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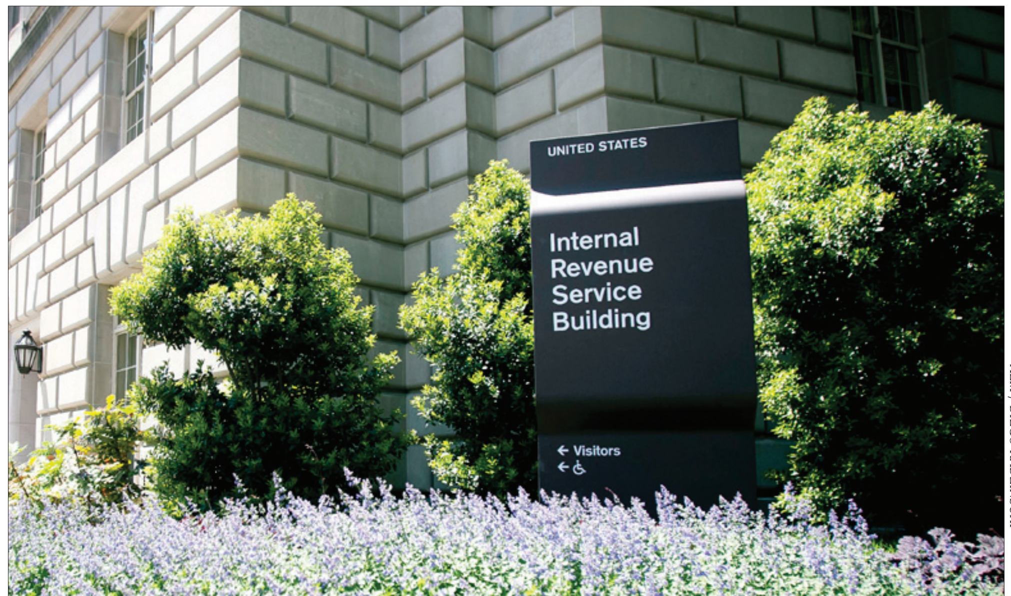
Changes Are On the Horizon In Administrative Law

BY BORIS BERSHTEYN



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Administrative law is hardly fertile soil for a revolution. The discipline has a well-deserved reputation for obscure facts and glacial change (at least back in the era before glaciers began to change with any speed). But the past year has offered the promise—or perhaps the threat—of tectonic shifts ahead. These developments may yet fizzle, but for now they make administrative law an area to watch for appellate lawyers.

'Chevron' Deference: Beginning of the End?

No administrative law doctrine is as familiar as *Chevron* deference. See *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Yet, as two U.S. Supreme Court decisions from the past year show, that doctrine also continues to evolve and surprise. Indeed, as *Chevron* enters its fourth decade, could its demise be at hand?

Under *Chevron*, a court defers to an agency's interpretation of a statute where "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency has reasonably interpreted the statute in exercise of that authority. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011). In those cases, the court first asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, the court "must give effect to the unambiguously expressed intent of Congress." Id. at 843. But if not, "a reviewing court must respect the agency's construction of the statute so long as it is permissible." *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 132 (2000).

So far, so familiar. Yet in two politically charged cases—*King v. Burwell*, 135 S. Ct. 2480 (2015), and *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015)—the Supreme Court skipped this deferential two-step dance entirely.

'King v. Burwell': Deference Disavowed

In *King*, the Supreme Court held that the Internal Revenue Service was not entitled to *Chevron* deference at all—despite having rulemaking authority over the ambiguous tax provision at issue. Petitioners in *King* challenged the validity of tax credits allocated to individuals who purchased health insurance on federal insurance exchanges—marketplaces that, under the Affordable Care Act (ACA), may be established by either a state or the federal government. But the ACA made funding for the credits available only to taxpayers who enrolled in health insurance through "an Exchange established by the State." 26 U.S.C. §§36B(b)-(c). The question in *King* was whether a federal exchange could function as "an Exchange established by the State."

Analyzing the statute, the court found the term "Exchange established by the State" to be ambiguous. The IRS had promulgated a rule resolving that ambiguity, concluding that purchases of insurance on either exchange were eligible for tax credits. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012). Ordinarily, this would be a quintessential case for *Chevron* deference.[1]

But *King* was no ordinary case. Although the court ultimately held that tax credits are available on federal exchanges, it did so without deferring

BORIS BERSHTEYN, *a litigation partner at Skadden, Arps, Slate, Meagher & Flom, previously served as acting administrator of the Office of Information and Regulatory Affairs.*

to the agency. The court reasoned that *Chevron* deference "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." *Brown & Williamson*, 529 U.S. at 159. Here, the court stated, Congress could not possibly have intended to delegate the tax credit question to the IRS. For one thing, "tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people." *King*, 135 S. Ct. at 2489. For another, it is "unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort." Id. (emphasis omitted).

Although the court looked to three prior decisions to support its central thesis—that questions of economic and political significance are not typically left to agencies—none quite fits the bill. In *Brown & Williamson* and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), the court expressly employed the *Chevron* framework. In *Brown & Williamson*, the court held at "step one" that Congress had spoken clearly and precluded the Food and Drug Administration from regulating tobacco. In *Utility Air*, the court determined at "step two" that EPA's decision to require operating permits solely based on greenhouse gas emissions was unreasonable. The final case, *Gonzales v. Oregon*, 546 U.S. 243 (2006), comes closer to the mark, but still misses. There, the court refused to defer to the Attorney General's interpretation of the Controlled Substances Act because his rulemaking authority under the Act was highly circumscribed. None of these cases refused to defer to the expert agency simply because the policy question at issue was too important.

The three precedents do have one thing in common: Each, at some point, recited a version of the now-common adage that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Key to this axiom is that the underlying delegation of authority is vague, unexpected, ancillary, or cryptic. *King* skips this step; there is nothing vague about ACA's delegation of rulemaking authority to the IRS. After all, tax credits were central to the statute's scheme—an elephant-sized hiding place if there ever was one. Not surprisingly, then, Congress delegated rulemaking authority

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over the ACA's tax credits to the IRS—and did so twice, in plain sight, and in plain language. See 26 U.S.C. §§36B(g), 7805(a).

In short, while the three precedents on which the court relied eschewed deference because

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Congressional intent was too uncertain, *King* did so solely because the underlying policy question was too important. That profound questions are reserved for the courts—not expert agencies—is an untested rule of administrative law. And one can expect litigants to wield it against agencies in the years to come.

'Inclusive Communities': Deference Ignored

A more subtle setback for *Chevron* deference came in *Inclusive Communities*, where the court addressed whether housing decisions with a disparate impact on minorities are prohibited under the Fair Housing Act. That statute makes it unlawful "[t]o refuse to sell or rent … or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. §3604(a). While the Act clearly prohibits disparate treatment—a defendant acting with discriminatory intent—a plaintiff's ability to bring disparate-impact claims under the statute was uncertain. The Secretary of Housing and Urban Development (HUD) had promulgated a regulation interpreting the statute to include disparate-impact liability. The court agreed on the basis of the statute's clarity, but the regulation seemed to play no role in its determination.

Perhaps most notable about *Inclusive Communities* is its deafening silence about *Chevron*. Unlike in *King*, the court offered no explanation for declining to defer to the agency. The court, instead, itself delved into the structure and purpose of the Fair Housing Act.

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Is the future of *Chevron* deference left in genuine doubt? In light of its longstanding position at the heart of administrative law, quick demise seems unlikely. *Chevron* might succumb, instead, to the thousand proverbial cuts. In *King*, the court offered a path around deference—ironically, one that courts can use when the economic and political stakes are highest. *Inclusive Communities*, too, took a detour around deference, albeit for less clear reasons. Thus, in a single year, the balance in administrative law has tipped somewhat from agencies to the courts, weakening the *Chevron* doctrine. Only time will tell how decisive this shift will be.

Cost-Benefit Analysis: A New Beginning?

As of June 2015, cost-benefit analysis—a mainstay of executive branch regulatory practice for over 30 years—may be poised for new prominence in the courts. In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the court held for the first time that an ambiguous provision of the Clean Air Act *required* EPA to take the cost of regulation into account.

In *Michigan*, the court addressed a provision of the Clean Air Act directing EPA to regulate emissions of hazardous air pollutants from power plants *if* the agency finds such regulation "appropriate and necessary." The question was whether the "appropriate and necessary" determination mandated that EPA consider costs. EPA determined that it need evaluate only risks to human health and the environment—not costs—before deciding whether to regulate power plants. Costs would be considered only later, when EPA addressed how, exactly, the plants would be regulated.

That decision, the court held, was unreasonable. The court noted that it generally defers to an agency's reasonable interpretation of the statute it administers. See *Chevron*, 467 U.S. 837. But in paying insufficient attention to cost, the court determined, EPA "strayed far beyond" the bounds of reason. *Michigan*, 135 S. Ct. at 2707. According to the court, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs" if one were to recover only "a few dollars in health or environmental benefits." Id. In addition, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate." Id.

The court's insistence on consideration of cost was hardly preordained by precedent. In *Whitman*, for example, the court analyzed a provision directing EPA to set air quality standards that are "requisite to protect the public health" with "an adequate margin of safety." 531 U.S. at 494 (citation omitted) (internal quotation marks omitted). The court held that the provision unambiguously *precluded* the consideration of cost, because the authority to consider cost had "elsewhere, and so often, been expressly granted" to EPA. *Whitman*, 531 U.S. at 467. In later cases, the court deferred to EPA's judgment regarding whether and how it would consider costs when regulating air pollution. See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014); *Entergy v. Riverkeeper*, 556 U.S. 208, 222 (2009).

Read narrowly, the court's insistence on cost considerations might be limited to the command of the power plant provision. *Whitman* and its progeny are, after all, still on the books. But a broader reading of the case is also possible, suggesting that cost is always a "relevant factor when deciding whether to regulate," unless Congress specifies otherwise. *Michigan*, 135 S. Ct. at 2707. This reading arms plaintiffs when burdensome regulations have been imposed without due consideration—a theme the D.C. Circuit has echoed in recent years. See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). Anticipation of a more searching judicial review may also change the calculus for an agency that considers promulgating a costly regulation. With both *Michigan* and *Whitman* enduring as valid law, upcoming cases may prove decisive.

'Paralyzed Veterans' Doctrine: End of an Era

For nearly 20 years, the D.C. Circuit required notice-and-comment rulemaking for certain interpretive rules, which are typically exempt from this procedure. No more. After sustained criticism, the so-called *Paralyzed Veterans* doctrine finally met its end at the hands of the Supreme Court in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

Mortgage Bankers addressed the difference between two kinds of rules: legislative and interpretive. Legislative rules, the court noted, carry the force and effect of law. An agency must offer the public notice of any proposed legislative rule and an opportunity to comment on it. But the Administrative Procedure Act exempts from the notice-and-comment requirement "interpretative rules," 5 U.S.C. §553(b)(A), which are simply "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers,'" *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (citation omitted).

The D.C. Circuit had nevertheless long held that some interpretive rules must undergo notice-and-comment rulemaking. In a line of cases beginning with *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), it ruled that if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation," the revised interpretation must go through notice-and-comment rulemaking. *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999).

In *Mortgage Bankers*, the Supreme Court abrogated this line of cases. It noted that "rule making" includes the process of "formulating, amending, or repealing a rule." 5 U.S.C. §551(5). If agencies need not engage in notice-and-comment when formulating an interpretive rule, it stands to reason that they need not engage in notice-and-comment when amending or revising an interpretive rule. To hold otherwise would impose an obligation on agencies beyond the "maximum procedural requirements" embodied in the *APA. Vt. Yankee Nuclear Power v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978).

Although the end of the *Paralyzed Veterans* doctrine removes one tool from potential plaintiffs' toolkits, it also eliminates a potential check on agency power. Motivating *Paralyzed Veterans* was the fear that, when an agency significantly revises its interpretation of a legislative rule, it may in effect be amending the rule itself, "something it may not accomplish" under the APA "without notice and comment." *Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1034. *Mortgage Bankers* may thus prompt courts to more aggressively police the hazy boundary between mere interpretive rules and legislative rules, which can affect the public's rights under law.

Conclusion

Administrative law may thus be shedding its reputation for dreary incrementalism. Some canonical doctrines, like *Chevron*, may be in decline, but how far will they fall? Others, like cost-benefit analysis, are in ascent, but how much will they rise? And as some familiar rules, like the *Paralyzed Veterans* doctrine, disappear from the books, which are next? Only time will tell.

1. Full disclosure: the author of this article was counsel of record on an amicus brief from former government officials arguing precisely that—in vain, as it turned out.

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