DANIEL R. SCHRAMM, L.L.C.
Attorney at Law
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 532-2300
Fax: (636) 532-6002
Email: daniel@dschrammlaw.com
Web site: www.dschrammlaw.com

THE POTENTIAL FOR A GRAND UPHEAVAL IN FEDERAL ADMINISTRATIVE LAW

Introduction

When I took a law school course in administrative law some forty plus years ago, I was taught by a rising young star then directing research and development at the Federal Trade Commission. The rising star was named Robert Reich. On the side, Reich taught administrative law as an adjunct professor at the American University Washington College of Law. This was where I went to law school. Years later, Reich became the Secretary of Labor in the Clinton Administration. Because of Reich's truly creative approach to administrative law, I considered him to be my favorite law school professor.

Reich taught me that Congress often used vague statutory language and then delegated authority to the administrative agencies with the expertise to fill in the regulatory standards. And Congress did so because it was not practical to legislate with precision the detailed standards that would apply in every possible situation. For example, Congress relied on the expertise of environmental scientists at EPA to gather data and to develop emission standards for categories of particles under the Clean Air Act. Congress did not have the time, staff or expertise to develop those kinds of emission standards on its own.

If an agency adopted a regulatory standard of general applicability, the agency ordinarily had to go through a process under the Administrative Procedure Act called notice-and-comment rulemaking.[1] Administrative law judges were

[1] See, agency rulemaking authority under 5 USC §553.

charged with applying those regulations in particular factual settings.[2] In a doctrine that later became known as *Chevron* deference, the courts gave deference to the agencies when interpreting ambiguous statutory provisions within the scope of the particular agency's area of expertise.[3] Painting with a broad brush, I consider these rules to be a general outline of how administrative law works.

When Donald Trump was elected, Steve Bannon famously vowed that a top priority of the new administration would be the "deconstruction of the administrative state."[4] Trump managed to fill three vacancies on the U.S. Supreme Court. These appointments effectively armed the conservatives with a six-to-three supermajority. Conservative ideologues have a history of showing general hostility to federal regulations. And only five of the justices may be necessary to realize Steve Bannon's dream. This article explores the different theories the Supreme Court may use to dismantle federal administrative law. And for two pending cases, I will focus on what the possible upheaval could mean for environmental protection and public health.

Theories for Dismantling Accepted Rules of Administrative Law

The Supreme Court may dismantle the accepted rules of administrative law under one or more different theories:

- First, the justices may apply a textual approach to statutes with the goal of narrowing the scope of agency authority. If the justices find no ambiguity, they have no need to give the agency interpretation any *Chevron* deference.[5]

- Second, some Supreme Court justices have expressed an open

---

[2] See, agency adjudication procedures under 5 USC §554.

[3] *Chevron, U.S.A, Inc. v. NRDC, Inc.*, 467 U.S. 837, 865-66 (1984).

[4] https://www.usatoday.com/story/opinion/2017/03/16/stephen-bannon-wants-to-dismantle-your-government-adminstrative-state-ross-baker-column/99180638/

[5] https://verdict.justia.com/2022/04/22/textualism-masks-ideological-opposition-to-the-administrative-state

hostility to *Chevron* during oral arguments. They may choose to overrule the precedent entirely and effectively make it a dead letter of the law.[6]

- Third, the justices may consider reviving the so-called "non-delegation doctrine." The non-delegation doctrine, if revived, would prevent Congress from delegating legislative power to a federal agency. In a relatively recent dissenting opinion in *Gundy v. United States*, Justice Neil M. Gorsuch urged the Court to revive the doctrine.[7] If that occurs, many federal laws that delegate authority to agencies could be subject to challenge.[8]

- Finally, the justices may consider applying the relatively new "major questions" doctrine. This doctrine suggests that if Congress wants to give agencies the power to make "decisions of vast economic or political significance," it must say so directly. Justice Amy Coney Barrett characterized this doctrine as resting on the relatively benign idea of an administrative agency "staying in its lane."[9]

West Virginia v. Environmental Protection Agency

The Supreme Court now is considering an appeal involving the Environmental Protection Agency's authority to regulate greenhouse gases. This is obviously a critical issue in the midst of today's climate change crisis. The case is styled *West Virginia v. Environmental Protection Agency*, Docket No. 20-1530.

A threshold question is whether the Supreme Court has jurisdiction to consider the merits of the appeal. The dispute began when the Obama EPA adopted

---

[6] *Id.*

[7] *Gundy v. United States*, 139 S.Ct. 2116, 2148 (2019) (Gorsuch J., dissenting).

[8] https://www.abajournal.com/columns/article/chemerinsky-scotus-could-make-significant-ruling-on-epas-authority-to-fight-climate-change-or-not/

[9] https://www.scotusblog.com/2022/02/in-climate-change-case-justices-grapple-with-epas-role-congressional-intent-and-their-own-jurisdiction/

its Clean Power Plan to reduce carbon emissions in power plants. The Trump EPA repealed the Clean Power Plan in 2019 and replaced it with a more lenient Affordable Clean Energy Rule known as the ACE Rule. In 2021, the D.C. Circuit vacated the repeal of the Clean Power Plan and vacated the ACE Rule. The court sent the issue back to the EPA for more proceedings.[10] The Supreme Court granted a request by Republican-led states and coal companies to review the ruling. The Biden Administration is now urging the Supreme Court not to take the appeal and to dismiss the case on standing grounds. They contend that the Biden EPA is not following either the Clean Power Plan or the ACE Rule. Instead, it is still planning on promulgating its own rule in the future.[11]

If the Supreme Court dismisses the appeal, Erwin Chemerinsky believes the decision will not be all that important. But if the Court decides the appeal on the merits, Chemerinsky expects the decision to have a monumental impact in limiting the scope of EPA's authority to regulate greenhouse gases. Some parties in the case have raised the non-delegation doctrine.[12] And the justices spent much of their time during oral argument asking about the "major questions" doctrine. No clear consensus was reached over how they would rule.[13] If the Court adopts either doctrine, EPA will be hamstrung in its ability to protect the environment under the Clean Air Act. A decision is expected in June.

Health Freedom Defense Fund, Inc. v. Biden

Another pending dispute over federal regulatory authority involves the CDC's decision to temporarily extend that mask mandate on airplanes, buses, trains, and other transportation hubs. Judge Katherine Kimball Mizelle declared the mask mandate to be unlawful in *Health Freedom Defense Fund, Inc. v. Biden*, 2022

[10] See, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021)

[11] https://www.scotusblog.com/2022/02/in-climate-change-case-justices-grapple-with-epas-role-congressional-intent-and-their-own-jurisdiction/

[12] https://www.abajournal.com/columns/article/chemerinsky-scotus-could-make-significant-ruling-on-epas-authority-to-fight-climate-change-or-not/

[13] https://www.scotusblog.com/2022/02/in-climate-change-case-justices-grapple-with-epas-role-congressional-intent-and-their-own-jurisdiction/

U.S. Dist. LEXIS 224099 (M.D. Fla. April 18, 2022). Judge Mizelle issued an injunction to stop enforcement of the mask mandate. The Biden Justice Department is appealing the decision.

Judge Mizelle ruled that the imposition of the mask mandate exceeded CDC's authority under the Public Health Services Act of 1944. *Id.* at *12-13. The judge rejected the government's claim that the CDC had authority to impose the mask mandate under §264(a) of the Act. This section gives the CDC authority to make and enforce regulations to prevent the introduction, transmission or spread of communicable diseases. To carry out and enforce the regulations, the CDC may provide, among other things, for "sanitation" and "other measures." 42 USC §264(a). The judge took a narrow dictionary view of "sanitation" to mean measures to make something clean. *Id.* at *15-17. And the judge considered the broader "other measures" language to be qualified by the more limited measures in the statutory list. The judge concluded the mask mandate could not be justified as a cleaning measure under the statute. *Id.* at *17-22. Judge Mizelle declined to apply *Chevron* deference because, in her view, the statute was not ambiguous. *Id.* at *29. And she ruled the government's attempt to invoke *Chevron* also was barred by the major questions doctrine. *Id.* at*30. Judge Mizelle then ruled that the mask mandate was unlawful because the CDC did not go through notice-and-comment rulemaking. *Id.* at *36. The judge rejected the government's argument that CDC could invoke a good cause exception to address a public health emergency. *Id.* at *38-47.

Professor Michael C. Dorf of Cornell Law School argues that Judge Mizelle's reasoning is completely wrong under existing law. The CDC order properly invoked good cause for dispensing with notice-and-comment rulemaking because it was impractical and contrary to public health. This justification was especially valid when nearly half a million Americans had already died from Covid-19. And Judge Mizelle erred in applying her narrow textualist approach to reject the mask mandate as a sanitation measure. Dorf believes this textualist approach exposed the judge's ideological hostility to using government agencies to address even the most pressing social problems. And Dorf believes she erred in dispensing with the broader reach of "other measures" in the statute. Finally, she erred in rejecting the deference that should have been given to the agency head under *Chevron*. And *Chevron*, at least for now, is still good law.[14]

[14] https://verdict.justia.com/2022/04/22/textualism-masks-ideological-opposition-to-the-

The real danger is that five members of the Supreme Court will adopt a similar rationale as Judge Mizelle and strip the CDC of its authority to protect public health. The Justice Department probably is hoping the issue will become moot before it gets that far. If the issue becomes moot, Judge Mizelle's adverse decision might be vacated.

Conclusion

The cohort of conservative justices on the Supreme Court have floated several different theories for creating a grand upheaval in federal administrative law. This great upheaval may or may not come to fruition in either the *West Virginia* or *Health Freedom Defense Fund* cases. But with the current makeup of the Court, the change seems almost inevitable. When the grand upheaval comes, we can expect it to dramatically limit the ability of federal agencies to confront important social issues like environmental protection and public health.

administrative-state