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Chevron Decision's Domain May Be Shrinking

by

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Last August, in a column for *The Hill* titled "[Happy 30th Anniversary, Chevron!](#)," I said that the Supreme Court's 1984 landmark decision in *Chevron USA Inc. v. Natural Resources Defense Council* had "fundamentally altered the existing jurisprudence regarding the deference owed decisions of administrative agencies by reviewing courts." And I concluded that, "for better or worse, the *Chevron* doctrine now is embedded in our jurisprudence."

Well, maybe not. Some portents in two major late term Supreme Court decisions hint that perhaps *Chevron's* domain is shrinking. If this is so, the implications for the exercise of broad discretion by the federal administrative agencies are considerable. And any weakening of *Chevron's* deference doctrine might mean another judicial defeat for the Federal Communications Commission in its effort to sustain new Internet regulations.

Under *Chevron*, if a reviewing court deems a statutory provision ambiguous and the agency's interpretation reasonable, then the agency's interpretation is to be given "controlling weight." As I said in my [earlier column](#), by virtue of according such deference to agency statutory interpretations, *Chevron* "has facilitated the steady growth of the administrative state."

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Now comes Chief Justice Roberts' opinion in *King v. Burwell* rejecting the challenge to the Obama Administration's implementation of the Affordable Care Act ("ACA"). Despite language in the ACA that appears, on its face, to limit tax credits to those purchasing health insurance through "an Exchange established by the State," Chief Justice Roberts concluded that, taken in context of the entire statutory framework, Congress did not intend for the federal subsidies to be limited to those purchasing insurance only through State-established exchanges.

There is vigorous debate, of course, concerning the propriety of the Chief Justice's approach to interpreting the ACA. But what's important for my purpose here is the way he treated *Chevron*. Because, after all, a principal Obama Administration claim was that, to the extent of any ambiguity, its interpretation should be given controlling weight.

In rejecting the ACA challenge, Roberts refrained, at least explicitly, from relying on *Chevron* deference, despite acknowledging the statute's ambiguity. While observing that *Chevron*'s approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," he nevertheless declared that this was one of the "extraordinary cases" in which the *Chevron* doctrine doesn't apply. Why not? Because, according to Roberts, it involves a question of such deep "economic and political significance that "had Congress wished to assign that question to an agency, it surely would have done so expressly."

There is no doubt that *King v. Burwell*, with the fate of the ACA almost certainly turning on the outcome, involved a question of deep economic and political significance. But so do many cases that reach the Supreme Court, including many whose outcome previously has been determined by reliance on *Chevron* deference. The economic and political significance of a case may be in the eye of the beholder – that is to say, the judge. In any event, it is easy to see that, by avoiding reliance on *Chevron*, Chief Justice Roberts, whether deliberately or not, may have diminished *Chevron*'s domain in future cases – and thereby diminished the power of federal agencies no longer accorded as much judicial deference.

Chevron treatment in another late term decision, *Michigan v. EPA*, is interesting too. In *Michigan*, Justice Scalia, writing for the majority, held that EPA's interpretation of a Clean Air Act provision to exclude consideration of costs was unreasonable. Under the statute, EPA may regulate power plants only if it concludes "regulation is appropriate and necessary." Justice Scalia, while not questioning *Chevron*'s applicability, determined that, "even under this deferential standard," EPA's interpretation of the statute was unreasonable. Thus, *Chevron* did not carry the day.

Not only did *Chevron* not carry the day, but Justice Thomas used his concurring opinion to call for a wholesale revisiting of the deference doctrine: "[W]e seem to be straying further from the Constitution without so much as asking why. We should stop to consider that document before blithely giving the force of law to any other 'interpretations' of federal statutes."

I don't want to suggest *Chevron*'s demise is imminent. But the *King* and *Michigan* cases could portend a diminished role, at least in some cases. One such case might be the appeal, now

pending in the D.C. Circuit, of the FCC's *Open Internet* order that fundamentally changes the way Internet service providers ("ISPs") are regulated. The FCC abandoned its previous interpretation of Communications Act in now classifying ISPs as regulated common carriers rather than unregulated information service providers. The ISPs claim that regulating them in this way, in essence as public utilities, will discourage Internet investment and innovation.

Certainly there is a good argument, a la *King*, that a case involving utility-like regulation of Internet providers is one of deep economic and political significance that should be decided without resort to *Chevron* deference, even though, ironically, it was Justice Thomas, relying heavily on *Chevron*, who affirmed the FCC's 2005 determination that ISPs are not common carriers.

Moreover, even assuming a court does apply *Chevron*, it is arguable, a la *Michigan*, that the FCC's order will be deemed unreasonable because the FCC's consideration of the costs imposed by the agency's regulation, at best, was paltry.

In sum, it could be that the *King* and *Michigan* cases, each in their own way, serve to undermine the *Chevron*'s reach. If this is true, the chances the FCC will prevail in the appeal of its *Open Internet* order may be undermined too.

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