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The End of *"Chevron"* or Its Rebirth?

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Fishermen in the small town of Cape May, New Jersey, are at the epicenter of a legal challenge that could reshape the landscape of agency authority. The fishermen are challenging the entrenched *"Chevron"* doctrine, which for years has afforded deference to government agencies with respect to reasonable interpretation of ambiguous statutes. Once again, the US Supreme Court (SCOTUS) is in the spotlight as it hears pivotal cases – *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, which may presage the dismantling of *"Chevron"*.

This intricate legal tapestry, woven with the complexities of statutory interpretation and deference to administrative agencies, not only echoes recent high-profile decisions like *Dobbs*, but also raises questions about the unique political implications attached to *"Chevron"* compared to other contentious issues. Having now heard oral argument on these pending cases, SCOTUS is poised to issue a decision that has significant implications for the regulated community, administrative agencies and legislators.

"Chevron" Deference and Its Complicated History

While *"Chevron"* has been the target of significant criticism, with some arguing that it constitutes an abdication of judicial authority, it is not entirely clear what the doctrine is – nor exactly which precedents SCOTUS would have to overrule to reverse prior circuit court judgments. In the original *"Chevron"* case, the court considered whether the Clean Air Act term "stationary source" counts each generating unit at a power plant, or rather counts the power plant as a whole. Under President Reagan, the US Environmental Protection Agency (EPA) reversed its previous views and concluded that "stationary source" means the full collection of equipment within a "bubble" of a certain size. This interpretation mattered because certain Clean Air Act obligations were only triggered upon a large enough modification at a stationary source; with the "bubble" concept, a company could replace one unit without incurring fresh regulatory restrictions. SCOTUS, facing that debate, decided that there was no sign of any congressional intent either way.

Given the effective silence, the court decided that it should defer to the views of EPA's policy experts. In explaining itself, the court went a step further – it said that when a statute is truly ambiguous in that way, Congress likely intended for agencies to fill interpretive gaps.

"Chevron" was not written as a hard-and-fast rule. Pragmatic justices, such as Souter and Breyer, wrote opinions declining to give the absolute deference that is today the target of criticism.[1]

At the same time, the *"Chevron"* doctrine has taken on a life of its own, with justices like Scalia opining that the same deference is extended not only to statutory interpretation, but also to those statutes defining an agency's authority. Justice Thomas wrote (in *Brand X*) that if a statute is ambiguous, *"Chevron"* deference is mandatory even if courts have previously interpreted the statute a different way. And Chief Justice Roberts brought *"Chevron"* into the tax realm, concluding that there is no reason to give the IRS less deference than other agencies, and emphasizing that when *"Chevron"* deference is at issue, it is not disqualifying that an agency's interpretation is new, that the agency has changed its position or even that the new interpretation was clearly a response to litigation. Despite his own work expanding and entrenching the *"Chevron"* doctrine, Justice Scalia ended up changing his mind in later years. Justice Thomas has written that *"Chevron"* is likely inconsistent with Article III of the Constitution, and that *Brand X* was probably incorrect.

By contrast, regarding the constitutionality of *"Chevron"* or the desire to maintain the doctrine, the chief justice has been silent.

Cases Facing SCOTUS Today and the Potential Outcome

The cases currently before SCOTUS involve a regulation of the National Marine Fisheries Service that requires some commercial fishers to hire independent observers to watch the catch. The challengers object to having to pay the cost of the observers, estimated to be around US$700 per day, a cost the fishers think the agency should bear. The statute says the agency may "require that one or more observers be carried." Both the First and the DC Circuits concluded that it was within the bounds of reason for the agency to conclude it was authorized to put the cost on the fishers. These cases have now set the stage to test *"Chevron"*.

1 For example, in *United States v. Mead,* Justice Souter explained that a routine adjudicative letter from the US Customs Service regarding a tariff classification is not the sort of thing that earns *"Chevron"* deference. In *United States v. Home Concrete & Supply,* Justice Breyer declined *"Chevron"* deference, alluding to a prior case where Justice Breyer's predecessors were disinclined to think a particular tax provision was the kind of thing Congress meant to leave to the Internal Revenue Service (IRS).

In predicting the court's trajectory, past writings of justices offer valuable insights. Justices Sotomayor, Kagan and Jackson appear inclined to preserve *"Chevron"*, possibly by providing nuanced guidance to lower courts rather than outright overruling. The court did exactly that a few years ago with respect to a somewhat comparable deference doctrine – the rule about deferring to an agency's interpretation of its own regulations. In that case (*Kisor*), the court held that a court should use the normal modes of interpretation and only defer if a regulation is truly ambiguous, and subject to additional conditions and requirements on how deference should operate.

On the flip side, Justices Thomas, Alito, Gorsuch and Kavanaugh seem poised for a decisive rejection of deference on statutory interpretation, echoing Gorsuch's longstanding advocacy. Justice Gorsuch led this charge at oral arguments while Justices Alito and Kavanaugh were less active but supportive of Gorsuch's view. Justice Thomas, despite his reticence, has written in dissenting opinions that he thinks *"Chevron"* is likely unconstitutional.

> That leaves the outcome turning on two people – Chief Justice Roberts and Justice Barrett.

The chief justice has kept his views largely to himself. He joined most of the *Kisor* opinion. In a concurring opinion, he agreed that the deference doctrines for regulatory interpretations should not be overruled. He also specified that the *Kisor* decision did not address the questions about *"Chevron"* deference, but, on past form with the chief justice, that kind of reservation should not be taken to indicate what he actually thinks about the reserved question. Over the years, as several other justices have written separate opinions expanding on their *"Chevron"* criticisms, the chief justice has not joined. At oral argument, he was fairly quiet. In light of the compromise that he came to in *Kisor*, it is conceivable that he would push for a similar outcome about *"Chevron"*.

Justice Barrett's stance remains uncertain. Scholars have analyzed her views on originalism, textualist interpretation and *stare decisis* and tried to make predictions based on her recent opinions. But the bottom line is that it is hard to predict what she might think about *"Chevron"*. At oral argument, Justice Barrett focused on the consequences of overruling the doctrine, raising questions about the nature of binding precedent. Justice Barrett's questioning did not appear to favor one side over the other. Rather, in our view, she was contemplating what *"Chevron"* really means and how the court's decision will impact the past and future of America's legal framework.

Implications of the SCOTUS Decision on *"Chevron"* Deference

It seems foreordained, as it has for some years, that the *"Chevron"* doctrine will be trimmed or pruned, perhaps in a *Kisor*-like opinion. That might or might not have much impact in practice.

Years on from *Kisor*, it is still debated how much that decision changed the regulatory landscape in practice. On the other hand, it is also quite possible that the court will cut down *"Chevron"* at the trunk. That could leave decades worth of regulatory policy open to challenge, on the grounds that past courts did not assess the best interpretation of the relevant statutes but instead just accepted whatever reasonable interpretations the agencies used. It is also possible that the court could issue some dictum advising lower courts on how to handle that potential tsunami of regulatory litigation – dictum that lower courts might or might not adhere to fully.

In short, alterations to the *"Chevron"* doctrine might – or might not – unleash profound implications for regulatory compliance, fundamentally shaping how businesses navigate an array of regulations spanning environmental, labor and other domains. The uncertainty surrounding agency authority may ripple through industries that heavily rely on regulatory clarity, potentially leading to an uptick in litigation and a reevaluation of established regulations. Chief Justice Roberts and Justice Barrett hold the key, and the country will be watching impatiently to learn what they decide. Under the court's practices, that decision will come no later than the end of June 2024.

In the meantime, if you are litigating against an agency, you cannot today make arguments free of the "*Chevron* handicap." It is impossible to tell whether you will be able to do that by the end of June. We recommend assessing your pending cases to see if there are debatable statutory interpretations involved. For those where *"Chevron"* is an issue, consider seeking some delay to gain the opportunity that may arise in a few months, to take a fresh approach to agency authority.

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