

# A TRIPLE BLOW TO ADMINISTRATIVE LAW: AN ANALYSIS OF *LOPER BRIGHT*, *CORNER* *POST*, & *JARKESY*

# THE PUBLIC HEALTH LAW CENTER



# LAND ACKNOWLEDGMENT

We acknowledge our presence in the tribal and treaty homelands of the Dakota Oyate since time immemorial. These lands are home to the Sisseton, Wahpeton, Mdewakanton and Wahpekute Dakota peoples. There are four Tribal Nations who remain in these lands as tribal governments, the Lower Sioux Indian Community, the Prairie Island Indian Community, the Shakopee Mdewakanton Sioux Community, and the Upper Sioux Community. We acknowledge and respect the Dakota Oyate as part of the larger Sioux Nation, traditionally known as the Seven Council Fires, the Oceti Sakowin. We also acknowledge the regional territory of the Ojibwe/Chippewa/Anishinaabe peoples in these tribal homelands. There are seven Tribal Nations who remain in these lands as tribal governments, the Bois Forte Band of Chippewa, the Leech Lake Band of Ojibwe, the Fond du Lac Band of Lake Superior Chippewa, the Grand Portage Band of Lake Superior Chippewa, the Mille Lacs Band of Ojibwe, the Red Lake Band of Chippewa Indians, and the White Earth Nation. We also acknowledge the ancestral connection of the Ho-Chunk Nation to this region. In these tribal lands, Indigenous peoples have joined together in community, stewardship, and spirituality upholding traditional values and legal principles.

Developed by:

**Native American Law and Sovereignty Institute (NALS Institute)**  
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**EQUALITY:**

Everyone gets the same – regardless if it's needed or right for them.









**EQUITY:**

Everyone gets what they need – understanding the barriers, circumstances, and conditions.

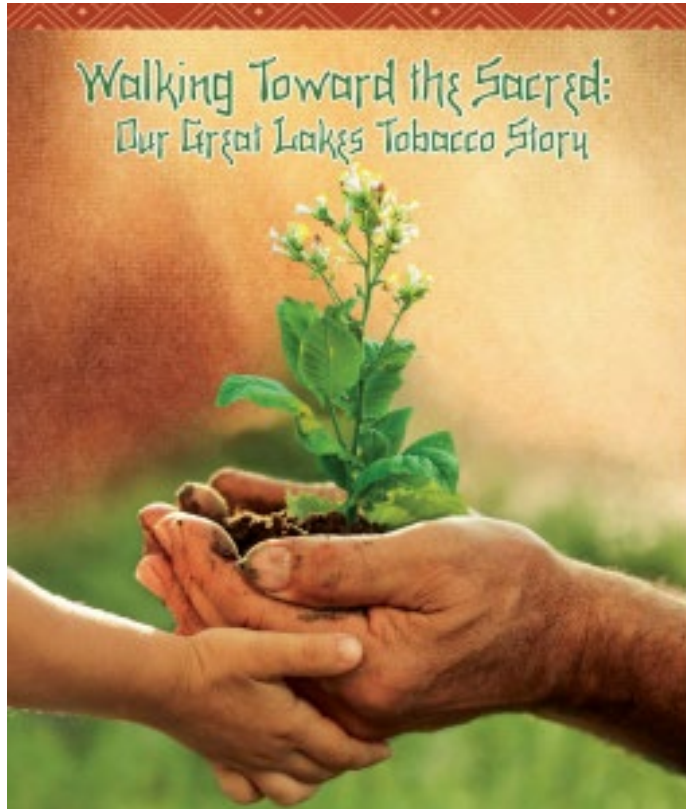


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# LEGAL TECHNICAL ASSISTANCE

-  Legal Research
-  Policy Development, Implementation, Defense
-  Publications
-  Trainings
-  Direct Representation
-  Lobby

# COMMERCIAL TOBACCO IS NOT TRADITIONAL TOBACCO



[Available at this link](#)



*Nicotiana rustica*, Solanaceae, Mapacho, flower. Botanical Garden KIT, Karlsruhe, Germany. Wikimedia Commons.

# AGENDA

- *Chevron* Doctrine
- *Loper Bright v. Raimondo*
- *Corner Post v. Board of Governors of the Federal Reserve System*
- *SEC v. Jarkesy*
- Impacts of Federal Regulatory Authority
- States and *Chevron*
- What Can Be Done?
- Conclusion

# ***CHEVRON V. NRDC*** **ESTABLISHING AGENCY DEFERENCE**



Two Step Test for statutory interpretation from agencies



Step 1

Is the law ambiguous?

No, court's apply the law.

Yes, go to Step 2



Step 2

Is the agency interpretation permissible?

Yes, court's give deference to agency

No, court's apply its own interpretation



# ***LOPER BRIGHT V. RAIMONDO*** **THE END OF AGENCY DEFERENCE?**



- Supreme Court decides that the APA does not allow for agency deference
- Judiciary Branch is the only branch that has the power to interpret laws
- Agencies can be afforded some persuasive power, but not controlling

# ***CORNER POST V. BOARD OF GOVERNORS STATUTE OF LIMITATIONS?***

- Agency statutes are now open to facial challenges at any time
- Entities can be created solely to challenge a statute
- Supreme Court says that the statute runs from when the harm occurred not when the rule was finalized



Credit: Shutterstock

# ***SEC V. JARKESY*** **JURY TRAILS NEEDED**

- Agency Enforcement Limited
- Remedies that require a monetary penalty must go before a jury



# FDA & TOBACCO CONTROL



- *Loper Bright* introduces uncertainty into administrative law
- How will the FDA respond?
- Will public health see more challenges to the FDA?

# FDA AUTHORITY

- Clarity in the TCA
  - Specific language about product standards
- Ambiguity in the TCA
  - “Appropriate for the protection of public health”
  - Could be open to further challenges under *Loper Bright*



# PMTA PROCESS

## ADDITIONAL RISKS & CHALLENGES

- Authorizing tobacco products
  - Challenges to denials
  - Need to be rooted in the statute or facts
- Enforcement related to unauthorized products
- *Wages & White Lion case*



# MENTHOL RULE

- Most vulnerable in new legal landscape
- Could be challenged indefinitely



No Menthol

# WHAT'S NEXT FOR FDA

- Willing to be aggressive?
- Forced to sit back?



# ***LOPER BRIGHT & STATES***

## States have their own deference structure

- Substantial Deference
- Appreciative Deference
- Due Weight Deference
- No Deference

## States and Localities can continue to regulate commercial tobacco

- Sales prohibitions
- License restrictions
- Limitation of flavors

# OPPORTUNITIES FOR AGENCIES



DECISIONS BASED ON  
STATUTORY AUTHORITY



DECISIONS BASED ON  
AGENCY FACT FINDING

# CONTACT US



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