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How Businesses Will React if the Supreme Court Overrules Chevron

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Taft partner Sohan Dasgupta analyzes the consequences of the US Supreme Court overturning or narrowing Chevron, which calls for deference to federal agencies' reasonable interpretations of ambiguous federal statutes.

The US Supreme Court may soon decide whether it will continue to defer to federal agencies' reasonable interpretations of ambiguous federal statutes—over those statutes' best reading.

Since its 1984 decision in *Chevron U.S.A. Inc. v. NRDC*, the court has done so. But a certiorari petition presently before the Supreme Court, in *Loper Bright Enterprises v. Raimondo*, might lead the court to overturn *Chevron* outright.

Sooner or later, *Chevron* likely will be overruled or significantly narrowed. If the Supreme Court limits *Chevron* deference, it may no longer defer to agencies' interpretation of ambiguous federal statutes any time that interpretation is reasonable—even if it's not the optimal or best interpretation.

This would mean businesses may have a greater chance at winning in court when challenging an agency. Under *Chevron* deference as it exists today (at least in theory), whatever the agency reasonably says, goes—so long as the courts think the statute is ambiguous.

Rough Path

In the past six years, the Supreme Court has not granted any agency *Chevron* deference. *Chevron's* critics contend that it prevents courts from independently judging questions of law. And in 2019, a majority of the Supreme Court in *Kisor v. Wilkie* hinted that one day *Chevron* could be overruled explicitly.

A concern *Chevron* raises is that, for some cases, it substitutes the agency's preferred view of what the law should have said—in place of the legislation that actually was enacted.

Another concern is that the Administrative Procedure Act directs courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action." To many, *Chevron* seems to contradict the APA too.

Judicial Power

Also problematic is that the US Constitution's understanding of judicial power refers to the federal courts' obligation to say "what the law is." This interpretation goes back to the Supreme Court's iconic *Marbury v. Madison* decision of 1803.

This comes substantially from the Constitution's Judicial Vesting Clause, and stands for the judicial "power to decide cases in accordance with *law*"—not (in Alexander Hamilton's words) the pretension of the courts to "substitute their own" or, for that matter, the Executive's "pleasure to the constitutional intentions of the legislature."

Chevron, many fear, tells courts to give preferment to the Executive's views of what the law should say, over what it actually says.

Due Process and Mechanics

Another concern some have is that *Chevron* is in tension with the Constitution's due process guarantee (contained in the Fifth Amendment) because *Chevron* turns the federal government into something of "a judge in [its] own case."

Agencies, this concept suggests, have too much skin in the game when they are construing statutes. Under this view, a casualty of *Chevron* is individual liberty.

There are mechanical issues associated with *Chevron* too. Just how indeterminate the answer to a textual question needs to be to count as "ambiguous" under *Chevron* bedevils many judges. As then-Judge Brett Kavanaugh concluded, "judges often cannot make th[e] initial clarity versus ambiguity decision in a settled, principled, or evenhanded way."

Another issue is that the Supreme Court has already poked holes into *Chevron*. One prominent 2014 decision of its, for instance, held that the federal government does not get *Chevron* deference on matters of "vast economic or political significance."

Finally, *Chevron* has been reproached for enabling agency gamesmanship: one justice has accused *Chevron* of "encourag[ing] executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms" and alleged that *Chevron* leads to the kind of boomeranging instability in law-making that the Framers of the Constitution set their faces against.

Broader Impact

The current Supreme Court is regarded as one that views itself as deeply contextualist and originalist. Such a Court might simply consider *Chevron* to be a bridge so far that not even stare decisis effect—the traditional principle of respecting precedent, with caveats—could rescue it.

Chevron's overruling would not guarantee that the private party would necessarily win and the agency become a permanent loser in court. It would just mean that the court would "interpret[] the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic [and substantive] canons."

In other words, the correct interpretation of the statute—according to the court's best lights—would become authoritative.

If *Chevron* were to go, then the agency probably would receive *Skidmore* deference (named after a 1944 Supreme Court decision) from the courts—meaning that courts would "follow [the] agency's [view] only to the extent it is persuasive," based on how "thorough[]" it is, how "consisten[t]" it is "with earlier and later pronouncements," and so on.

Certain consequences would follow *Chevron's* curtailment. Businesses, NGOs, individuals, and other entities regulated by an agency would be treated as that agency's equal.

Agencies would no longer get a tip on how federal statutes should be interpreted, and would not get to backdoor a policy by camouflaging it as statutory interpretation—particularly if that interpretation would not have been enacted as legislation.

Congress might also be incentivized to draft clearer—more precise, more predictive, and more definite—laws in the first place. Additionally, the regulated parties might receive "fair notice" and may therefore conform their conduct to set expectations.

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