Strategic Perspectives

2022 Supreme Court Decisions Signal Erosion on the Chevron Doctrine

By Jamie Cain and John Coffron[1]

Last year, around the same time as their landmark decision in *Dobbs* v. *Jackson Women's Health Organization*[2], the Supreme Court handed down two quieter decisions, weighing in on another controversial forty-year line of precedent – the *Chevron* doctrine. The first decision, *AHA v. Becerra,* involved a Department of Health and Human Services ("DHHS") regulation of Medicare drug reimbursement rates for certain hospitals.[3] The second, *West Virginia v. EPA,* involved a question of interpretation of the Clean Air Act ("Becerra") by the Environmental Protection Agency ("EPA") regarding the EPA's plan to devise carbon emission caps by shifting its approach to electricity generation.[4]

Each case centered on a very narrow issue, but involved an issue relevant to every federally regulated industry – how much weight to give a federal agency's interpretation of a statute when challenged in court. Before *West Virginia v. EPA,* the answer to this question was that agency interpretations, if done through formal action, generally carried decisive weight. Now, that answer is unclear, potentially unseating decades of regulatory activity, including by federal financial institutions and market regulators.

Potential Impact on Recent Rulemaking

The impact of these cases appears to have already had an effect on at least one regulator. In its recent proposed rulemaking required by the Adjustable Interest Rate (LIBOR) Act (the "Act")[5], the Federal Reserve Board (the "Board"), without specifically mentioning the *Chevron* doctrine or the recent cases discussed herein, addressed potential concerns regarding the scope of its authority to provide an interpretation as to when LIBOR would cease to be available or no longer representative of the underlying markets on which LIBOR was based, triggering the application of fallbacks in financial and other contracts that use LIBOR to a nonLIBOR rate. The potential need for such an interpretation arose in the context of the Board seeking comments to the Proposed Rule, including whether it should define the trigger events for the application of contractual fallback rates that were deemed adequate under the Act and the Proposed Rule ("non-covered contracts"), in addition to defining proposed fallback rates that would be imposed by operation of law in the absence of fallbacks that would be deemed adequate ("covered contracts").[6] The Act mandated that fallback rates for covered contracts would be defined in a Board rule and would include trigger events with respect to financial instruments and other contracts without LIBOR fallbacks or with LIBOR fallbacks that were otherwise deemed inadequate. In the Proposed Rule, the Board noted there was an ambiguity under the Act as to whether the triggers that would apply for the application of mandated fallbacks under covered contracts should also apply to fallbacks under non-covered contracts (other than those that specifically indicate in writing that they are not subject to the Act) if the fallbacks under such contracts apply once LIBOR is no longer available

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2 *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (concluding that the Constitution of the United States does not confer a right to abortion). The Dobbs decision curtails prior precedent established in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

3 142 S. Ct. 1896, 1901 (2022).

4 142 S. Ct. 2587, 2602-03 (2022).

5 Regulation Implementing the Adjustable Interest Rate (LIBOR) Act, 87 Fed. Reg. 45,268 (proposed July 19, 2022) (the "Proposed Rule") (promulgating regulations as required under the Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5807 (LexisNexis 2022)). On December 16, 2022, the rule was adopted and finalized in 12 C.F.R. pt. 253.

6 87 Fed. Reg, at 45,273, 45,277.

but do not address the possibility of the continued publication of a LIBOR that has been determined by a regulator as "not to be representative of the underlying market or the economic reality LIBOR had been intended to measure" (which could be the case if a so-called synthetic LIBOR, e.g., a rate denoted "LIBOR" but determined using a formula that was not based on transaction rates using LIBOR, rates used in transactions that the FCA allowed to be published and used for certain limited regulator approved purposes).[7]

While the Proposed Rule did not clarify this ambiguity, it sought comments on whether it should.[8] In doing so, the Board indicated that the rule's clarification of what triggers should apply to non-covered contracts could be justified using *Chevron*-like arguments akin to those used to uphold prior regulator interpretations of federal regulators' rule-making authority. Specifically, the Board noted that:

> "...the findings and purpose of the LIBOR Act indicates that Congress sought to "establish a clear and uniform process...—for *replacing LIBOR* in existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate" based on a finding that "the cessation or non-representativeness of LIBOR could result in disruptive litigation related to existing contracts that do not provide for the use of a clearly defined or practicable replacement benchmark rate."[9] In addition, Congress sought to "allow existing contracts that reference LIBOR but provide for the use of a clearly defined and practicable replacement rate, to operate according to their terms."[10]

The Board further indicated that it believed, based on the foregoing findings, that: "Congress intended that, in the event LIBOR ceases to be published *or becomes nonrepresentative* on the LIBOR replacement date, a LIBOR contract with a clear and practicable benchmark replacement would replace references to LIBOR in the contract with the specified benchmark replacement, even if synthetic LIBOR continues to be published on and after the LIBOR replacement date."

Moreover, the Board further noted that non-covered contracts had appropriate LIBOR fallbacks, "... a sensible and reasonable expectation of the parties at the time of the agreement would have been that, upon the non-representativeness of LIBOR, [the non-covered contract's] fallback provision would operate to replace LIBOR, rather than binding the parties to a synthetic LIBOR rate that may not have been anticipated to exist at the time of the agreement...." The Board went further to say that synthetic LIBOR was not the LIBOR being replaced since the former did not represent the underlying rates represented by LIBOR.[11] The Board also stated its belief that including such a clarification would be useful and "—also may promote the LIBOR Act's intention to preclude disruptive ligation related to existing contracts' references to LIBOR".[12]

Alternatively, the Board left open the possibility that it could decide not to offer particular interpretation or clarification concerning non-covered contracts that do not contain an express non-representativeness or similar triggering provision should synthetic LIBOR be published on and after the LIBOR replacement date. This position may be reasonable since this particular situation was not specifically addressed in the Act, and non-covered contracts include an adequate fallback rate and are otherwise generally presumed to be unaffected by the Act. The Board noted, in light of the foregoing, that it "may be prudent" not to address this in the final rule.[13]

An effect of the Board's non-action would mean that if a non-representative synthetic LIBOR was published and, to the extent triggers of such fallbacks in a non-covered contract did not specifically address whether such publication would trigger the application of fallbacks and would not constitute cessation of the publication or unavailability of LIBOR, then the use of synthetic LIBOR could occur in such non-covered contracts until no longer published or available. (At such point,

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7 *See id.* at 45,272-73. Synthetic LIBOR has been approved by the U.K. Financial Conduct Authority (the "FCA"), the regulator on the administration of LIBOR rates, to be published for certain sterling and yen transactions, and may be approved for certain U.S, dollar transactions; *see* CP22/21: Consultation on 'synthetic' US dollar LIBOR and feedback to CP22/11, https://www.fca.org.uk/publication5/consultation-papers/cp22-21-synthetic-us-dollar-libor ARTICLE II. In either case, the synthetic LIBOR that has been or will be published deemed non-representative.

8 *See id.* at 45,277.

9 *Id.* at 45,273 (citing Act section 102(a)(3)-(b)(1)).

10 *Id.* (citing Act section 102(b)(3)).

11 *Id.*

12 *Id.* (citing Act section 102(b)(2), 102(b)(3)).

13 87 Fed. Reg, at 45,273.

though not addressed by the Final Board Rule, it could reasonably be assumed that the agreed upon non-LIBOR fallbacks would then apply.) Ultimately, the Board in its final rule determined not to issue rules for determining triggers for non-covered contracts as beyond the scope of its authority.[14] The Board did, however, indicate it had the interpretive authority to establish the trigger event for contracts that provide for the exercise of discretion to determine a fallback to LIBOR where no fallback had been specified in a contract, if such discretion is not exercised on or prior to the trigger date specified in the final rule, then the application of a fallback mandated in the final rule is required.[15]

Overview of the Chevron Doctrine

The *Chevron* doctrine originated from the Supreme Court's 1984 decision in *Chevron, LLS-Si, Inc. v. NRDC, Inc.,* where a company, Chevron U.S.A., Inc. ("Chevron"), challenged an EPA regulation that interpreted the Clean Air Act.[16] The Court found that the EPA's interpretation of the statute represented a reasonable accommodation of manifestly competing interests and was entitled to deference.[17] In reaching this conclusion, The Supreme Court held that where a statute is silent or ambiguous on a specific issue, courts should defer to the agency's interpretation of the statute on that issue, so long as the agency's action was a permissible construction of the statute.[18] Thus, the Court created a two-step test to determine if an agency's interpretation of a statute should be entitled to deference and have decisive weight. First, a court will ask if Congress was clear or ambiguous on the issue interpreted by the agency. ("Step One"). Then, if Congress was ambiguous, a court must ask whether the agency's action was a permissible construction of the statute, or whether its action was reasonable in light of the statute's purpose. ("Step Two").

Chevron deference replaced *Skidmore* deference, where courts would defer to an agency's interpretation only as much as their interpretation deserves, considering (1) the thoroughness of its consideration; (2) the validity of its reasoning; (3) its consistency with earlier and later pronouncements; and (4) all factors giving persuasive power.[19] Subsequently, the court limited the scope of *Chevron* deference in *U.S. v. Mead,* where the Court stated that *Chevron* only applies if Congress indicated that they intended to delegate such authority to the agency.[20] *Mead,* in effect, created a precondition to the application of the *Chevron* doctrine, that agency action is only awarded deference if its interpretation was through formal agency action, meaning through notice-and-comment rulemaking or an adjudication.

The Court later also created *Auer* deference, which is based on *Chevron* deference, but answers the question of when courts should defer to an agency's interpretation of its own ambiguous regulations.[21] This doctrine was upheld in *Kisor v. Wilkie,* but limiting *Auer* deference only to where a regulation was "genuinely ambiguous."[22]

Almost since its inception, *Chevron* has been subject to scrutiny and criticism from legal scholars, industry trade organizations, and even Supreme Court Justices.[23] Critics of *Chevron* have argued that *Chevron* allows administrations to change interpretations of statutes, through a court's deference to agency interpretations, even if interpreted to its almost opposite effect by the prior administration.[24] This raises questions of reasonableness and consistency in the law. In light of this, some argue that the second step of *Chevron,* which has traditionally been a very low bar to meet, should examine if an agency's interpretation is reasonable,

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14 12 C.F.R. pt. 253.3 (2022).
15 *Id.*
16 467 U.S. 837, 841 (1984).
17 *Id.* at 859-866.
18 *Id.* at 866.
19 *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).
20 *U.S, v. Mead,* 533 U.S. 218, 232 (2001).
21 *See Auer v. Robbins,* 519 U.S. 452 (1997) (giving agencies the highest level of deference for such interpretations),
22 139 S. Ct. 2400. 2414 (2019).
23 In a scathing dissent, Justice Gorsuch condemned the Court's decision to deny certiorari when *Chevron* was ripe for discussion. The plaintiff, an injured veteran, was denied disability benefits because the Department of Veteran Affairs limited retroactive payments to one year. Justice Gorsuch explained that this limitation contradicted the purpose of the statute and wrongfully delegated authority to "a bureaucrat." By allowing courts to defer to "reasonableness," Justice Gorsuch argued that the judiciary is abdicating its role and duty to interpret the law. The courts are placing "a finger on the scales of justice in favor of the most powerful of litigants, the federal government..." *See Buffington v. McDonough,* 598 U.S. (2022) (Gorsuch, J., dissenting).
24 *See* Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations* 40 J. Legal Stud. 85, 88 (2011) (arguing that less deference to inconsistent agency interpretations would have a moderating effect on administrative interpretations of statutes).

not just in light of the statute's purpose, but also in light of the agency's previous interpretations of the statute [25]

Additionally, as a practical matter, some critics argue the doctrine is unpredictable and inconsistently applied in lower courts. [26] Other critics argue that the test is so pliable that courts applying it can still reach their desired result since Step One of *Chevron* comes out very differently depending on a judge's method for interpreting statutes. [27] Furthermore, they contend that even the Supreme Court rarely cites *Chevron* in cases which it arguably applies, indicating the doctrine should no longer be used. [28]

However, until recently, *Chevron* had largely withstood such challenges, particularly in the context of formal agency action. Proponents of *Chevron* noted that regardless of its criticisms, eliminating the doctrine would tie down the hands of agencies to interpret their statutes, substantially harming their ability to promulgate regulations because any of their interpretations of statutes would be tied to interpretations by the court, yielding uncertainty and potentially preventing timely regulation and enforcement. [29] To that effect, because many statutes establishing and authorizing action for federal agencies are very broad and vague, *Chevron* has been a critical tool for agencies such as the SEC or CFTC to fill in the gaps of important federal regulatory statutes. [30]

Becerra and EPA

In both *AHA v. Becerra* and West *Virginia v. EPA,* DHHS and EPA relied on *Chevron* to support their interpretations of the Medicare statute and Clean Air Act, respectively. Through both cases, the Supreme Court had the opportunity to revisit *Chevron* deference. The Court heard oral argument for *Becerra* on November 30, 2021, for which both sides briefed and argued extensively on what to do with *Chevron,* prompting heated debate on the issue. Similarly, *West Virginia v. EPA* involved a tense discussion on whether or not to limit *Chevron* deference.

Surprisingly, in *Becerra,* despite both sides' arguments regarding the application of *Chevron* and split decision from the Court of Appeals for the D.C. Circuit that involved a lengthy discussion of the *Chevron* doctrine, the Court resolved the issues in the case without ever citing to *Chevron.* In a 9-0 opinion, the Court used traditional tools of statutory interpretation to find the Congress unambiguously precluded the DHHS's interpretation, thereby disallowing their interpretation of the Medicare statute. [31] In effect, the Court applied *Chevron,* but by refraining from citing to the landmark case once, especially given the heated discussion on *Chevron* in the D.C. Circuit, the Court once again continued the practice of failing to explicitly use the *Chevron* doctrine in a case where it arguably applied.

Following the *Becerra* case, some speculated that the Court had essentially ducked the issue of *Chevron* because the Court may have been hesitant to overturn the doctrine so soon along with overturning another long line of precedence in *Roe v. Wade.* [32] Others argued that this was a continuance of a trend of slowly phasing *Chevron* out by not citing to it in any future cases that the Court would hear. [33] However, it appears that the Court, having already heard argument for *West Virginia v. EPA,* was waiting for a better case to revisit *Chevron* where the case's outcome was determinate based on application of the doctrine.

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25 *See* Christopher Walker, *Attacking Auer and Chevron Deference: A Literature Review,* 16 Geo. J.L. * Pub. Pol'y 103, UL8_X2018).

26 *See, e.g.,* Jack Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled,* 42 Conn, L. Rev. 779, 78384 (2010) ("Chevron encourages irresponsible agency and judicial behavior.").

27 *See* Christine Kexel Chabot, *Selling Chevron,* 67 Admin. L. Rev. 481, 492 (2Q15)

28 *Id.* at 493 ("Beyond inconsistent grants of deference by courts, confusion also stems from the fact that the Supreme Court applies *Chevron* in a surprisingly small percentage of cases."). *Compare City of Arlington v. FCC,* 569 U.S. 290 (2013) (finding deference applies to an agency's expansion of its own jurisdiction and refusing to recognize an exception for extraordinary decisions involving controversial grabs of power), *with King v. Burwell,* 576 U.S. 473 (2015) (finding *Chevron* inapplicable to this extraordinary question of "deep economic and political significance").

29 *See Givati, supra,* at 91.

30 *Compare Stryker v. SEC,* 780 F.3d 163 (2d Cir. 2015) (finding SEC's interpretation of a section of the Securities Exchange Act within their authority and consistent with the legislation under *Chevron), with ISDA v. CFTC,* 887 F. Supp. 2d 259 (D.D.C. 2012) (stating that CFTC's interpretation of a provision of Dodd-Frank is not entitled to *Chevron* deference because Congress was not ambiguous under Step One of the *Chevron* analysis).

31 *Becerra,* 142 S. Ct. at 1903.

32 See Cary Coglianese & Allison K. Hoffman, *Faculty Reactions to AHA v. Becerra,* Univ, of Pa- Law Sch, (June 15, 2022), https://www.law.upenn.edu/live/news/14841-facultv-reactions-to- aha-v-becerra-.

33 See James Romoser, *In an op. that shuns Chevron, the court rejects a Medicare cut for hosp, drugs,* SCOTUSblog (June 15, 2022), https://www.scotusblog.com/2022/06/in-an-opinion-that- shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs.

That case was indeed *West Virginia v. EPA*. In this case, EPA had promulgated a rule in 2015 addressing carbon emissions from power plants, creating a "generation shifting" framework that heightened regulations over time.[34] The Supreme Court stayed the rule in 2016, which was then repealed in 2019 after a change in administration.[35] Several states judicially challenged the repeal,[36] which was appealed to the Supreme Court in the present case.[37] In a 6-3 decision, the Supreme Court held first that the case was justiciable, even though the new Biden administration had reversed the repeal, putting the original 2015 rule back into effect.[38]

The Court then addressed whether the EPA rule, which interpreted a provision of the Clean Air Act, was entitled to *Chevron* deference.

In the opinion, the Court drew upon different precedent that signaled "there are 'extraordinary cases' in which the 'history and the breadth of the authority that the agency has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.[39] While to date, these cases denying a delegation of authority to agencies were confined to isolated instances, and were applied inconsistently, the Court formalized this doctrine as "the major questions doctrine," concluding that this case is one that fits within the doctrine.[40] [41] The Court then stated that in this case that, as a result, there is "every reason to 'hesitate before concluding that Congress' meant to confer EPA the authority it claims" under the section of the Clean Air Act.[42]

The formalizing of the major questions doctrine adds a wrinkle to the *Chevron* doctrine. Where the Court concludes that the issue in question is one of "economic or political significance," the agency must point to "clear congressional authorization" to regulate in that manner—and, absent such authorization, the agency does not have authority under the statute to promulgate rules under that issue.[43] Because the Court concluded that the Clean Air Act was too vague with respect to the grant of such authority, it ultimately concluded that the EPA's rule was promulgated outside of its authority under the Clean Air Act, and such rule was required to be passed by an act of Congress or "an agency acting pursuant to a clear delegation from that representative body."[44]

The Court's EPA decision has received mixed reactions from the public. One supporter argued that this decision reaffirms separation of powers and reigns in executive agencies that have been acting well beyond the scope of authority intended by Congress. He stated "modern complexities are not a sufficient reason for abandoning the Constitution's separation of powers, which still governs those who

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34 *West Virginia,* 142 S. Ct. at 2603.

35 *Id.* at 2604.

36 See, *e.g., State of New York et al, v. Environmental Protection Agency* (D.C. Cir. Aug. 13, 2019), *available at* https://agportal-s3bucket.s3.amazonaws.com/2019%2008%2013%20final%20petition%20for%20review.pdf.

37 *West Virginia,* 142 S. Ct. at 2606.

38 *Id.* at 2607.

39 *Id.* at 2609 (citing to several cases).

40 *Id.*

41 Justice Breyer posited that Congress intended to address *major questions* while saving interstitial matters for agencies. Reserving the doctrine for exceptional cases, the Court has rejected agency interpretations that "rewrite" statutes. *See MCI Telecommunications Corp, v. AT&T,* 512 U.S. 218 (1994) (finding the removal of tariffs on communications carriers to introduce a new scheme of free market competition, which exceeded FCC authority granted by the Communications Act); *see also Utility Air Regulatory v. EPA,* 573 U.S. 302 (2014) (finding that raising the statutory thresholds for emitted air pollutants transformed the "EPA's regulatory authority without clear congressional authorization"). When the agency's decision involves matters of significant economic influence, the Court has repealed the promulgated rule, invoking the *major questions doctrine. See King v. Burwell,* 576 U.S. 473 (2015) (rejecting the IRS making tax credits available on both federal and state exchanges because the tax credits involved billions of dollars in spending each year); *see also FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000) (rejecting the FDA's decision to regulate tobacco products because the tobacco industry was of such economic importance that if Congress wanted to delegate regulation, it would have done so expressly). The Court has also raised the doctrine when the agency's rule preempts state legislation. *See Gonzales v. Oregon,* 546 U.S. 243 (2006) (rescinding the Attorney General's Interpretive Rule that illegitimated the use of drugs for physician-assisted suicide when Oregon legalized the medical practice and the Attorney General's power over such drugs was limited to "registration" and "control" under the Controlled Substances Act).

42 *West Virginia,* 142 S. Ct. at 2610.

43 *Id.* at 2614.

44 *Id.* at 2616.

govern us."[45] On the other hand, critics argue that the Court's decision is ill-timed and not practical in today's world, particularly when fast action is needed to handle our climate crisis. One critic stated "Congress deliberately chose to delegate lawmaking authority to expert agencies in appreciation of Congress's own inability to anticipate and address all those complexities on a real-time basis."[46]

What's Next?

The Court's formalization of the major questions doctrine presents massive implications for not just environmental regulators, but also for financial regulators. Many statutes that agencies, such as the SEC and the CFTC, and bank regulators operated under contain broad, vague mandates, through which such agencies have promulgated myriad rules interpreting the statutes to better regulate the industry. After the *West Virginia v. EPA* decision, many of these agency actions are potentially uncertain and may be challenged in court, even if they have been in effect for decades. While the major questions doctrine does consider "the history and breadth of the authority exercised by an agency" for actions that result "in a broad societal impact," it is nonetheless true that many such agency actions are now vulnerable to being overturned as exceeding the scope of its authority under its operating statute.[47] For now, *Chevron* lives on, but the Supreme Court has dealt a serious blow to its application in past and future agency interpretations, particularly for agencies that operate under broad statutory mandates. In the coming years, it will be seen the impact of the new major questions doctrine as lower courts will wrestle with reconciling the doctrine with previous cases affirming an agency's action under the *Chevron* doctrine.

Even as this article was finalized, the Petition for a Writ of Certiorari in Loper Bright Enterprises, et al., Petitioners, v. Gina Raimondo, in her official capacity as Secretary of Commerce, et al., Respondents, filed November 10, 2022, explicitly asking whether *Chevron* should be overridden is being considered by the Supreme Court.[48] It provides clear evidence that opportunities to have the Supreme Court definitively curtail *Chevron* are not abating. How far will the Court go?

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45 George Will, *The EPA Decision is the biggest one of all, and the Court got it right,* Washington Post (June 30, 2022).
46 Richard Lazarus, *The Supreme Court just upended environmental law at the worst possible moment,* Washington Post (June 30, 2022).
47 *West Virginia*, 142, S. Ct. at 2608.
48 *See*, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-451.html.