Connecticut Debate Association
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THBT the *Chevron* deference should be overturned.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

From Wikipedia, the free encyclopedia

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), was a landmark decision of the United States Supreme Court that set forth the legal test for when U.S. federal courts must defer to a government agency's interpretation of a law or statute.[1] The decision articulated a doctrine known as "Chevron deference".[2] Chevron deference consists of a two-part test that is deferential to government agencies: first, whether Congress has spoken directly to the precise issue at question, and second, "whether the agency's answer is based on a permissible construction of the statute."

'Chevron deference' faces existential test

Harvard Gazette, by Christina Pazzanese and Jody Freeman, January 16, 2024

Jody Freeman pinpoints key question in case before SCOTUS: 'Who decides when laws aren't clear — courts or agencies?

When federal agencies interpret and enforce the laws passed by Congress, are they fulfilling their statutory duties or emboldening "the administrative state"?

On Wednesday, the Supreme Court will hear oral arguments in two cases challenging a federal rule that requires commercial fishing vessels to pay for the professional observers who monitor their catches to ensure they comply with National Marine Fisheries Service regulations. The plaintiffs in Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Department of Commerce are urging the justices to overrule a landmark holding involving the energy giant Chevron. In that decision, from 1984, the court said government agencies are best positioned to interpret federal statutes if a question is not specifically addressed, provided the interpretation is reasonable.

Since then, "Chevron deference" has been a foundational framework in administrative law. But in recent years, critics have argued that the principle violates Article III of the Constitution, which says the federal courts should handle interpretation of law.

The Gazette asked Jody Freeman, a leading administrative law expert and the Archibald Cox Professor at Harvard Law School, to explain why the court is revisiting Chevron deference after 40 years and the potential implications for regulators. Freeman responded to questions by email. Her answers have been edited for clarity and length.

What is Chevron deference and how does it relate to the two cases before the court?

Chevron is, at bottom, about the power of administrative agencies relative to the courts. It stands for the idea that judges should defer to agency interpretations of the gaps and ambiguities in the laws they implement, so long as those interpretations are reasonable. Under this doctrine, agencies get some room to maneuver when Congress does not specifically anticipate or resolve every imaginable legal question (as is often the case), on the theory that Congress entrusted the statutes in the first instance to the agencies, and because they are more expert and experienced in their domains than courts.

This is not a radical idea. Implementing health, safety, environmental, financial, and consumer-protection laws requires a great deal of day-to-day legal interpretation which depends significantly on subject-matter expertise — questions such as what makes a drug "safe and effective," what constitutes "critical habitat," what qualifies as an "unfair or deceptive" trade practice, and countless other questions big and small. Chevron says, if Congress has been clear about the statute's meaning, that's the end of the matter. But if Congress has been ambiguous or silent, the expert agency's reasonable reading should govern.

The two cases being argued raise the same issue: whether a longstanding fisheries conservation law that clearly authorizes the government to require trained, professional observers on regulated fishing vessels can be read to require that their daily rate be paid by the owners of the vessels. In essence, if Congress has not addressed the question of who pays, should the court defer to the agency's view?

The court didn't take these cases because it cares about fisheries conservation, though. They are a vehicle for the larger question: Who decides when laws aren't clear — courts or agencies? (…article continues)

How the Supreme Court could end the 'Chevron deference' foolishness.

Washington Post, by George F. Will 01/17/2024

Hyperbole being the default setting in today's discourse, we are warned that the oral arguments the Supreme Court will hear on Wednesday concern cases that could, some progressive commentators insist, "kneecap" and "take a sledgehammer" to federal agencies. And could end the government's "capacity to address the most pressing issues of our time."

This capacity already seems nonexistent. And the people who say that the doctrine of "Chevron deference," at issue Wednesday, is indispensable to today's government are actually saying two things: That today's government is incompatible with the Constitution. And that enabling the former is more important than respecting the latter.

The cases involve four small, family-owned herring fishing companies that have been ordered by a federal agency to pay the cost of a regulation the agency has decreed. The agency has ordered their fishing vessels to carry, and pay the cost of, onboard government observers. The cost can be more than $700 a day, reducing the companies' profits 20 percent. The issue is not whether the policy (it pertains to overfishing) is wise, but whether the agency can properly impose the financial burden, absent explicit statutory authorization.

The principle of Chevron deference, first propounded by the court in 1984, is that where legislative language is ambiguous or silent, a court reviewing an agency's action should defer to the agency if its action is "reasonable." This expressed progressivism's core conviction that animates the sprawling administrative state: Modern America's complexities require minute management by experts, who require -- whose expertise justifies -- vast discretion barely circumscribed by Congress.

In an amicus brief supporting the fishermen, 36 members of Congress argue that Chevron encourages two derelictions of duty -- Congress's duty to legislate, and judges' duty to adjudicate questions of law. An agency counting on judicial deference becomes what Justice Antonin Scalia called "a junior varsity Congress," telling Congress what it (perhaps) intended when it passed a vague semi-sort-of "law."

Under Chevron, agencies do, illegitimately, what Chief Justice John Marshall said is the judiciary's job: to "say what the law is." The members of Congress's amicus brief argues that not only does this commingling of executive and legislative powers "offend the fabric of the Constitution," it also violates the Administrative Procedure Act of 1946 (APA). This set rules for the administrative state, which then was beginning to balloon.

With the APA, Congress stipulated that courts would "interpret" statutes and decide "all" questions of law. It would be incongruous for the court to merely prune, rather than erase, Chevron deference. The court should not allow Congress the power to expressly delegate major rulemaking discretion to agencies. Congress lacks the power to issue judicially binding interpretations of laws; therefore it cannot delegate, by statutes, such power to the executive. Courts would never defer to agencies' interpretations of the Constitution. Why do so regarding statutes?

Chevron is a perpetual thumb on the scale, favoring today's swollen executive. And favoring the most powerful litigant, the federal government, when it is challenged by citizens, whom Chevron deference leaves uncertain about their legal rights and duties.

Eliminating Chevron would not, as excitable progressives claim, cripple the government's power to do progressives' favorite thing: regulate. Congress's regulatory power would be undiminished. Congress would, however, have to be more involved in writing, and therefore accountable for, regulations. By erasing Chevron, the court would force Congress out of its lassitude, whereby it allows agencies vast discretion to interpret vague statutes that are tissues of generalities.

"The interpretation of the laws," wrote Alexander Hamilton in Federalist 78, "is the proper and peculiar province of the courts." Ending Chevron deference, which has transferred power from Article III courts to the Article II executive, would restore a judicial responsibility and would require Congress to exercise its atrophied ability to legislate unambiguously.

Furthermore, erasing Chevron would be congruent with the court's recent, and excellent, formulation of the "major questions" doctrine, which is: If an administrative agency makes a decision with substantial economic and/or social impacts, and the decision is not based on explicit statutory authority, then the agency bears the burden of proving that its action reflects Congress's intent.

The Biden administration says that discarding Chevron would be -- hyperbole alert -- a "convulsive shock" to government. This is implicitly a damning acknowledgment that today's government depends on (what should be) a shocking departure from the Constitution's vesting of particular powers and responsibilities in the legislative and judicial branches.

Ending Chevron would end this foolishness: Congress passes laws; later, agencies tell Congress what it has done.

Why the Chevron deference is needed

Washington Post, by Miriam Becker-Cohen January 17, 2024 (Washington Post)

In his Jan. 14 op-ed, "'Chevron' could be the catch of the day," George F. Will claimed that ending Chevron deference would rein in what he calls the "sprawling administrative state" by transferring power from agencies to the legislative and judicial branches of government. Mr. Will is wrong about the former but right about the latter. Ending the Chevron deference would not return any power to Congress. Instead, it would effect a massive transfer of policymaking authority from the people's representatives in Congress to unelected federal judges.

Chevron, since 1984, has directed courts to defer to agency interpretations of ambiguous questions of law. Congress legislates against its backdrop. When it encounters areas of law that require technical expertise, it writes statutes in capacious terms to leave policy choices open to the scientists, doctors and economists who staff government agencies and have dedicated their lives to the study of particular substantive issue areas.

Thus, transferring technical policy choices away from these experts to unelected federal judges would not be an act of congressional empowerment; it would be an act of congressional defiance. Neither the Constitution nor the Administrative Procedure Act demands this rebellion.

Let's recognize the battle cry to overrule Chevron for what it is: a move in the conservative project to hamstring government by making it more difficult for agencies to implement the laws that Congress has passed, not a thoughtful reconsideration of a precedent on the basis of binding law.

Miriam Becker-Cohen, *Washington. The writer is appellate counsel at the Constitutional Accountability Center and a drafter of an amicus brief in support of the respondents in Loper Bright v. Raimondo.*

Kagan's questioning exposes the stakes of overturning the Chevron precedent

MSNBC, by Jordan Rubin January 17, 2024

The justice highlighted the implications at play right out of the gate at Wednesday's arguments at the Supreme Court. The forthcoming decision could reshape how government functions.

The Supreme Court heard oral arguments Wednesday about an important issue known as Chevron deference, which comes from the decades-old Chevron precedent under which courts defer to administrative agency expertise. The dry-sounding subject could have profound implications, affecting things like regulations over business, the environment and much more, so it's understandable why it has become a target for conservatives.

Toward the start of the lengthy hearing, Justice Elena Kagan's questions to a lawyer arguing against the Chevron precedent illustrated the issue. She asked, for example, whether a new product designed to promote healthy cholesterol levels is a "dietary supplement" or a "drug"? Her inquiry raised the broader prospect of whether it should be courts or agency experts deciding questions like these.

"You want the courts to decide that?" the justice asked incredulously.

She summed up the issue as whether the countless policy issues confronting the nation will be decided by courts that don't have expertise or agencies that do.

"Will courts decide these issues as to things they know nothing about? Courts that are completely disconnected from the policy process ... and that just don't have any expertise and experience in an area?"

For context, it's important to understand that the Chevron decision came in 1984, when Republicans had executive power and wanted to wield it instead of judges. Now that Republicans have reshaped the high court — cementing a 6-3 conservative majority — they want the justices to hold that power.

As is often the case, Kagan's questions got to the heart of the matter. But in many of the biggest cases in recent years, the Democratic appointee's views have been relegated to dissents on the Roberts Court.

Overturning 'Chevron' Can Help Rebalance the Constitutional Order

The New York Times, By David French, Jan. 21, 2024

The Supreme Court on Wednesday heard oral arguments in a case that could go a long way toward fixing some of the systemic dysfunction in American government. The case, which revisits a judicial doctrine known as the "Chevron deference," has been widely described as a conservative effort to limit government. But that's not entirely correct. The case is better understood as a key part of the effort to restore the proper balance of power among the three branches of government.

If you took high school civics, there is a good chance you've heard the phrase "coequal branches of government." It's such a common formulation for America's separation of powers that it's easy to slide into the false belief that each branch of government is equal in authority to the others.

But if you read the Constitution, you'll quickly see that while each branch of government has some power to check the others, one branch is plainly supreme. The government can't spend one dime unless it's appropriated through Congress. Impeachment gives Congress the power to fire not only the president but also any member of the Supreme Court. Only Congress has the power to declare war.

Even if the president takes the exceptional step of vetoing a bill it has passed, Congress has the power to override that veto. And the Constitution gives Congress immense power over the federal judiciary. Congress defines the number of judges and justices, sets their compensation and defines the full extent of their jurisdiction.

Not only is Congress the most powerful of the three branches of government, it's also the branch closest to the people. Members of the House and Senate are elected by popular vote, and members of the House run for election every two years. By contrast, no American ever votes for a single federal judge — let alone a Supreme Court justice — and the Electoral College distances the presidency from majority rule to such an extent that the last two Republican presidents entered office having failed to win the popular vote.

And indeed there is a compelling logic in the most powerful branch also being the branch closest to the people. It builds popular support for public policy, and it provides Americans with the crucial sense that they are participants in American democracy, not mere observers of the machinations of a distant government elite.

But by now you most likely see the problem. Congress is not performing its constitutional tasks. It's a broken institution that contains too few genuine lawmakers and far too many would-be activists and TV pundits. Time and again, it has proved incapable of compromise or of accomplishing even the most basic legislative tasks. It's been 27

years since it even passed a budget on time. And that barely begins to capture the current level of dysfunction, with a razor-thin House Republican majority consistently held hostage by a mere handful of MAGA extremists.

As Congress has shirked its duties, presidents and the courts have filled the power vacuum. Presidents have used the power of their executive agencies to promulgate new regulations without congressional involvement. Executive agencies publish 3,000 to 4,500 new rules per year, and these regulations have a substantial impact on the American economy. Compounding the problem, courts have ratified that presidential power grab by enacting a series of judge-made rules that require federal courts to defer to the decisions of executive agencies.

The most important of those judge-made rules is called "Chevron deference," named after the 1984 Supreme Court case Chevron v. Natural Resources Defense Council. The case involved a highly technical dispute over the meaning of the term "stationary source" under amendments to the Clean Air Act. Congress did not define the term, so the E.P.A. defined it for itself. The question at issue was whether the court should defer to the agency's interpretation or interpret the statute itself.

The court chose to defer to the E.P.A., and it established a default rule of deference going forward. If the statute an agency administers is "silent or ambiguous with respect to the specific issue," the majority held, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."

The justification for Chevron deference is compelling, at least on the surface. Agencies regulate some of the most complex businesses and industries in the United States. They possess a level of expertise that's clearly beyond the capabilities of Congress. Why not defer to their determinations? Isn't that simply wise?

But what might be wise in specific, highly technical circumstances can be very problematic when adopted as a general rule, as the Chevron doctrine has been. Chevron disrupted the constitutional order by effectively giving the president the power to make, interpret and enforce laws acting solely through his administrative agencies. It injected the presidency's lawmaking abilities with steroids.

This is not the way the United States was intended to function. It magnifies the power of the president beyond recognition, diminishes democracy, raises the stakes of presidential elections to destabilizing levels and puts immense pressure on the president to maximize his rule-making authority. Just as bad, it encourages congressional inaction and incompetence. If the agencies can take over when Congress is silent or ambiguous, it diminishes the necessity for Congress to speak clearly. It's much easier to punt the hard decisions to the president, and then heckle (or cheer) from Fox News or MSNBC.

How have we seen this dynamic play out? Three consecutive administrations — Obama, Trump and Biden — have attempted radically different immigration reforms through executive action rather than through legislation. We've also seen the Obama, Trump and Biden administrations enact or propose divergent rules and regulations on sex discrimination under Title IX. We've witnessed President Biden attempt to forgive student loans and mandate workplace vaccinations through executive action.

These policy disputes and policy shifts have very little to do with "agency expertise" and everything to do with presidential ideology. The language of Title IX or of federal immigration statutes isn't changing, but the ideological commitments of the president do, and the president is then using his rule-making authority to alter the law. The same law shouldn't mean wildly different things based on the whim of a president.

Wednesday's oral argument signaled that America may be on the verge of a welcome restoration of proper constitutional order. The case is called Loper Bright Enterprises v. Raimondo, and the facts are both simple and representative of how the Chevron doctrine distorts American law. The plaintiffs are fishing companies that are challenging a federal rule that requires them to pay the cost for federal observers who board their boats and observe their compliance with federal fishing rules.

The plaintiffs aren't challenging just the rule itself; they're also challenging Chevron deference, arguing that it is "at odds with the basic division of labor in the first three Articles of the Constitution." Unfortunately, much of the commentary around the case has been simplistic and reductive, casting the case as merely another Republican effort to limit government power.

But it's not that simple. After all, some conservative jurists, including most notably Antonin Scalia, agreed with Chevron. In 1989, Scalia wrote that "broad delegation to the executive is the hallmark of the modern administrative state." He said the nation was "awash in agency 'expertise.'"

Yet the question at issue in Loper Bright — like the questions at issue in many of the administrative law cases that fall under Chevron — has nothing to do with special agency expertise. Congress is perfectly qualified to determine who should bear the cost of fishery observers.

The question isn't how much power the government should possess, but rather who should possess it. And it's far from clear to me that it's inherently "conservative" or "Republican" to say that Congress, the most democratic branch of government, should possess more power than the president. Indeed, a number of conservatives adhere to a theory of presidential power called the "unitary executive" that often means the opposite, increasing executive authority at the expense of Congress.

Moreover, reversing Chevron wouldn't end executive rule-making. Nor would it block Congress from explicitly granting agencies a degree of discretion based on agency expertise. It would instead roll back the president's

extraordinary dominance. Do we really want to maintain a system that enables a man like Donald Trump to eclipse both Congress and the judiciary?

Americans feel alienated from their government for good reason. Democracy feels more distant because it is more distant. Decades of congressional failure have diminished congressional power and placed it in the hands of presidents and their army of unelected administrators. We need to reverse bad precedent. Regardless of whether one is for big government or small government, we should all be for democratic government, and that — at the very least — requires Congress to do its job.

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Will the Supreme Court Show a Little Humility?

The New York Times, By Jody Freeman and Andrew Mergen, Jan. 18, 2024

The Supreme Court heard arguments on Wednesday in two cases inviting the justices to drastically restrict the authority of federal agencies, upend decades of precedent and take more power for themselves.

At least four members of the court seem prepared to do so. The question is whether Chief Justice John Roberts or Justice Amy Coney Barrett will go along with them to provide a majority.

Out of respect for precedent and judicial humility, they should not.

On the surface the cases concern fishing regulation, but the real question before the court is this: Who fills in the gaps and resolves ambiguities Congress leaves when it writes statutes for federal agencies to put into effect and enforce? For 40 years, the answer has been the agencies, as long as they interpret the law "reasonably."

That principle comes from a 1984 case, Chevron v. Natural Resources Defense Council, one of the most widely cited cases in the law, which the Supreme Court is now being urged to jettison. Conservatives have been stalking this precedent for years, believing, in the words of Justice Neil Gorsuch in 2016, that it gives "prodigious new powers to an already titanic administrative state."

Overturning the well-established Chevron framework would invite litigation over virtually every decision, big and small, that agencies must make in their day-to-day work, decisions that are in part legal but also call for expert policy judgments. Questions such as how to define a stationary source of air pollution, what constitutes critical habitat for endangered species, which drugs are safe and effective for human use and what amounts to unfair or deceptive marketing.

The cases before the court are a good example. Plaintiffs are challenging a federal rule requiring private fishing boats to pay for onboard observers who monitor their compliance with conservation rules. Congress clearly authorized the onboard monitors in the Magnuson-Stevens Act but did not say who should pay for them. The National Marine Fisheries Service, which oversees the law, determined that a reasonable reading would require the government to pay for the training and administrative costs of the observers and private boat owners to pay their daily fees. In both cases, the lower courts ruled for the agency, with one of them citing Chevron.

When it was decided, Chevron was a conservative victory. The court deferred to the Environmental Protection Agency's pro-business interpretation of the Clean Air Act during the Reagan administration. Now, though, Chevron is seen as enabling agencies to run amok. Overturning it is part of a larger project to disable the federal administrative state.

The lawyers representing the fishermen plaintiffs in these cases are linked to the anti-regulatory Koch Industries. Conservative movement organizations are also behind other cases pending before the court seeking to restrict consumer, environmental and firearm regulation.

Already, the Supreme Court has limited Chevron, creating procedural hurdles agencies must clear to invoke it. And in 2022 the court formally embraced a new principle, the major questions doctrine, which requires agencies to point to supremely clear textual authority if they wish to do big, important things. These steps essentially aggrandize more power for the court over the prerogatives of the political branches of government.

The current court's direction contrasts sharply with the approach the court took in Chevron. The government prevails, the court said in that decision, when its reading of the law is a reasonable choice "within a gap left open by Congress." In such cases, the court went on, "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." And those who do have constituencies are the president and Congress.

After the oral arguments, we now have a better sense of where the justices stand. Several of them already have expressed deep skepticism about Chevron. Justice Clarence Thomas, once a fan of the precedent, has recanted. In a 2015 concurring opinion, he argued that deference to agencies "wrests from courts the ultimate interpretive authority to say what the law is and hands it over to the executive." Justice Gorsuch, who railed against Chevron as a lower court judge, made his ongoing antipathy plain during the oral arguments.

Justice Samuel Alito relied on Chevron when dissenting in a 2018 immigration case. Though he noted that "in recent years, several members of this court have questioned Chevron's foundations," he did not do so himself then. But recent Alito decisions have been notably hostile to federal regulation, suggesting that he is likely to go along with

the Chevron critics.

Most revealing was Justice Brett Kavanaugh. In a 2016 article in The Harvard Law Review, he wrote that "courts should still defer to agencies in cases involving statutes using broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible' or 'practicable.'" But his questions at Wednesday's oral arguments signaled strongly that he is open to overturning Chevron. Courts should "pay attention to" what agencies think, he said, but agencies should not have the power to control meaning.

That leaves Chief Justice Roberts and Justice Barrett among the six conservatives on the nine-member court. The chief justice has been more measured than his conservative colleagues, criticizing Chevron but indicating it might be limited rather than tossed out. He said relatively little at the argument, although he did observe that the Supreme Court has not cited it in several years, implying that Chevron's influence has waned.

Justice Barrett has not commented meaningfully on Chevron, either while on the court or before. During the argument, however, she seemed concerned about overturning such an important precedent and the flood of litigation it might unleash. What will happen to the thousands of cases decided under Chevron? "Isn't the door then open for litigants to come back?" she asked.

These two justices could help steer the court to cabin Chevron, perhaps limiting it to instances in which Congress has clearly delegated an ambiguity to the agency to resolve. The benefits of such an approach would be less upheaval, less disruption, less chaos and greater stability. And the Supreme Court would still be able to say what the law is in cases it wants to decide.

On the other hand, dispensing with Chevron altogether would lead to a result that Elizabeth Prelogar, the solicitor general of the United States, warned would be an "unwarranted shock to the legal system." She argued that it would embroil federal judges in intricate questions of statutory interpretation for which they lack the necessary scientific, economic or technical expertise and increase the likelihood of judicial policymaking, resulting in a raft of inconsistent lower court decisions.

Chevron is integral to the operation of a modern government in an ever more complex world, especially when Congress is in gridlock and no longer updating old statutes as it once did routinely, with input from the agencies. But even if Congress were not so dysfunctional, it cannot be expected to anticipate every interpretive question that agencies might face or to legislate on the intricacies that often drive policies in the real world. As Justice Elena Kagan noted, courts are disconnected from the policy and political process, and "judges should know what they don't know."

Especially troubling was the at times breezy disregard with which some justices treat coequal branches of government. Without any sense of irony, for instance, Justice Kavanaugh suggested that the danger of Chevron is that it allows "aggressive assertions of unilateral executive power." Some self-reflection might be in order.

Toward the end of the hourslong argument, Justice Kagan described both Chevron and stare decisis, the idea that courts should stand by things decided, as doctrines "of humility." She pressed the plaintiff's counsel: "You're saying blow up one doctrine of humility, blow up another doctrine of humility and then expect anybody to think that the courts are acting like courts."

Let's hope two of her conservative colleagues were listening.

Jody Freeman is a professor at Harvard Law School, where she teaches administrative and environmental law. Andrew Mergen, a former Justice Department lawyer, directs Harvard's environmental law and policy clinic.

A Potentially Huge Supreme Court Case Has a Hidden Conservative Backer

Hiroko Tabuchi, New York Times January 16, 2024 (NOTE: This article has been abridged.)

The Supreme Court is set to hear arguments on Wednesday that, on paper, are about a group of commercial fishermen who oppose a government fee that they consider unreasonable. But the lawyers who have helped to propel their case to the nation's highest court have a far more powerful backer: the petrochemicals billionaire Charles Koch.

The case is one of the most consequential to come before the justices in years. A victory for the fishermen would do far more than push aside the monitoring fee, part of a system meant to prevent overfishing, that they objected to. It would very likely sharply limit the power of many federal agencies to regulate not only fisheries and the environment, but also health care, finance, telecommunications and other activities, legal experts say.

"It might all sound very innocuous," said Jody Freeman, founder and director of the Harvard Law School Environmental and Energy Law Program and a former Obama White House official. "But it's connected to a much larger agenda, which is essentially to disable and dismantle federal regulation."

The lawyers who represent the New Jersey-based fishermen are working pro bono and belong to a public-interest law firm, Cause of Action, that discloses no donors and reports having no employees. However, court records show that the lawyers work for Americans for Prosperity, a group funded by Mr. Koch, the chairman of Koch Industries and a champion of anti-regulatory cause. (…article continues)

The Chevron Doctrine Discomfits the Weak

Reason Magazine, by Jacob Sullum January 17, 2024

In two cases the Supreme Court is considering, herring fishermen in New Jersey and Rhode Island are challenging regulatory fees they say were never authorized by Congress. Critics of those lawsuits misleadingly complain that the sympathetic plaintiffs are "providing cover" for a corporate attempt to "disable and dismantle" environmental regulations.

These cases ask the justices to reconsider the *Chevron* doctrine, which requires judicial deference to an administrative agency's "reasonable" interpretation of an "ambiguous" statute. While big businesses might welcome the doctrine's demise, so should anyone who cares about due process, the rule of law, and an independent judiciary, which are especially important in protecting "the little guy" from overweening executive power.

Maybe you should not take my word for that, since I work for a magazine whose publisher, Reason Foundation, has received financial support from organizations founded by Charles Koch, chairman of the petrochemical company Koch Industries. *The New York Times* describes Koch as the "hidden conservative backer" of the New Jersey case, which involves lawyers employed by the Koch-funded Americans for Prosperity.

The dispute at the center of these lawsuits is real, however, and it illustrates how vulnerable Americans are to the whims of federal agencies empowered to invent their own authority. The plaintiffs are family-owned businesses that cannot easily bear the financial burden imposed by the requirement that they not only make room on their cramped boats for observers monitoring compliance with fishery regulations but also pay for that dubious privilege.

That cost, which amounts to about a fifth of the money these businesses earn each year, adds insult to injury. "The framing generation was vexed enough by being forced to quarter British soldiers," writes Paul D. Clement, a former U.S. solicitor general who is representing the New Jersey plaintiffs, "but not even the British forced the unlucky homeowner to personally pay the redcoat's salary."

Worse, Clement notes, the relevant statute says nothing about collecting such fees from operators of herring boats in New England waters, although it does authorize them, within specified limits, for "certain North Pacific fisheries, limited access privilege programs, and foreign fishing." Two federal appeals courts, the D.C. Circuit and the 1st Circuit, nevertheless ruled that the unauthorized fees fit within the leeway required by *Chevron* deference.

The Department of Veterans Affairs took advantage of the same doctrine to deny a disabled veteran three years of benefits it owed him, relying on an arbitrary rule it invented for its own convenience. When the Supreme Court declined to hear that case in 2022, Justice Neal Gorsuch noted that *Chevron* deference systematically discomfits the weak in such disputes by allowing the government to rewrite the law in its favor.

"Many other individuals who interact with the federal government have found themselves facing similar fates," Gorsuch wrote, "including retirees who depend on federal social security benefits, immigrants hoping to win lawful admission to this country, and those who seek federal health care benefits promised by law." The examples he cited included a case he encountered as a 10th Circuit judge, involving an immigrant who was fighting deportation under an executive board ruling that contradicted the appeals court's prior interpretation of U.S. immigration laws.

The victims in such cases are not billionaires like Charles Koch. They are ordinary Americans who are hopelessly outmatched by government agencies that write their own rules.

For decades, that license allowed the Drug Enforcement Administration to keep marijuana in Schedule I of the Controlled Substances Act, a classification that President Joe Biden rightly says "makes no sense." As the Department of Health and Human Services implicitly conceded last August, that policy was based on a highly implausible reading of the statute.

The lawlessness fostered by the *Chevron* doctrine, in short, should give pause even to Koch's progressive critics. The Goliath in this story is not Koch Industries. It is an administrative state that has usurped the judicial power to interpret the statutes under which it operates.

Conservatives want to unleash the courts. They might regret asking.

The Editorial Board Washington Post Jan. 20, 2024

To hear some describe the stakes, a pair of cases argued before the Supreme Court on Wednesday could create a watershed moment in American government. Business lobbies and conservative activists see an opportunity to restrain an out-of-control "administrative state." Progressives fear the court will render the federal government incapable of responding to modern challenges from climate change to artificial intelligence.

At issue is a deceptively arcane matter: who gets to interpret the law when Congress leaves it ambiguous as it often does, sometimes inexcusably, but sometimes unavoidably. The current rule, called "Chevron deference" Çö after the 1984 case in which the court developed it Çö instructs judges to uphold challenged regulations as long as they reflect an agency's "reasonable" reading of a genuinely ambiguous law.

Agencies, the logic goes, have more expertise and on-the-ground experience than judges and are more democratically accountable Çö albeit indirectly, through the elected president. Absent a Chevron-like doctrine enforcing a degree of judicial modesty, judges could fill gaps in the law according to policy considerations they are poorly equipped to evaluate.

Conservatives see this as an abdication of the judiciary's power to "say what the law is," its exclusive purview since Marbury v. Madison. They also see it as backdoor encouragement for sloppy statute writing. This is an updated conservative take on Chevron, to be sure. Initially praised by Justice Antonin Scalia, Chevron was a unanimous

ruling to uphold a Reagan administration air pollution regulation that environmentalists considered too lax. During a long run of presidencies that, apart from Jimmy Carter's four years, spanned the late 1960s to the early 1990s, Republicans controlled the White House and the agencies to which judges were deferring.

The distribution of power has shifted since then. With a mix of good luck and Senate GOP leader Mitch McConnell's application of some hardball politics, Republicans can count on a conservative supermajority on the Supreme Court. Meanwhile, Democrats are winning more presidential elections, and their appointees have used executive powers to issue ambitious rules Çö on power plants, car emissions, financial markets, credit cards, airlines and so forth.

These political developments, as much as high-minded constitutional principle, explain conservatives' objections to the doctrine and their broader effort to invigorate judicial supervision of the executive. Chevron or no Chevron, the court majority has already started doing just that, expounding principles such as the "major questions" doctrine to strike down agency actions. In West Virginia v. Environmental Protection Agency, the court rejected a greenhouse emissions program on the grounds that Congress could not have wanted the EPA to wield the hefty regulatory powers the agency claimed without saying so more clearly in the law.

During Wednesday's oral arguments, Chief Justice John G. Roberts Jr. pointed out that the court has not relied on Chevron in years to defer to a federal agency's interpretation of an ambiguous statute. Ditching Chevron deference would be just another move this court has taken to encourage judicial intervention in executive branch actions.

In time, however, conservatives might come to regret all of this. At their core, the cases the court heard Wednesday are about power and, more specifically, whether a 40-year balance between the executive branch and the judiciary should be shifted. Long-term, who wins and who loses will depend on who controls these organs of government.

With the major-questions doctrine in place, courts already have more latitude to prevent liberal presidents from regulating ambitiously. By also pushing for Chevron's destruction, conservatives run the risk that, when Republican administrations try to write weak regulations that arguably fall short of what Congress desired, future courts might not defer to them.

This risk rises as time goes on and the judiciary continues to evolve, at some point drifting back leftward. Progressives will ask judges to force federal agencies to, say, more aggressively enforce clean-air laws, substituting their own expansive view of the law for that of agencies that might be more cautious.

The moment calls for restraint from a court decreasingly interested in this virtue. Not because overturning Chevron would permanently hobble progressive governance but because doing so would be disruptive and unnecessary. Chevron's underlying logic is sound: On balance, federal experts are better suited to filling gaps in the law than courts. Overturning Chevron, meanwhile, would spur advocates of all ideological stripes to bring countless new lawsuits before judges they believe will be sympathetic to their cause; they will have some 800 federal district court judges across the country from whom to choose.

How a SCOTUS challenge over federal power could affect health care

Axios, by Jason Milman, January 17, 2024

A Supreme Court hearing on a case that could significantly curtail the federal government's regulatory power has big implications for America's health care system.

Why it matters: The justices on Wednesday are considering whether to overturn the 40-year-old legal doctrine known as the "Chevron deference," in which the courts have given leeway to federal agencies to reasonably interpret ambiguous laws or ones subject to multiple interpretations.

Chevron has long been targeted by the conservative legal movement that's supported deregulatory efforts.

If the doctrine is overturned — which Axios senior editor Sam Baker writes is likely — more federal rules will face closer scrutiny from the courts and are less likely to survive.

Details: The case itself involves a challenge to federal oversight of herring fishing, but health experts say a rollback of authority could ultimately hinder the administration of government insurance programs like Medicare and Medicaid that cover tens of millions of people, public health protections and scientific advancement.

Essentially, they argue that federal health agencies have the subject matter expertise and the ability to deal with a range of complex issues in a timely way that Congress simply does not.

"The prospect of overruling Chevron is especially concerning in health care policy, where agencies must leverage their expertise to address emergencies, adapt to ever-changing technology, and improve health outcomes," Suhasini Ravi of Georgetown's O'Neill Institute for National and Global Health Law writes in a roundup of what health experts have told the Supreme Court.

What they're saying: Overturning Chevron would unleash a wave of litigation against federal rules governing payments to health care providers that depend on the Chevron doctrine, the American Cancer Society wrote with consumer advocates, medical associations and legal experts.

"The resulting uncertainty would be extraordinarily destabilizing, not just to the Medicare and Medicaid programs but also — given the size of these programs — to the operational and financial stability of the country's health care system as a whole," they wrote.