TPInsights

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Getting rid of Chevron? Be Careful What you Wish For

While unlikely to draw the level of attention given to abortion rights, the Affordable Care Act, and affirmative action, the status of the "*Chevron* doctrine" is, to many, a crucial consideration for and against the confirmation of Judge Brett Kavanaugh's nomination to the Supreme Court. The *Chevron* doctrine gives regulatory agencies substantial discretion to decide what they can do under the laws that define their authority. The most recent Supreme Court appointee, Justice Neil Gorsuch, opposes Chevron. The doctrine is central to those concerned with what they view as the unjustified growth of the power of regulatory agencies in the "administrative state" or, to use a more conspiratorial term, the "deep state." Those with this view, however, should re-member that while regulations can reduce efficiency, *Chevron* deference has been used in ways that increase economic efficiency. Thus, eliminating it may not yield the hoped-for benefits.

Why is does the "*Chevron* doctrine" exist in the first place? It is the current legal answer to the question of how to interpret vague regulatory statutes. It holds that regulatory agencies should be given deference in their interpretations of vague laws (hence, "*Chevron* deference"). Regulatory statutes are often vague, sometimes because it is not possible to foresee all circumstances, and sometimes intentionally so that supporters could sell different meanings to donors, constituents, and perhaps themselves. But if regulatory statutes are vague, who gets to decide what they mean becomes paramount.

The doctrine comes from a 1984 Supreme Court decision, *Chevron et al. v. National Re-sources Defense Council* (NRDC). While *Chevron* was the lead petitioner, the case at its heart was a dispute between NRDC and the Environmental Protection Agency (EPA) about whether a permit was necessary to approve "new or modified major stationary sources" of pollution. The issue turned on whether EPA could determine under the Clean Air Act that an entire manufacturing plant was a single "stationary source" or if, as NRDC argued, each polluting unit within the plant was a "stationary source" potentially needing a permit.

The D.C. Circuit Court of Appeals, in an opinion by then Circuit Judge Ruth Bader Ginsburg, had ruled in favor of NRDC's view, but the Supreme Court reversed that decision, giving birth to the *Chevron* doctrine and the last thirty-five years of administrative law. In the Court's words, the test for agency discretion is simply stated, with two steps:

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- First is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."
- Second, "if the statute is silent or ambiguous with respect to the specific issue . . . there is an express delegation

> of authority to the agency.... [A] court may not substi-tute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

The second step, which limits a court's ability to "substitute its own construction of a statutory provision," is the controversial heart of the *Chevron* doctrine and the basis for concern that it is responsible for a runaway administrative state.

I'm not a lawyer, so it's not my place to evaluate legal arguments regarding whether *Chevron* is an unconstitutional delegation of Congress's legislative authority to regulatory agencies. However, policy issues are at stake as well. Many who put competition and economic efficiency at or near the top of the list of criteria for good policy agree that the *Chevron* doctrine should be vacated. The reasoning goes as follows:

- Markets, by promoting economic efficiency, are good.
- Regulation, by interfering with markets, is presumptively bad.
- More regulatory discretion leads to more interference, making matters worse.
- Therefore, the *Chevron* doctrine should go.

The error is in the third bullet. Certainly, giving unelected regulators more discretion can lead to more harm—although it is not obvious that reallocating that discretion to the unelected judiciary is necessarily an improvement. However, regulators can use their discretion to interpret vague provisions of regulatory law to promote more economically efficient outcomes.

The latter is more than a theoretical possibility; the leading cases point in just that direction. First and perhaps foremost is *Chevron* itself. The relevance of the interpretation of "stationary source" was that environmental permits were not necessary if the pollution from that "stationary source" did not increase. The Reagan Era EPA's interpretation of the Clean Air Act gave firms greater latitude to avoid its permitting process if a potential polluter used emissions reductions elsewhere in the plant to offset any negative consequences from installing or modifying a unit within the plant. This flexibility allows a firm to meet an emissions target at lower cost, equivalent to an intra-plant emissions trading program. Had EPA lacked that discretion, economic efficiency could have decreased.

[Irresistible Factoid #1: The EPA administrator whose discretion NRDC initially contested and what was ultimately upheld in *Chevron* was Anne Gorsuch, mother of Neil Gorsuch, who, as noted, is a leading *Chevron* opponent.]

The case for which this doctrine is named is not the only example. In *City of Arlington, Texas v. Federal Communications Commission*, the issue was whether the FCC had the authority to set a time limit for state and local zoning authorities to rule on applications for putting wire-less telecommunications towers in particular locations. Writing for the majority in the 2013 decision, Justice Antonin Scalia found that the FCC had the authority under *Chevron* to interpret not only a particular term, but its own jurisdiction relative to state and local governments in these siting decisions. This decision allowed the FCC to accelerate the development of mobile telecommunications services across the country.

Perhaps the most relevant Supreme Court *Chevron*-related opinion these days is *National Cable Television Association v. Brand X*, decided in 2005. "Brand X" was a generic name for firms that wanted to offer broadband service by using facilities owned by the existing cable operator at regulated wholesale access prices, not by building their own facilities. As with *Chevron*, the real respondent was the regulator, in this case the FCC. The *Chevron* issue was whether the FCC had the authority under the Telecommunications Act of 1996 to classify broadband data as an information service or a telecommunications service. Only under the latter classification would the FCC be required to force cable companies to provide access as a regulated common carrier. The majority found that the Telecommunications Act of 1996 was sufficiently vague that the FCC could classify broadband as either a telecommunications or, as it did at the time, an information service. Here again, *Chevron* deference to the regulator led to an arguably procompetitive and certainly deregulatory outcome.

[Irresistible Factoid #2: Normally two peas in the same jurisprudential pod, Justice Clarence Thomas wrote the majority opinion while Justice Scalia wrote the (scathing) dissent. I remain curious as to whether there were any other such instances while both were on the Court.]

Brand X remains relevant today because the FCC used the "either/or" aspect to justify reclassifying broadband as a telecommunications service to justify its 2015 promulgation of net neutrality rules, and the succeeding FCC used *Brand X* finding to justify in 2017 re-reclassifying broadband as an information service in rescinding the 2015 rules.

Undoubtedly, one can imagine circumstances where agencies interpret vague statutory provisions in ways that limit rather than advance market-like outcomes and economic efficiency. And certainly, respecting the constitutional division of governmental labor between legislative, executive, and judicial branch warrant some if not primary consideration in the debate over the *Chevron* doctrine. But those who want to get rid of *Chevron* to limit regulatory aversion to markets should look at the record and think again.

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