Perspectives from FSF Scholars
August 8, 2014
Vol. 9, No. 28

Happy 30th Anniversary, Chevron!

by

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The Hill
August 8, 2014

This year marks the 30th anniversary of the Supreme Court's landmark *Chevron USA Inc. v. Natural Resources Defense Council* decision. Justice John Paul Stevens's 1984 opinion for a unanimous court fundamentally altered the existing jurisprudence regarding the deference owed decisions of administrative agencies by reviewing courts.

By doing so, the *Chevron* doctrine – as the new deference standard quickly came to be known – has facilitated the ongoing expansion of the modern regulatory state.

Chevron's citation in law review articles rivals *Marbury v. Madison*. At first blush, this may seem surprising. But not when you consider that the *Chevron* doctrine impacts relations among Congress, the executive branch and the courts – just as *Marbury* did.

Chevron's central holding is this: When a statutory provision is ambiguous, if the agency's interpretation is "based on a permissible construction of the statute," then the agency's interpretation is to be given "controlling weight." So, in most cases in which a reviewing court determines that Congress's intent is not clear regarding the interpretative issue at hand, the

agency's own interpretation prevails. Before *Chevron*, reviewing courts usually applied a multi-factored deference test articulated in the Supreme Court's 1944 *Skidmore v. Swift & Co.* decision. This test sought to determine the overall persuasiveness of the agency's interpretation by considering factors such as the thoroughness of the agency's investigation, the validity of its reasoning and the consistency of its interpretation over time.

Stevens offered this explanation for the new deference test announced in *Chevron*:

> "[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choice – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."

This rationale provided a foundational construct for fitting administrative agencies into the separation of powers doctrine at the core of our constitutional regime. In this view, the administrative state's legitimacy would be called into question if Congress's delegation of policymaking authority, necessary to achieve gap-filling in ambiguous statues, ended up in the hands of politically unaccountable judges rather than the politically accountable executive branch.

Understood this way, in the context of our system of separated powers and political accountability, *Chevron* makes considerable sense, even as it continues to generate much controversy. Not a little of this controversy relates to the claim – to which I subscribe – that *Chevron*, by virtue of giving agency interpretations of ambiguous statutory provisions "controlling weight," has facilitated the steady growth of the regulatory state. This certainly is a likely result because of the natural bureaucratic imperative for agencies, granted leeway to do so, to interpret delegations of authority in a way that expands, rather than contracts, their own authority.

No doubt *Chevron*'s deference requirement, in some sense, is in tension with Chief Justice John Marshall's famous declaration in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." Indeed, Harvard Law School Professor Cass Sunstein, President Obama's first "regulatory czar," has called *Chevron* the "counter-*Marbury* for the administrative state" because it holds that "in the face of ambiguity, it is emphatically the duty of the administrative department to say what the law is."

To the extent that the *Chevron* doctrine – the counter-*Marbury* – in fact facilitates aggrandizement of power by government officials all too eager to expand administrative authority, there is a ready remedy. Congress can choose to legislate in a way that makes its intent unmistakably clear. Remember, absent ambiguity in the statute, a reviewing court never reaches the question of how much deference is due the agency's own interpretation.

Congress legislating with unmistakable clarity? I understand that in the legislative sausage-making process this is an ideal infrequently realized. In many instances, Congress actually intends, whether or not it says so explicitly, to leave "gap-filling" for the agencies. That way, when an agency's action rouses the public's ire, Congress can blame the bureaucrats for overreaching.

In any event, for better or worse, the *Chevron* doctrine now is embedded in our jurisprudence. We might as well just say, "Happy 30th Anniversary," as we continue to ponder how this landmark decision has altered relationships among our three branches of government.

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