C. § 1862.

[7] Am. Inst. for Int'l Steel, Inc. v. United States, 806 Fed. App'x, 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020).

[8] The Supreme Court recently agreed to answer whether Congress violated the nondelegation doctrine by authorizing the Federal Communications Commission to determine the amount that providers must contribute to the Universal Service Fund. Fed. Commc'n Comm'n v. Consumers' Rsch., 109 F.4th 743 (5th Cir. 2024), *cert. granted*, 220 L. Ed.2d 227 (U.S. Nov. 22, 2024) (No. 24-345).

of a law written decades ago to deal with change, with Congress available to stop them if they go too far.

Agencies implement laws in two main ways: First, they issue rules, which is the primary area where the major questions doctrine and *Loper Bright* will affect agencies; and second, they bring enforcement actions, mainly in special agency tribunals, although some are brought in federal court as well. Because those adjudications are based on the law applicable to the agency, all agency adjudications as well as rulemakings may be impacted by *Loper Bright* and the major questions doctrine, especially agencies like the National Labor Relations Board, which uses adjudications much more than rulemaking to carry out statutory mandates. However, the Court has also restricted the agency adjudication process and appears poised to do so further in ways that undermine the clear intent of Congress.

This past term in *SEC v. Jarkesy*,[9] the Court overturned a statute in which Congress gave the Securities and Exchange Commission (SEC) the choice whether to bring an enforcement action for securities fraud either before the agency or in federal district court. The SEC chose to bring the case before the agency. The administrative law judge (ALJ) who initially heard the case and the SEC itself on appeal agreed that the respondents committed fraud, and the SEC imposed substantial civil penalties on the respondents, required them to disgorge their unlawful profits, and barred them from the investment business.[10] The Supreme Court held that, because a defendant was entitled to a jury trial in an action for civil penalties at common law, Congress could not compel the respondents to defend themselves before the SEC.

Jarkesy is not clear as to whether the ruling extends to actions to recover other forms of money (such as disgorgement) or actions in which there is no right to jury trial, such as actions for an injunction. The SEC had a choice of forum, but many agencies do not. And some defendants may prefer to litigate in an agency proceeding, but it is unclear whether the forum limitation imposed by *Jarkesy*, like the right to a jury trial in court, can be waived. For now, agencies such as the U.S. Social Security Administration, which adjudicates claims for benefits from the government, and not the obligation to pay money to it, seem safe from challenge under *Jarkesy*. However, another part of the lower court decision in that case presents a further challenge to administrative adjudications that may end up hurting those who are the defendants in any remaining agency proceedings.

The U.S. Court of Appeals for the Fifth Circuit in *Jarkesy* also found that the statutory protection for the ALJ who heard the case, which required "good cause" to fire him, was an unconstitutional restriction on the power of the President to "take care that the laws be faithfully be executed" under Article II of the Constitution.[11] The Supreme Court did not reach that issue,

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[9] 144 S. Ct. 2117 (2024).

[10] Jarkesy v. Sec. Exch. Comm'n, 34 F.4th 446, 450 (5th Cir. 2022).

[11] *Id.* at 463.

but the claim is being made in a number of pending cases and is likely to reach the Court in the near future. The good-cause protection for ALJs was an important addition when Congress enacted the APA, not so much for the benefit of ALJs, but to provide parties to administrative adjudications the protection of a neutral ALJ who is not subject to removal by the agency that brought the proceeding in the first place.

Beyond the ALJ issue, the conservatives who support a strong President are also pushing for the end of for-cause removal protection as it applies to the members of multi-member bodies like the SEC. The Court took an initial step in that direction in *Seila Law v. Consumer Financial Protection Bureau*,[12] where it struck down the for-cause removal protection enjoyed by the director of the CFPB, the sole head of the agency. The majority shied away from overruling *Humphrey's Executor v. United States*,[13] which upheld that protection as applied to the Federal Trade Commission (FTC), although three members of the *Seila Law* Court would have done that as well. There is no logic that held back the Court in *Seila Law*, and it seems only a matter of time before the other shoe will fall, and *Humphrey's Executor* will go the same way as *Chevron*.

There is another element to the appointment of members of multi-member commissions that may be on the judicial chopping block as well, if the Court's approach to presidential power continues on its current path. Some statutes provide for partisan balance among the members of those commissions. The Federal Trade Commission Act, for example, provides that no more than a bare majority — three out of five — of commissioners on the FTC can belong to the same political party. [14] If the President has a constitutional right to remove commissioners at will, the same logic might well mean that Presidents must not be limited in their choices of those who assist them in carrying out the law. Why not all Democrats? The result would be that Senate confirmation, even when the Senate is controlled by the President's party, is the only check that the Constitution will allow.

It is unclear who the winners would be, beside the incumbent President, if the Court struck down these efforts at limiting presidential removal power. Perhaps agencies like the FTC and the SEC would survive without great change. But what about the statute establishing the Federal Election Commission, which provides for a three-three party balance and removal protection?[15] Could Presidents fire all the commissioners from the other party and then pass rules and bring cases that would greatly aid their reelections? Or what about the Federal Reserve, which largely controls interest rates? Could a threat to fire the chair or most of its members, unless they either raised or lowered interest rates in an election year, fundamentally alter the results in a presidential race? The Court's approach in these removal cases does not readily suggest a line that would uphold Congress's

[12] 591 U.S. 197 (2020).
[13] 295 U.S. 602 (1935).
[14] 15 U.S.C. § 41.
[15] 52 U.S.C. § 30106.

judgment that it is important to preserve the limited independence of at least some agencies, if not all of them.

One theme comes through with these cases, all of which relate to the governance of the administrative state: The Court knows best. It knows better than agencies, whose officials have been specially chosen to implement particular laws and resolve the inevitable ambiguities that arise when interpreting them. The Court also believes that it knows better than Congress whether political compromises on how agencies should be governed are essential to creating the agency in the first place, or whether agencies should be permitted to handle some kinds of cases and not require the federal courts to absorb them. The Court did not issue the decisions addressed above because it wanted more power for itself, although that is the result. Rather, the Court defended itself on the ground that "the Constitution made me do it" to protect the values enshrined in it by the Founding Fathers (no mothers allowed). That is so regardless of whether the separation of powers forbids granting agencies deference on issues of statutory interpretation, or whether that doctrine requires much more centralization of power in the President than the Congress and the American people have thought proper for 100 years. Perhaps the Constitution does mandate all these results. But perhaps a little more modesty and respect for the other branches is in order lest we end up with a very different federal administrative state than we have had at least since the APA was enacted in 1946.

Returning to my initial question, even if agencies sometimes overstep their boundaries, is reigning them in so clearly preferable to their not being able, or not even being able to try, to solve serious societal problems because they expect to be rebuffed by the courts? Given where Congress is today, is it realistic for courts to assume that, if there are areas where an agency should be able to issue rules but cannot, Congress will step in? Or would our country be better off if Congress did what it did in the trade area and expressly give agencies or the President carte blanche to solve any problem by any means they choose, if the party in power had the votes to enact such laws?

The *Jarkesy* decision literally affected only the SEC and its authority to seek civil penalties in administrative hearings, but its anti-agency attitude suggests that other agency proceedings may meet a similar fate. And if so, will the already busy federal courts be able to take up the slack, and who will bear the added costs of court rather than agency litigation? And is it so clear under the Constitution that Congress is forbidden from choosing the appropriate forum for enforcing the laws it passes that have at least some significant differences from arguably similar common law claims?

And if agencies are somewhat independent of the President, even though their leaders are appointed by the President, is it so clear that Congress is wrong to give them and the ALJs, whose decisions they review, some protection against arbitrary removal by the President? Are we really to expect that our principles of separation of powers will be seriously undermined

by a little less presidential control over implementation of the laws enacted by Congress?

The Supreme Court has made clear that it does not like many things that Congress has done. What it has not done is give us a coherent notion of what a functioning federal government should be, unless that notion is that the country is plainly over-regulated and that Congress's judgment to the contrary should be disregarded. "As compared to what?" appears to be a question that the Court does not think it has to answer.