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Justices' EPA Ruling Didn't Move Needle On Chevron Doctrine

By **Dan Wolff and Eryn Howington** (August 9, 2022, 2:56 PM EDT)

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Is Chevron deference dead? Definitely, maybe.

In the weeks since the U.S. Supreme Court invoked the major questions doctrine in late June in West Virginia v. U.S. Environmental Protection Agency[1] in support of its ruling that the EPA lacks authority under the Clean Air Act to force power plants to switch from coal-fired energy generation to cleaner fuel sources — starting with natural gas, but to ultimately renewable fuel sources like solar or wind[2] — some have interpreted the decision as the end of Chevron deference, established in the Supreme Court's 1984 Chevron U.S.A. Inc. v. Natural Resources Defense Council decision.

But, in our estimation, West Virginia taken by itself broke no new ground in administrative law, and it did nothing to undermine Chevron. At most, the decision merely articulated more forcefully what was already well-developed Supreme Court precedent on the limits of agency authority.

In fact, West Virginia was not even the first decision of the court's 2021-22 term to rest on the major questions doctrine.

In January, on more or less identical grounds, the court held in National Federation of Independent Business v. Occupational Safety and Health Administration that OSHA lacked the authority to mandate COVID-19 vaccinations or weekly testing for all employees at large workplaces in the U.S.[3]

As with the Clean Air Act, the statutory authority on which OSHA relied was enacted and signed into law in 1970,[4] and the court was utterly unimpressed with OSHA's argument that its authority was so vast as to allow it to broadly mandate vaccinations to address a public health crisis through the guise of workplace safety.

Similarly, in August 2021, while the court was officially in recess, it killed another action related to COVID-19 based on the major questions doctrine: the national eviction moratorium order issued by the Centers for Disease Control and Prevention.[5]

Perfectly foreshadowing the results in the OSHA and EPA cases, the court held that the broad authority to regulate landlord-tenant relations under the guise of a public health emergency, which the CDC

purported to find in statutory authority dating to the 1940s, simply did not exist.[6]

Moreover, although the court's major questions doctrine trifecta in a 12-month period was impressive, in the same way a hat trick is always impressive in a soccer match, the doctrine itself is decades old.

To say, therefore, that West Virginia marks the death of Chevron deference is to misunderstand the limits to Chevron that have long been recognized.

Over 20 years ago, the Supreme Court told the U.S. Food and Drug Administration in FDA v. Brown & Williamson Tobacco Corp. that it could not regulate cigarettes based on the authorities the FDA found in the Food, Drug and Cosmetic Act.

Rejecting the agency's request for deference, the court famously stated, "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[7]

As Justice Antonin Scalia punctuated a year later in another case involving the EPA, Whitman v. American Trucking Associations Inc., Congress does not usually hide elephants in mouseholes.[8]

The court's point then, as in West Virginia, was that agencies should not expect the courts to uphold major regulatory actions based on vague, hoary statutes.

The major questions doctrine stands for the simple proposition that if an agency wants to go big — by, for example, fighting climate change in ways that affect the economy directly to the tune of billions of dollars, or affecting the civil liberties of tens of millions of Americans by requiring they get vaccinated or banning cigarettes — it must point to specific authority from Congress.

This follows from Article I of the U.S. Constitution, which vests all lawmaking authority in Congress, and Article II, which established the executive branch to execute those laws enacted by Congress.[9] If Congress has not authorized it, the executive branch cannot do it.

To be sure, Chevron deference is, if not dead already, on the wane, precisely because agencies have given it a bad name by too frequently taking the position over the last several decades that it permits them to go big in regulations based on nothing more than silences or ambiguities in the statutory text.

But on big questions — on major questions — Chevron was never supposed to be the answer, and those who read West Virginia to unsettle administrative law overlook or misunderstand nearly 30 years of Supreme Court precedent.[10]

The better way to think about the Chevron and major questions doctrines is as existing along a continuum. Chevron deference exists for smaller questions of statutory interpretation — questions that are interstitial to the statutory text but where the answer, regardless of policy direction, results in regulatory action unquestionably within the scope of the agency's authority.

The doctrine's applicability ends when the action at issue is a bigger deal — when it has the look and feel of something we would expect from Congress in the first instance, i.e., legislation.

Yes, there is a gray transition area along that continuum as to what constitutes a major question, and undoubtedly federal dockets will be full over the next decade with cases battling on that front, but

several decades of Supreme Court precedent already provide useful guidance.

Take Chevron itself, which contrasts well with West Virginia. The question in Chevron was whether an EPA rule authorizing states to treat multiple smokestacks at power plants as a single stationary source under the Clean Air Act was a reasonable interpretation of the statute.[11]

Environmental groups challenged the rule, arguing that stationary source was better interpreted to mean, for example, an individual smokestack, not an industrial grouping of them.

Because the Clean Air Act itself did not provide the answer, the Supreme Court deferred to the EPA's interpretation, finding it reasonable.

That was not to say the environmental group's interpretation was not also reasonable, only that in close cases — i.e., where the text is ambiguous — deference goes to the agency.

That interpretation question was, relatively speaking, of far lesser consequence than what the EPA was trying to accomplish through the rulemaking at issue in West Virginia: Nobody doubted that the EPA could regulate smokestack emissions; the only question was how to do it.

When decided, Chevron was a bit of a nothingburger. The idea that the courts would defer to agencies on the minutiae of laws Congress charged them with executing seems rather ho-hum. Even to nondelegation hawks, Chevron, properly understood, does no more than service the **originalist view** of the Constitution that the executive branch must have some operational latitude to execute the law.

The fuss arose over time, as agencies saw in Chevron deference the opportunity to arrogate to themselves greater and greater authority to address new problems based on old statutes. After all, how hard is it to find an ambiguity in an act of Congress?

By exploiting the doctrine in service of achieving political objectives that appeared legislative in nature and scope, but were either not pursued or could not be achieved in Congress, excessive invocation of Chevron by agencies — and, to be fair, by a federal judiciary, including the Supreme Court,[12] too lax in its application of Chevron — led to the backlash we see today.

While the major questions doctrine served as a bulwark to prevent agencies from accomplishing through regulation the sorts of big policy changes that look, walk and quack like legislation, it was invoked only sparingly, and so Chevron plowed onward, undeterred. The Chevron era is now over.

Indeed, of late, notions of deference have fallen out of favor even on the smaller interpretative issues that are well within the traditional and rational application of Chevron.

The first major salvo came in 2019 in Kisor v. Wilkie, where the court emasculated Chevron's cousin — so-called Seminole Rock or Auer deference — which stands for the proposition that where a regulation is ambiguous and capable of two or more reasonable interpretations, the courts must defer to the reasonable interpretation given by the agency.[13]

While at first blush Auer deference seems obvious — who better to resolve regulatory ambiguities than the agency that promulgated the regulation? — in time it was attacked for allowing agencies to promulgate intentionally ambiguous regulations while leaving it for a later day to interpret those ambiguities, giving them the benefit of deference without the messy back-and-forth of the notice and

comment process.

Although the Kisor court did not kill Auer, it effectively put a knife through its chest and left it on life support. In his concurring opinion, Justice Neil Gorsuch pointed out that in order to spare Auer from being officially overruled, the majority so emasculated the doctrine that it might as well have overruled it.[14]

For advocates, Justice Gorsuch was right — there is little value to the advocate in invoking Auer anymore. If you cannot win the argument based on powers of persuasion, uttering "Auer deference" will more quickly get you laughed out of court than it will tip the judicial scale in your client's favor.

This past year, Chevron met a similar fate, albeit far less ceremoniously. In American Hospital Association v. Becerra, the question was whether the U.S. Department of Health and Human Services was authorized by the Medicare statute to manage the allocation of Medicare dollars to reimburse hospitals for certain outpatient prescription drugs in a way that, through a change in regulation, shifted $1.6 billion away from a subset of hospitals that, because of their lower-income patient base, were highly dependent on those dollars.[15]

The U.S. Court of Appeals for the District of Columbia Circuit concluded that the governing provision of Medicare was ambiguous, and it ruled in favor of HHS based on Chevron. Certiorari was granted to address specifically whether Chevron deference was appropriate, and indeed, whether Chevron should be overruled.[16]

In the decision that issued, the court ruled unanimously against HHS.[17] Yet despite Chevron serving as the basis for the lower court's decision and being central to the question presented, the case was not even mentioned in the court's decision.

Of note, American Hospital Association was argued on Nov. 30, 2021, but not decided until June 15, 2022. The issued opinion, by appearances, showcases nothing more than a simple case of statutory interpretation.

One is left to wonder how many drafts circulated between the justices' chambers discussing Chevron. In the end, it seems that instead of giving Chevron the Kisor treatment, the court simply ignored it. The effect is the same.

In fact, in a second case involving HHS decided just a week later, the court doubled down on its abandonment of Chevron.

In Becerra v. Empire Health Foundation, the court resolved a circuit split on the soundness of HHS's interpretation of another provision of Medicare without any reference to Chevron deference, even though the circuit split was the result of different circuits differing on their indulgence of Chevron deference.[18]

Incredibly, in competing opinions over what everyone agreed was ambiguous statutory text, the majority said HHS's interpretation "best implements the statute's bifurcated framework," while the dissent said "HHS's ... interpretation is not the best reading of this statutory reimbursement provision."[19]

If Chevron still mattered, competing judicial views of the best interpretation would be irrelevant.

The irony to the Supreme Court overruling Chevron in silence — if that is what it has done — is poetic. If it has, it is surely the work of the HHS decisions, not West Virginia. Neither of those cases involved major questions, and yet, in the face of multiple ambiguities for which the Medicare statute is famous, Chevron got ghosted — twice.

Even if not dead, Chevron, like Auer, is certainly out of fashion; the likelihood that deference will be the basis for a court upholding a major rulemaking over the next couple of decades is extremely low.

But even for smaller questions — narrow questions of policy or computation that fit neatly within existing statutory authority and agency expertise, and which do not give rise to broader economic or political debate — the court seems intent on doing its own work.

Skeptics can take heart that, as Empire Health illustrates, if you just refrain from invoking the "C" word, coalitions can form across the political spectrum in agreement with agency reasoning — there, the majority opinion was authored by Justice Elena Kagan and joined by Justices Stephen Breyer, Sonia Sotomayor, Clarence Thomas and Amy Coney Barrett.

If anything is left of Chevron, it seems no greater than whatever is left of Auer. Both doctrines appear to have collapsed into something more akin to Skidmore deference — the courts will defer only to the extent the agency rationale has the power to persuade.[20]

Skidmore, of course, has always been nothing more than a tautology, but alas, it survives because tautologies are less dangerous in that they merely confirm the answer already reached.

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[1] West Virginia et al v. EPA, 597 U.S. __ (2022).

[2] Id. at 4.

[3] Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. ___ (2022).

[4] See 29 U.S.C. §655(b) (directing the Secretary to set "occupational safety and health standards"); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace).

[5] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021).

[6] Id. at 2491.

[7] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[8] Whitman v. Am. Trucking Ass'ns., Inc., 531 U. S. 457, 468 (2001).

[9] U.S. Const. arts. I & II.

[10] See, e.g., MCI Telecomms. Corp. v Am. Tel. & Tel. Co., 512 U.S. 218 (1994); Brown & Williamson, 529 U.S.120; Util. Air Regul. Grp. v. EPA, 537 U.S. 302 (2014).

[11] Chevron, 467 U.S. at 840.

[12] For example, although Justice Scalia penned the now-iconic brushback to administrative bloat—Congress "does not, one might say, hide elephants in mouseholes" (Whitman, 531 U. S. at 468)—he also authored the majority opinion in the case that many consider to be the apogee of Chevron abuse, City of Arlington, writing that the federal courts are to defer to the agency's reasonable interpretation of an ambiguous statutory authority even where the statutory ambiguity has to do with the agency's jurisdiction to act in the first instance. City of Arlington v. Fed. Commc'n Comm'n, 569 U.S. 290 (2013).

[13] Kisor v. Wilkie, 139 S.Ct. 2400 (June 26, 2019); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); Auer v. Robbins, 519 U.S. 905 (1997).

[14] Kisor, 139 S.Ct. at *2425 (June 26, 2019) (Gorsuch, J. concurring).

[15] Am. Hosp. Ass'n v. Becerra, 569 U.S. ___, 142 S.Ct. 1896 (2022).

[16] Id.

[17] Id.

[18] Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S. Ct. 2354 (2022).

[19] Id. at 2368, 2370.

[20] Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).