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Legal Sidebar

Deference and its Discontents: Will the Supreme Court Overrule *Chevron*?

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October 11, 2018

Less than a week before announcing his retirement, Justice Anthony Kennedy called for the Supreme Court to "reconsider" the seminal administrative law doctrine known as *Chevron* deference in a concurring opinion in *Pereira v. Sessions*. The doctrine, established by the Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, instructs that when reviewing certain agency interpretations of statutes, courts should defer to the agency's construction if the statute is ambiguous and the agency's construction is reasonable. Some members of the Court—namely, Justices Clarence Thomas and Neil Gorsuch—have called for reconsideration of *Chevron*. In addition, the newest Justice, Brett Kavanaugh, was a leading critic of the doctrine during his tenure on the U.S. Court of Appeals for the D.C. Circuit. The selection of Justice Kavanaugh has led commentators to question whether the Court might reconsider *Chevron* in the near future. As the Supreme Court's new term began this month, the Court confronted the issue of agency deference in *Nielsen v. Preap*, although *Chevron* itself did not come up during oral argument. Recent cases suggest, however, that the Court might continue to reaffirm the case's vitality, and if the Court were to reassess *Chevron*, it might be to narrow the circumstances under which the doctrine applies in lieu of jettisoning it.

Chevron Deference

The *Chevron* framework generally applies when a court reviews an agency's interpretation of a statute if, as the Supreme Court has said, "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." If *Chevron* applies, courts use the doctrine's two-step

Congressional Research Service
7-5700
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LSB10204

framework to review the agency interpretation. In Step One, *Chevron* instructs courts to ask whether the relevant statute is clear, using the "traditional tools of statutory construction" to determine whether Congress unambiguously resolved "the precise question at issue." If instead the statute is silent or ambiguous, courts proceed to Step Two and ask whether the agency's interpretation of the statute is reasonable.

It is this second step, in which courts uphold "reasonable" agency constructions, that embodies *Chevron* deference. In a normal statutory interpretation analysis, a court would seek to determine the *best* reading of the statute, as determined by the court itself. But under *Chevron* Step Two, a court may defer to an agency's interpretation even if it is not "the reading the court would have reached," as long as the agency's construction is reasonable. The Supreme Court explained this deference in its *Chevron* opinion by stating that where a statute is silent or ambiguous, the Court assumed that Congress had implicitly delegated interpretive authority to the agency tasked with administering that statute.

Judicial Criticism of *Chevron*

As many scholars have noted, the *Chevron* framework has long been subject to criticism (although, as others have observed, the general principle that courts will afford *some* deference to *some* agency interpretations predates the *Chevron* decision). This *Chevron* skepticism has surfaced in academia and, perhaps more importantly, in the courts. In one recent study, a majority of federal appellate judges surveyed by the authors "were decidedly anti-*Chevron*."

Supreme Court Justices Thomas and Gorsuch have voiced their own reservations about the doctrine. Justice Thomas may be the most vocal critic, arguing in one concurring opinion that *Chevron* raises constitutional separation-of-powers concerns by "preclud[ing] judges from exercising" constitutionally mandated "independent judgment" in interpreting statutes, and instead handing that interpretive power "over to the Executive." He later called for the Supreme Court to "reconsider" "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law." Justice Gorsuch is also skeptical of the doctrine. As a judge on the Tenth Circuit prior to his elevation to the Court, he echoed Justice Thomas's separation-of-powers concerns. More pointedly, he argued that *Chevron*, in conjunction with subsequent cases applying that doctrine, "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."

Narrowing *Chevron*'s Scope

Despite this criticism, the *Chevron* framework of review remains good law, and one recent study shows that the federal circuit courts of appeals have consistently applied *Chevron* to defer to agency interpretations. However, two trends in the Supreme Court's application of *Chevron* have resulted in the Court less frequently deferring to agencies under *Chevron*'s Step Two: first, a more rigorous Step One analysis; and second, the major questions doctrine.

First, as commentators have noted, a more robust inquiry into statutory meaning at *Chevron*'s Step One means that courts might be less likely to proceed to Step Two. Step One requires courts to engage in interpretation of the underlying statute, and whether a reviewing judge determines that a statute is ambiguous may turn on the judge's approach to statutory construction. If a judge is reticent to find statutory ambiguity, as Justice Kavanaugh and others have stated they are, then under the rubric of *Chevron* itself, that judge will be more likely to conclude that the statute is clear, and the deferential review involved in Step Two will never come into play. For example, in the Supreme Court's last term, the Court considered whether to defer to an agency's interpretation of a statute under *Chevron* in five opinions. In each instance, the Court's opinion concluded that *Chevron* deference did not apply because

the statutory language at issue was clear. The authors of these opinions spanned judicial philosophies: three were written by Justice Gorsuch, one was authored by Justice Ginsburg, and the last was prepared by Justice Sotomayor. Thus, this past term, the Court never deferred to an agency under *Chevron*'s Step Two, but neither did it question *Chevron* itself—although in two of Justice Gorsuch's opinions (*SAS Institute v. Iancu* and *Epic Systems Corp. v. Lewis*), he emphasized that none of the parties asked the Court to reconsider *Chevron*.

Second, some scholars have stated that *Chevron*'s scope has been narrowed through application of the major questions doctrine (sometimes known as the major rules doctrine). The major questions doctrine, while never endorsed by name by the Supreme Court, has been distilled from a number of cases in which the Supreme Court suggested that it would not defer to an agency's interpretation under *Chevron* because the disputed interpretation involved a question of "such economic and political magnitude" that it is unlikely that Congress would have implicitly delegated the authority to resolve that question to the relevant agency. Most recently, in his 2015 opinion for the Court in *King v. Burwell*, Chief Justice Roberts concluded that the *Chevron* framework was inapplicable to the IRS's proffered interpretation of certain provisions of the Patient Protection and Affordable Care Act. In the view of the Court, the question of whether certain tax credits were available for health care plans procured on federal health care exchanges was "a question of deep 'economic and political significance' that [was] central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." Instead, the Court analyzed the statute independently without any deference to the agency's position. Thus, when the major questions doctrine is invoked, it displaces *Chevron* deference. But the precise scope of this major questions doctrine remains unsettled and there is scholarly dispute regarding its wisdom.

Chevron's Future

Justice Kennedy's retirement and the confirmation of Justice Kavanaugh to fill his seat have brought renewed interest to the continuing vitality of *Chevron*. Prior to the Court's most recent term, Justice Kennedy had not seemed to take a strong stance on *Chevron*. But in June 2018, in an opinion concurring in the Court's judgment in *Pereira v. Sessions*, the now-retired Justice announced that he believed it would be "necessary and appropriate to reconsider . . . the premises that underlie *Chevron* and how courts have implemented that decision." In particular, he said that some lower courts have not engaged in a sufficiently rigorous examination of relevant statutes but were instead exhibiting "reflexive deference" to agency interpretations, suggesting "an abdication of the Judiciary's proper role in interpreting federal statutes." Justice Kennedy's parting salvo has focused attention on his successor's views on *Chevron*.

Prior to his confirmation to the Court, Justice Kavanaugh indicated skepticism of the doctrine in both academic and judicial writings. In his scholarly writing, Justice Kavanaugh argued that the *Chevron* doctrine incentivizes federal agencies to push the boundaries of their statutory authority, taking actions unless "clearly forbidden." He also criticized the mechanics of *Chevron* deference as imprecise. He is troubled by the "threshold trigger" of ambiguity in Step One, arguing that it is difficult to develop consistent rules to determine when a statute is sufficiently ambiguous. Justice Kavanaugh has indicated that he is perhaps more likely to find clarity in statutory text than some other judges, meaning that he is more likely to resolve a case at *Chevron*'s first step. In a law review article, he argued that the *Chevron* framework of review should not apply when "an agency is . . . interpreting a specific statutory term or phrase." That said, he explained that while he believes courts should engage in more rigorous review of an agency's statutory interpretation, Congress sometimes clearly delegates discretion to an agency to make policy choices within the terms of a statute. Courts should defer to agencies in situations where a statute employs "broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'" Justice Kavanaugh's judicial opinions from his time on the D.C. Circuit reflect these concerns. When dissenting from the D.C. Circuit's decision to deny rehearing en banc in *United States Telecom Association v. FCC*, then-Judge Kavanaugh articulated a distinct approach to judicial review of agency

rules that might cabin the reach of *Chevron* deference. Citing the "major rules doctrine," he wrote that when courts review agency rules, "two competing canons of statutory interpretation come into play." *Chevron* deference applies, he wrote, to ordinary agency rules; but Congress must "*clearly* authorize" major rules of great economic and political importance. If there is only *ambiguous* statutory authority to support a major rule, according to then-Judge Kavanaugh, the rule is unlawful. This encapsulation of a court's role in reviewing agency rules is arguably distinct from past cases in which the Supreme Court has declined to defer to an agency because of the importance of the issue; the requirement of a clear statement to authorize a major rule is arguably a more stringent requirement than the Court typically requires to justify agency regulation.

Nevertheless, it is unclear whether there is a majority willing to overturn or expressly limit *Chevron*—or even create the four-justice plurality necessary to grant certiorari. As discussed above, Justices Thomas and Gorsuch have expressed broad and seemingly fundamental concerns about the *Chevron* framework, suggesting they might be willing to overrule the case entirely. Justice Kavanaugh might provide a third vote to sharply limit *Chevron*—although, as mentioned, he has stated that *Chevron* deference "makes a lot of sense in certain circumstances," particularly when Congress uses words like "reasonable" that, in his view, more clearly impart policymaking discretion to agencies.

Some have speculated that Chief Justice John Roberts or Justice Samuel Alito might provide additional votes to either strictly limit or overrule *Chevron*. However, neither has expressed clear opposition to the *Chevron* framework as a whole. Other commentators have argued that, based on their past statements, these two justices may be more willing to narrow than overrule *Chevron*. Both have, in the past, opposed applying the *Chevron* framework of review to so-called jurisdictional questions, when an agency is interpreting whether it has authority to regulate. And as noted above, Chief Justice Roberts declined to apply the *Chevron* framework in *King v. Burwell* because of the significance of the question presented in the case. Additionally, in a 2017 speech, Justice Alito (seemingly unfavorably) described the result of *Chevron* deference as "a massive shift of lawmaking from the elected representatives of the people to unelected bureaucrats."

Finally, some have argued that Justice Stephen Breyer might also support narrowing *Chevron*'s scope—albeit under a distinct theory. Justice Breyer has long argued that courts should employ a multifactor inquiry when determining whether an agency interpretation is entitled to deference. He seemed to reassert this view of *Chevron* this past term in a dissenting opinion in *SAS Institute v. Iancu*. In that dissent, Justice Breyer emphasized that courts should not treat *Chevron* "like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision." Instead, he said, *Chevron* is "a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have." To determine whether the disputed agency interpretation was entitled to deference under *Chevron*, he then asked not whether the statute was clear or ambiguous, but instead looked to the "statute's complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience."

At least one law review article has suggested that the Supreme Court may want to retain *Chevron* as a doctrine governing the *lower* courts—even if the High Court does not, in practice, strictly follow the doctrine itself. This theory, too, suggests that the Court might be unlikely to overrule *Chevron*, even if the Court narrows its application.

Looking to the current term, which started at the beginning of October 2018, the Supreme Court has yet to agree to hear any cases expressly challenging *Chevron* or other Court rulings governing judicial deference to agency action. The Court could, however, still add cases to its docket that present the issue. There are at least two pending petitions for certiorari that may present the Court with the opportunity to further clarify the proper scope of *Chevron* deference, both of which have been set for consideration at the October 26 conference.

Further, as suggested at the outset, the Court has agreed to hear some cases that implicate doctrines of agency deference, even if the parties in those cases do not challenge the general validity of those doctrines. During its October sitting, the Court has heard oral argument on two cases in which the lower court had applied the *Chevron* framework of review. First, in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, the High Court is asked to review a decision by the U.S. Court of Appeals for the Fifth Circuit, which concluded that it was appropriate to defer to the Fish and Wildlife Service's interpretation of the Endangered Species Act—an interpretation that allowed the Service to designate a certain area as a critical habitat for the dusky gopher frog. Agency deference concepts, however, did not come up during oral argument, although observers noted that the Court was engaged in significant debate over the proper interpretation of the relevant statutory provision. Second, in *Nielsen v. Preap*, the High Court is reviewing a decision by the U.S. Court of Appeals for the Ninth Circuit on whether to defer under *Chevron* to the Department of Homeland Security's interpretation of a provision of the Immigration and Nationality Act. The Ninth Circuit noted that two other federal courts of appeals had deferred under *Chevron* to the agency's interpretation, but ultimately concluded that the statute was unambiguous, ending its own *Chevron* analysis at Step One. Although the parties' briefs had discussed *Chevron*, the case was not mentioned by name during oral argument before the Supreme Court. The concept of agency deference came up only in passing, when counsel for the parties challenging the agency's interpretation mentioned that some courts had deferred to the agency's reading. While any prediction of the Court's decisions would be premature at this time, the fact that the Justices used oral argument to explore statutory meaning, absent any discussion of *Chevron* deference, may suggest that the Court will continue its recent tendency to find clear meaning in statutes and resolve cases at *Chevron*'s first step, rather than deferring to an agency's interpretation.