REGULATORY

HOW THE SUPREME COURT MIGHT CONSTRAIN AGENCIES

The Trump administration has been successful in filling open spots on the federal bench with conservative judges, with the expectation by many that a more conservative bench will go hand in hand with the president's deregulatory agenda, and thus help shape the direction of not only the federal courts but of the administrative state, long after this administration ends. With the Supreme Court now firmly in conservative hands, some think the time is nigh for the federal judiciary to reassert itself as the final arbiter of what statutes mean in litigation involving federal agencies.

At stake is so-called *Chevron* deference, which is the deference courts typically give to federal agencies interpreting statutory programs they are responsible for administering. The doctrine has dominated administrative law for more than 30 years. If the Supreme Court reverses or narrows it, as some are clamoring for it to do, it could have major repercussions for future regulations in areas ranging from the environment to health care to communications.

The clamoring is in no small part a response to the regulatory agenda of the prior administration. "Business has been frustrated for many years as the judicial check they relied on to scrutinize agency action was viewed more as a rubber stamp," says Dan Wolff, co-chair of the Administrative Law and Regulatory Practice at Crowell & Moring. Reversing or narrowing *Chevron* would signal that the judicial check means something again. Of course, what's good for the goose is good for the gander, says Wolff: "A revisited *Chevron* would apply to deregulatory actions as well as new regulations."

TOO MUCH DEFERENCE?

The landmark 1984 decision was the "seminal distillation of a principle of interpretation that developed over the course of the 20th century, as the administrative state grew," Wolff says. *Chevron* articulates a two-step test for judges reviewing an agency's construction of the statutes it administers. Step 1 analyzes whether Congress has "directly spoken to the precise question at issue." If it has, then the statute itself provides the answer to the legal question. But if it hasn't—that is, if the statute is silent or ambiguous—then the court moves to Step 2 and considers whether the agency's interpretation is "a permissible construction of the statute."

In practice, when a court finds that the statute is ambiguous, it usually defers to the agency's interpretation. This is what many find galling, especially in light of the burgeoning number of federal regulations on the books. Indeed, for better or worse, the "administrative state" has grown inexorably. The number of federal regulations nearly tripled from about 400,000 in 1970 to almost 1.1 million in 2016, according to The Mercatus Center at George Mason University. That trend continued through both Republican and Democratic administrations.

During the Obama administration, business complained vociferously about regulatory overreach in such areas as finance, the environment, health care, and labor. At the same time, the chorus of jurists, scholars, and commentators contending that the federal courts were showing too much deference to agencies grew to a near fever pitch, with *Chevron* taking much of the blame.

Chevron is premised on a separation-of-powers notion that when Congress delegates to an agency the authority to administer a law and is not specific about a particular outcome, it is not up to the courts to second-guess the agency's policy choice to address the ambiguity because that, in effect, would be legislating, which is not the proper role of the judiciary, Wolff explains. But more recent scholarship posits a counter separation-of-powers viewpoint that is hostile to deference. In 2016, then Judge Gorsuch stated that, thanks to *Chevron*, "courts are not fulfilling their duty to interpret the law." Justice Thomas has also stated that *Chevron* is a usurpation of judicial power. Chief Justice Roberts has indicated a willingness to revisit the doctrine, as did now-retired Justice Kennedy in an opinion issued his last day on the Supreme Court, and many see Justice Kavanaugh as his natural torchbearer. "Conventional thinking is that at least four justices are ready to revisit *Chevron* in the right case," Wolff notes.

SIGN OF THINGS TO COME?

Indeed, the Supreme Court has already agreed this term to reconsider *Chevron*'s jurisprudential kin: *Auer* deference. *Auer* posits that courts should defer to agency interpretations of their own regulations if, as under *Chevron* Step 2, the agency's interpretation is not unreasonable.

Wolff points out that to administrative law wonks, while at first blush *Auer* seems to be logical and consistent with *Chevron*, it is more problematic because it effectively allows agencies to "move the goalposts" by revisiting key terms of a regulation long after the notice-and-comment rulemaking period has closed. In that way, it encourages agencies to write ambiguous

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regulations to give them greater regulatory flexibility at some later date—at the expense of the regulatory certainty and due process desired by business. Yet for most business folks, *Auer* deference and *Chevron* deference are more or less synonymous.

While Wolff believes *Auer* is in real trouble—"its day of reckoning has seemed imminent for several years now"—he thinks that the Supreme Court is unlikely to reverse *Chevron* outright. Instead, he thinks the Supreme Court will narrow its application and embolden the lower courts to more closely scrutinize agency interpretations. For example, the Supreme Court might direct judges to be more rigorous at Step 1 by working harder to distill the meaning of the text and to be less inclined to find ambiguity. Wolff says this was more or less the philosophy of the late Justice Scalia: "He adhered to *Chevron*, but judiciously," Wolff says. The problem, he notes, is that the lower courts have not consistently applied the same rigor in agency cases as the Supreme Court.

Another path the high court might take is to encourage lower court judges to apply the "major questions" exception to *Chevron*, which excuses deference in instances where the subject matter of the regulation has deep political or economic significance. Chief Justice Roberts articulated a version of this exception in his 2015 decision in *King v. Burwell*, dealing with the Affordable Care Act, articulating the notion that where the impact to society is great, the courts should not—in contrast to the basic premise of *Chevron*—presume that Congress intended to delegate so much discretion to the agency. Justice Scalia said something similar in a 2014 Clean Air Act opinion, stating that the courts should be wary of deferring to agency rulemaking that "would bring about an enormous and transformative expansion" of the agency's regulatory authority "without clear congressional authorization."

What has become known as the "major questions" or "major rules" doctrine seems premised on a related constitutional theory favored by opponents of expansive agency authority: the idea that the Constitution vests in the Congress the exclusive authority to create new law and that agency claims on delegated rulemaking authority must therefore be viewed with a healthy skepticism, lest agencies venture from their law "executing" function to a law "making" function. Wolff points out that *Chevron* deference has greater logic where the agency is addressing the interstices of a statutory program that seem obviously within the agency's statutory mandate and wheelhouse; it loses currency as a doctrine where it is invoked to justify massive expansions of agency authority into new areas that Congress itself has not yet touched.

In 2016, then-Appeals Court Judge Kavanaugh summarized the basis for the doctrine: "For an agency to issue a major rule, Congress must clearly authorize the agency to do so. If a statute only ambiguously supplies authority for the major rule, the rule is unlawful."

BE CAREFUL WHAT YOU WISH FOR

For opponents of aggressive regulation, the narrowing or reversal of *Chevron* could be a double-edged sword. That's because while the soundness of new regulations often depends on interpretations of ambiguous statutes, the *repeal* or *replacement* of a regulation may also turn on the interpretation of the identical ambiguity.

In fact, *Chevron* itself was a Reagan-era deregulatory victory of sorts: The deference granted was to a reinterpretation of the Clean Air Act that was favored by industry. It is well accepted, Wolff notes, that an agency's decision to change course on the meaning of an ambiguous statute is entitled to no less deference than the prior interpretation so long as the new interpretation is a permissible reading of the statute. But if *Chevron* is narrowed, he says, "it may make it harder for an agency to peel back a regulation, especially if the prior regulation was upheld by the courts or has become part of the legal fabric."

In this way, a *Chevron* narrowing may not necessarily redound to the benefit of the business community, Wolff adds, noting that "the business community intervenes all the time in defense of favorable agency decisions, and deference is no less important in many of those cases."

Ultimately, the question for the Supreme Court to decide is whether separation of powers militates in favor of deference—or against it. If the high court constrains *Chevron*, it will likely hark back to the seminal 1803 case of *Marbury v. Madison*, which first established the principle of judicial review. It's the judiciary's obligation, the Supreme Court declared, "to say what the law is." Of course, *Marbury* arose more than a century before the rise of the modern "administrative state." Wolff thinks that if *Chevron* did not exist by name, some semblance of deference would still exist as a matter of judicial practicality and restraint. What is needed, therefore, is not the reversal of *Chevron* but a return to original principles and balance. "The Supreme Court cannot decide every case," Wolff observes. "It would seem inevitable that it must revisit *Chevron* not for itself but to bring the lower courts into line." And if it does that, then "a paring down of *Chevron* might really bend the historical curve of regulations that make their way into the federal code."