US Law Week
Jan. 22, 2024, 4:30 AM EST

Supreme Court Launches Latest Salvo in War on Federal Government

Column

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Columnist Tonja Jacobi of Emory Law writes about the US Supreme Court and legal ethics. Here, she looks at the Supreme Court's agenda to weaken federal agencies' authority—a movement that has gained momentum over decades.

The US Supreme Court heard argument Jan. 17 on whether to overturn one of the most foundational cases controlling how government agencies can interpret legislation. How it rules could determine whether government can operate effectively going forward.

Forty years ago next month, in *Chevron v. Natural Resources Defense Council*, the court ruled that when a statute is ambiguous, courts should defer to reasonable agency interpretations. This seemingly technical rule is essential to a properly functioning government: Congress can't write legislation specifically enough to cover every minor nuance in every situation.

Congress depends on agency experts to fill in the details to make regulation work. And if courts can second-guess every agency decision across the spectrum of regulations covering health, the environment, worker safety, and more, the government will effectively be hamstrung.

The pair of cases before the court—*Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*—seem custom-made for showing government action to be unreasonable. A federal rule required fishing companies pay the salaries of agency officers whom they are obliged to carry aboard to monitor compliance with other rules. The total cost was capped, but at a whopping 20% of annual revenue.

Chevron is a meta-case, a landmark ruling that spells out a broad principle to guide future decisions. But its broad application won't give the justices pause. Last term, the court effectively overruled another meta-case with its *Dobbs* decision, *Planned Parenthood v. Casey,* which laid out the principles for when cases should be reversed.

Some justices have been chomping at the bit to overturn *Chevron* for years. Justice Neil Gorsuch has long championed overturning *Chevron*, saying in a recent case that *Chevron* is contrary to "the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts." And he is gaining allies: Justice Clarence Thomas previously applied *Chevron* but now says that "*Chevron* is in serious tension with the Constitution."

At oral arguments, the liberal justices pointed out the minutiae that government agencies regulate, like how best to deliver cholesterol drugs, which courts can't assess with any expertise. They described the inability of Congress to look into the future with specificity, such as with regards to artificial intelligence. And they warned that 17,000 lower court rulings would be up for re-argumentation.

But all six conservative justices critiqued *Chevron*, while downplaying the significance of overruling it.

Justices Gorsuch, Samuel Alito, and Amy Coney Barrett all stressed that it's ambiguous what counts as ambiguity in legislation, suggesting it's unclear when *Chevron* applies currently anyway.

Justices Gorsuch and Brett Kavanaugh questioned whether overruling *Chevron* would really be a shock to the system, given that "*Chevron* itself ushers in shocks to the system every four or eight years when a new administration comes in."

And Chief Justice John Roberts suggested the court had already effectively "overruled [Chevron] in practice" by not applying it, hinting he would shunt it aside rather than overrule it, similar to his position with *Roe v. Wade*.

Supporters of the *Chevron* doctrine stress that the modern administrative state depends on reliance on agency interpretation. It's sometimes overlooked that those who oppose *Chevron* understand this basic point. Opponents understand that agency directives make regulation meaningful and they see abolishing *Chevron* as a way of stopping regulation in its tracks.

Understanding the evolution of the conservative position on *Chevron* reveals the potential significance of these cases.

Chevron was a unanimous decision by the Rehnquist court in the 1980s—albeit with three judges not participating—and the conservative Supreme Court embraced *Chevron* deference. But at that time, the Reagan administration was issuing conservative interpretations of laws, whereas the lower courts were more liberal.

Within a few years, Reagan and George H.W. Bush appointees had filled the lower courts, and Bill Clinton took the White House. And so the still-conservative Supreme Court became more open to lower court interpretation than agency interpretation.

Back then, conservative support for *Chevron* swung based on the ideological lean of the agencies in relation to the lower courts. Since, conservatism has moved far right, and a segment of conservatives oppose government action no matter what the ideological bent. They want full deregulation. Those voices have become increasingly influential on the court.

Federal appeals courts have been far more friendly to *Chevron*, finding it applies—i.e., there's enough ambiguity in legislation to warrant agency interpretation—in 50% of cases, and agencies win 57% of the time. In contrast, the Supreme Court finds ambiguity in only 10% of cases, and agencies win only 30% of the time. Some Supreme Court justices want to pretend there is zero ambiguity in legislation and do away with *Chevron* deference altogether.

Killing *Chevron* deference would work hand-in-hand with other doctrines the Supreme Court has developed in recent years to limit government functioning, such as the "major questions doctrine," which presumes Congress hasn't delegated authority to executive agencies on issues of major political or economic significance and requires clear statements by Congress to do so.

Most major pieces of legislation involve delegations to agencies to make the legislation work in practice. And the major questions doctrine, invented by the Supreme Court as a restriction on *Chevron* and expanded to the clear statement requirement, is being applied to legislation written long before the court came up with this new barrier. The Rehnquist court-created federalist canon requires a similar clear statement to overcome, presuming invalidity of federal government action in realms it deems better suited to the states.

With these doctrines, invented by conservative justices in the last few decades, the court can effectively cut back major legislation. If *Chevron* goes, even if Congress manages to overcome gridlock in passing legislation and also clearly specify that it means to delegate authority to agencies, that delegation will be subject to constant legal attack.

Altogether, these rulings stack the odds against the federal government functioning as Congress intends, while also promoting an ultraconservative agenda of deregulation. Overruling *Chevron* would be a big step in achieving that goal.

The cases are Relentless v. Department of Commerce, U.S. No. 22-1219, argued 1/17/24; and Loper Bright Enterprises v. Raimondo, U.S., No. 22-451, argued 1/17/24.

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