

A Do-Nothing Rule in the Court Threatens Much Agency Regulation

There aren't many environmental disputes on the Supreme Court's docket this term. But in one case the Court has granted certiorari on the question of whether it should overrule *Chevron v. NRDC*, one of the most important precedents in all of law.

The case involves an agency's decision about implementing the Magnuson-Stevens Act. Congress passed that statute to "prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery."

The statute directs the National Marine Fisheries Service to create fishery management plans, which include provisions for collecting data to be used to support the law's overall goals. The agency promulgated a rule during the Trump administration requiring vessel owners to pay part of the cost of monitors who will collect the data, while also providing exemptions, waivers, and reimbursements that essentially eliminated the cost of the monitors.

Yet that payment requirement is what the case is about. A group of states, led by West Virginia, say that the agency "asserted power to force the family-owned and -operated fisheries it regulates to fund the agency's invasive inspection program or else stop fishing." And they complain that the lower courts sided with the agency simply because of the *Chevron* doctrine—a 1984 precedent that commands courts to respect an agency's expertise in reasonably implementing ambiguous statutory language—while leaving the fishers "out of luck."

Since that Supreme Court case was decided, Congress has set up countless regulatory programs where it has either tasked agencies with regulating within a very technical landscape, many of which are environmental statutes, or explicitly told them to exercise their judgment.

For example, in an amicus brief led by Washington, D.C., a separate coalition of states points to statutes like the Natural Gas Act, which directs the Federal Energy Regulatory Commission to set rates for the sale of natural gas that are "just and reasonable." In its brief, the U.S. government asked the Court not to overrule *Chevron* by pointing to the fact that Congress has legislated against the backdrop of the precedent for almost forty years. If Congress expected agencies to take certain interpretative steps because of the *Chevron* doctrine, then a court would threaten separation of powers principles by inserting itself into that decisionmaking role.

Interesting empirical research shows that *Chevron* has had some salutary effects. For example, Professors Kent Barnett and Christopher Walker explained in their brief that "*Chevron* reduces disagreements among federal courts over policy-laden judgments and thus promotes national uniformity." They found that a nationwide interpretation of a statute is more likely to govern when a court applies the doctrine, as compared to the interpretations that come out of lower courts deciding on the "best reading" of a statute. They show that *Chevron* fosters agreement "across ideologically varied courts of appeals and panels."

West Virginia's argument against *Chevron* is that it is a "government-always-wins arrangement" that "feeds regulatory growth" with no limits. But in another amicus brief, Professor Thomas Merrill explains that the *Chevron* framework promotes "greater political accountability for regulatory policy"—and that any time Congress becomes concerned about too much agency discretion, it has the ability to restrict or eliminate that discretion. Merrill also explained that concerns about instability and bias can be ad-

West Virginia leads a coalition of states seeking to overturn the *Chevron* doctrine



Bethany A. Davis Noll is executive director at NYU Law's State Energy & Environmental Impact Center: bethany.davisnoll@nyu.edu.

dressed through existing doctrines that require agencies to consider reliance interests and follow strict notice-and-comment procedures whenever changing course.

In the Washington, D.C.-led brief, those states argue that the *Chevron* framework is needed for programs where the states are working together with the federal government to address complex scenarios that arise in the regulation of telephone companies, in addressing air pollution, or in issuing water quality standards. *Chevron* allows them to invest time and resources into their programs with the confidence that the federal agency's regulatory decisions will be upheld as long as they are reasonable and in line with the clear language of the governing statute. Interestingly, West Virginia agrees that it is not helpful when "businesses must guess whether the agency's action will be upheld."

When there are either technical or complex challenges that Congress has instructed an agency to address, it is a troubling trend to see courts around the country make their own decisions about what Congress wanted. But recent data from the Pew Research Center show that only 25 percent of Democrats and 8 percent of Republicans say that they trust the federal government. Against that backdrop, this battle over how to interpret a fishing statute may not be that surprising. The question will remain how to rebuild that trust so that federal agencies can keep doing what we need them to do.