



Will The Supreme Court Overturn Chevron?

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[00:00:00] Jeffrey: On January 17th, the Supreme Court heard oral arguments in *Loper Bright Enterprises versus Raimondo*, and *Relentless versus Department of Commerce*. Those are two cases which asked the court to overrule the landmark Chevron Case.

[00:00:17] Jeffrey: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to *We, the People*, a weekly show of constitutional debate. The National Constitution Center is a national nonpartisan nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people.

[00:00:35] Jeffrey: In this episode, we'll break down arguments in *Loper* and *Relentless*, and explore the future of Chevron and the administrative state.

[00:00:43] Jeffrey: Joining me to answer these questions are two leading experts on the case, and on administrative law.

[00:00:50] Jeffrey: Christopher Walker is a Professor of Law at Michigan Law School. He's the author of many books on administrative law, including the forthcoming "*Constraining Bureaucracy Beyond Judicial Review: Rethinking Administrative Law in a System Without Quirks*". He's filed a brief in support of neither party for these cases.

[00:01:08] Jeffrey: Chris, it is wonderful to welcome you to *We, the People*.

[00:01:11] Chris Walker: Great to be here.

[00:01:12] Jeffrey: And Tim Sandefur is Vice President for Legal Affairs of the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, and he holds the Duncan Chair in Constitutional Government. He's also an Adjunct Scholar with the Cato Institute. He's the author of eight books, including most recently "*Freedom's Furies: How Isabel Paterson, Rose Wilder*

Lane, and Ayn Rand Found Liberty in an Age of Darkness". He's filed a brief in support of the petitioners.

[00:01:37] Jeffrey: Tim, great to welcome you back to We, the People.

[00:01:40] Tim Sandefur: Thanks for having me back.

[00:01:41] Jeffrey: Chris, you argued that Chevron should be affirmed. Tell us what Chevron is, and why you think it should be affirmed.

[00:01:49] Chris Walker: Chevron is a decision of the Supreme Court from 1984 that recognized, in my mind, the bedrock principle of administrative law today. The agencies are the primary implementers of the statutes that Congress charges them to implement.

[00:02:06] Chris Walker: And so, the court, it was a unanimous court, this was the beginning of the Reagan Administration, the Reagan Administration's EPA had changed its position in a regulation to make it more business-friendly under the Clean Air Act. And the Supreme Court said you could do that, when there's new administration, or whenever an agency sees those change policy rationales or facts on the ground they have the flexibility to change how they interpret that law.

[00:02:31] Chris Walker: In particular, we have, from the Chevron decision, this famous, kind of, two-step approach, where the court says the first question a reviewing court has to look at is whether statutory provision at issue that the agency's administering is ambiguous. If it's unambiguous, the court declares what it is, and we're done. If it's ambiguous then the court defers to the agency's interpretation, so long as it's reasonable.

[00:02:58] Chris Walker: And Justice Stevens', writing from the court in Chevron, kind of, made three main arguments for why we have it: the first is, Congressional Delegation, that, when Congress leaves an ambiguity in a statute that an agency administers it once, the agency, and not the court, to be the first and primary interpreter. And the reason why they do that, Justice Stevens said, is because agencies have more expertise on their statutory scheme, and on the subject matter that they regulate, than the court.

[00:03:27] Chris Walker: And also that agencies are more politically accountable than an unelected judiciary because the president ultimately has quite a bit of control over what agencies do. And, of course, Congress can come back through oversight appropriations, and initial legislations, to reign in what an agency does on the ground.

[00:03:44] Chris Walker: And so, for those reasons, the court said, this is a tool the courts should use to respect judgements an agency makes when it comes to the statutes they administer.

[00:03:54] Jeffrey: Thank you very much for that, and for introducing the case so well. Tim tell us what Chevron is, and why you think it should be overturned.

[00:04:02] Tim Sandefur: Well, so, Chevron started out as this idea of trying to minimize the discretion of judges to implement their own policy preferences, as in the form of legal interpretation, which I think everybody agrees is not an appropriate thing for courts to do. The problem is that, 40 years of experience with Chevron has proven what really ought to have been obvious from the beginning, which is that, by ordering courts to defer to these administrative bureaucracies, what you do is, you basically remove the important checks and balances that prevent those bureaucracies from expanding their own power, and taking advantage of broad language in statutes to grow themselves.

[00:04:50] Tim Sandefur: We begin by saying, this is not a knock against administrative officials or bureaucrats themselves, in fact, it's conscientious bureaucrats, it's hard-working, honorable bureaucrats who are most to be feared in this context, because they are the ones who are going to strive the hardest to expand and the bureaucratic power, and to enforce it to the utmost.

[00:05:13] Tim Sandefur: And so, by removing judicial oversight, the way Chevron does, by telling courts that they have to defer to these agencies, you create a system where these bureaucracies can read the statutes that give them power in the most expansive way possible, and they're likely to do so.

[00:05:30] Tim Sandefur: And then that, of course, creates an additional danger, which is in, it creates an incentive for Congress to pass very broadly worded statutes, in order to, sort of shuffle off democratic accountability and responsibility, so that they can maximize, so that Congress members can maximize their credit for the good things, and minimize their blame for the bad things and not have to actually take on the hard responsibility of governing.

[00:05:56] Tim Sandefur: A good example of that is the statute at issue in the Loper Bright case itself, which gives the agency in question power to "prescribe such other measures or conditions or requirements as are determined to be necessary and appropriate". Now, how broad is that, right? That is a blank check on government power.

[00:06:16] Tim Sandefur: And then, Chevron tells the courts that, when the bureaucracy goes ahead and writes whatever rules it deems to be necessary and appropriate, the court has to just, you know, bow and say, "Yes, sir." And I think that has proven itself to be a real problem over the past 40 years, as bureaucracies have expanded their power, and accountability has been minimized.

[00:06:38] Jeffrey: Thank you so much for that.

[00:06:40] Jeffrey: Let's now step back and explore the history of judicial deference in administrative cases. Chris Walker, the decision that Chevron overturned on the lower court was written by then-Judge Ruth Bader Ginsburg, who told me in later years that there was nothing inherently liberal or conservative about judicial deference.

[00:07:00] Jeffrey: In this case, there's a dispute about whether or not the original understanding of the constitution requires strict construction of executive actions or not, and there's also a dispute about whether the Administrative Procedure Act requires judicial deference to executive agencies.

[00:07:18] Jeffrey: Tell us about that history, and whether or not you think that judicial deference to agencies is consistent with the original understanding of the constitution.

[00:07:28] Chris Walker: I would just say, at the outset the hard question here is Chevron deference consistent with the Administrative Procedure Act, that was enacted in 1946, and I think that's where some of the most interesting scholarship has been done, kind of, a deeper dive.

[00:07:49] Chris Walker: All of the scholars I am aware of, recognize that some form of deference existed before the Administrative Procedure Act of 1946. And I think most also would agree, it's not our Chevron two-step, but that's, like, a much more crystallized, kind of, maybe a more robust rule-like deference. But when you think about what Congress was trying to do when they enacted the Administrative Procedure Act, which is, like, the quasi constitution of the administrative space that it was trying to confine the existing common law backdrop, the, the norms and rules the courts had created when it comes to deference.

[00:08:26] Chris Walker: I've argued that Chevron's not consistent with the Administrative Procedure Act. Their argument, someone like Aditya Bamzai or John Duffy, both professors at the University of Virginia, they argue that if you look at those earlier cases, most if not all, I would say most, because there are a couple that don't quite fit say that courts should defer to agency interpretations that are contemporaneous and consistent. In other words, if they were done at the time the statute was enacted, or if they were consistent over time that gets deferred.

[00:09:00] Chris Walker: So, of course, that's a lot weaker deference than Chevron. Chevron itself was a case where the EPA changed its interpretation from the Carter's Administration EPA's approach. So that's, kinda, the debate you have on the statutory side.

[00:09:13] Chris Walker: And I can't really think it's a really hard questions. But, ultimately for me, this is about keeping in place a rule that has existed for over 40 years, and cited thousands of times in the lower courts.

[00:09:27] Chris Walker: But that, but I do think that's the big debate. I think that's the hard debate along those lines. Now, there are also constitutional arguments that have been raised against Chevron, and, candidly, I just don't think they're very good. Tim might disagree with me, a little bit, maybe a lot, but, when I think of the constitutional arguments, there're, kinda, two different flavors.

[00:09:47] Chris Walker: The first argument is an Article I argument at least and because it's Article I in the constitution that gives Congress the power to legislate. And the argument goes that, Chevron deference encourages Congress to over delegate to agencies, for some of the reasons that Tim said. They have incentives, they can give a lot of power to agencies, if they don't like what they're doing, they can reach out and pressure them to do something different, through oversight, through committee work, through appropriations. And then they can take the credit for the good stuff the agency does, as Tim mentioned, and blame the agency when something goes wrong.

[00:10:22] Chris Walker: A decent policy argument that, you know, something we should think about, does Chevron reward Congress for over delegating? I think it's a pretty meritless constitutional argument though. If what we're really worried about is Congress delegating something they can't delegate then we should be talking about the non-delegation doctrine and reinvigorating that.

[00:10:45] Chris Walker: And instead of what we're worried about as well, like, this might give incentives or that's Congress' prerogative, as long as their delegating is constitutional then that's, that's really just fair game. Congress can decide how much it wants to give away within constitutional limits.

[00:10:59] Chris Walker: So, that's the Article I argument.

[00:11:01] Chris Walker: The Article III argument is, the Article III is what gives the courts the power to the constitution that says that, the judicial power of the United States shall be vested in the supreme court and lower courts as Congress so designs. And that argument is, kind of, your Marbury versus Madison, the Supreme Court has to say what the law is, and Chevron doesn't allow them to say what the law is. In other words, they can't say, this is the best interpretation of the statute. If there are multiple reasonable interpretations, a court has to defer to an agency.

[00:11:32] Chris Walker: Another way to think of this, this is Phil Hamburger's approach, he, he's the, runs the center that is the counsel for the Relentless petitioner in this case, and he would say this is a due process violation. So, another way to think of this is, it puts the thumb on the scale for the government when they get into court. And on this one, again, I just don't think it works, in the sense that, Congress can strip lower courts and jurisdiction entirely, and since the founding is the Solicitor General mentioned yesterday, we've had habeas review, we've had

mandamus review. All of those require a court to defer to the government in one way or another, or to defer to the party that's not seeking relief.

[00:12:16] Chris Walker: And it would be a dramatic, dramatic change to our constitutional structure to say that, de novo review of legal interpretations is required of the constitution. In fact, I'll go so far as to say, and I'm stealing this from Judge Easterbrook, "You'd have to get rid of federal habeas review, state court convictions as well," because their Congress has commanded that federal courts defer to state court interpretations along those lines.

[00:12:39] Chris Walker: So, I don't think any of those arguments work, the Article I or Article III, although they do raise good policy points. The one point that I would flag is, it gets more complicated with criminal law, and that's why Chevron doesn't apply to criminal law. And I think it also gets a little bit more complicated on the Article III front with private rights because you could imagine there'd be some issues there. But that's, like, way into the weeds.

[00:13:00] Chris Walker: Vast majority of Chevron deference deals with public benefits and not private rights.

[00:13:07] Jeffrey: Tim, lots to respond to, but I wanna ask you about the framers, and deference. You say in your brief, judicial deference is inconsistent with our constitutional order, the framers had no theory of judicial restraint, they considered a vigilant engaged judiciary, indispensable to a successful constitution." Tell us more about your historical arguments that judicial deference was invented in the 20th century by justices, like Holmes, and scholars, like Thayer, and consider the, the counter argument that, in fact, the debate about deference versus engagement goes back to the debate between Hamilton and Jefferson over the constitutionality of the bank, and Hamilton's liberal construction, embraced by Chief Justice Marshall, is a theory of deference to national power, and that the petitioners here are trying to resurrect a Jeffersonian efforts to constrain the power of the federal government, a debate that goes back to the founding.

[00:14:02] Tim Sandefur: Oh, man, it sounds better every time I hear it. Jeff, you should know that all constitutional debates go back to Marbury versus Madison, and the debate between Jefferson and Hamilton of everything. I thought Professor Walker did a good job of, of referring to this Article I and Article III problem, because it is rooted in, in this constitutional order that, when it when the constitution was written it simply did not contemplate the administrative regulatory state that we have today, which is really an advent of the progressives in the 20th century, and really exploded with the New Deal and Great Society eras.

[00:14:43] Tim Sandefur: And so, the constitution makes no reference to any kind of deference theory at all. And, in fact, it arguably does just the opposite of that, by creating three, equally powerful, branches of government for the purpose of checking and balancing each other. Deference is a form of disarmament unilateral disarmament by the courts that are supposed to be

there to ensure that the legislature stays within its bounds, and the president stays within his bounds.

[00:15:10] Tim Sandefur: This is where the courts step back and say, "Well, we're, we're just gonna let the other branches, you know, act." There's nothing in the constitution that justifies that. And quite the opposite, in Federalist 62, Madison has this, this marvelous passage where he says, I'm just paraphrasing here, he says, it will be of little value to the people that the laws are made by people of their own choosing, if the laws are so voluminous that they cannot be read or understood, or if they change from one day to the next, and therefore don't even really qualify as law.

[00:15:39] Tim Sandefur: That's what happens with administrative law. The great philosopher, Hannah Arendt, described administrative law as "unlike the rule of law, instead, it was the rule of cleverness." That's the way administrative decrees operate, they're not chosen by the people's elected representatives, they're the result of insulated bureaucrats who are often career bureaucrats, who are often members of government unions, so they can't even be fired, and who have every incentive to increase their power at the expense of the citizenry.

[00:16:10] Tim Sandefur: The constitution, by contrast, anticipates that the courts are going to be the interpreters of the law. There's that famous passage in Marbury versus Madison, when Marshall says, "It is emphatically the province and duty of the judiciary to say what the law is." And in that respect, with regard to that quote, there was a very revealing passage in the oral arguments in these cases, when Justice Ketanji Jackson said, are you say- I'm paraphrasing again, she said, are you saying that every case of statutory ambiguity has to be reviewed by the courts? Like this was some, sort of, shocking new dramatic, radical, new innovation, when, of course, that has always been the job of courts, since for centuries before Marbury, it was the job of courts to interpret statutes. And, of course they apply de novo review.

[00:16:58] Tim Sandefur: This is not a hard, radical, dramatic, drastic suggestion, this is the ordinary process that the founding fathers were familiar with when they wrote the constitution, and created the judiciary. I agree, you mentioned, that Justice Ginsberg said that, there is nothing inherently liberal or conservative about this, I wanna emphasize that point. There is nothing inherently liberal or conservative about this, the, if there's anything that the previous administration should have taught my Democrat Party friends, it's that, they should be just as leery of Administrative power as any of my Republican friends are, because it's these Administrative agencies that enable the president to drastically alter the legal landscape with the stroke of a pen.

[00:17:42] Tim Sandefur: That's not the constitutional order that was contemplated by the framers of the constitution, or by any of the amendments, nothing in the constitution today contemplates anything like this. If the people want it, they should amend the constitution to create this thing. But, to create excuses for it, such as, the judge made doctrine of judicial

deference as a means of reducing the constitutional barriers that limit government power seems very foolhardy. And not only does it seem that way, but it has been proven very foolhardy in case after case of administrative agencies expanding their power beyond reasonable limits.

[00:18:18] Tim Sandefur: The example I give in the brief, actually, my favorite example that I give in my brief, which is actually a state law case under this, under a state equivalent to Chevron deference, is in California, where an administrative agency determined that bees, that is honey bees qualify as fish under California statute. And the state supreme court applying California's version of the Chevron deference said, "Yeah, that's fine with us."

[00:18:44] Tim Sandefur: I mean, now that's crazy. There's not a single Californian, not a single one of the 30 million people living in California think that bees are fish. And yet, this administrative agency, using the equivalent of Chevron, says, "We wanna expand our power bees are invertebrates, that qualifies that is included within the definition and there you go." And the courts say, "We're gonna blind ourselves to that." I mean, that's the problem with, with these deference doctrines, is, we the people, are entitled to an independent judiciary, that acts as a check and balance against the other branches, and we're being deprived of that, under the court-made, non-constitutional doctrines of deference they govern today.

[00:19:23] Jeffrey: Chris, let's turn to the question of stare decisis, what you address in your brief, you say, "As to Chevron the pull of statutory stare decisis is too strong to overcome. Over the last four decades, has repeatedly reaffirm Chevron, and the federal courts have relied on it in thousands of cases." Tell us why you think stare decisis is so strong, and, of course, this is a debate that's on the court very vibrant right now. Is there a chance, do you think, that the court might be more persuaded by the stare decisis argument in considering Chevron than they were in the Dobbs case overruling Roe v. Wade?

[00:19:56] Chris Walker: Yeah. So, when talking about stare decisis when it comes to Chevron, this is a statutory interpretation. You know, it is a bedrock view of what the Administrative Procedure Act means, and so, we're not in a world of constitutional stare decisis that someone, like, Justice Thomas, like, doesn't believe in.

[00:20:15] Chris Walker: You know, we're in a world that even Justice Thomas thinks that stare decisis matters. And the reason why is because, if the court got it wrong Congress can fix it. If Congress doesn't want Chevron, tomorrow, they could pass legislation. In fact, some Republicans have had legislation on this for over a decade, called The Separation of Powers Restoration Act, and it's never made it anywhere in the senate, although it's come out of the house a couple of times.

[00:20:40] Chris Walker: We're no in a world where Congress can't legislate to overrule Roe v. Wade, or another constitutional precedent. And so, the separation of powers concerns are at their

height when it comes to a court. Deciding whether to get rid of a precedent that Congress can, can change itself.

[00:20:58] Chris Walker: If you look at all the, kind of, the empirical work that's been done Lisa Breastman and Abby Glutz study of congressional staffers, what does congress use, what tools of interpretation they use when they draft statutes? The number one tool is Chevron. They think about Chevron when they draft statutes. And what they say is that, when we draft statutes, our primary audience isn't a court, it's the agency. Our dialogue is trying to tell the faithful agents at, in the bureaucracy, what Congress wants them to do, fill in the details in the statutes they're charged to administer.

[00:21:35] Chris Walker: Kent Barnett's got this great article, a professor at the University of Georgia about Chevron, and Congress departed from Chevron in Dodd, Frank, and in other places, where it said, "Ee actually don't want Chevron deference." In this particular context, there was preemption decisions by the Office of the Control of the Currency.

[00:21:56] Chris Walker: And so, Congress knows what Chevron is. Since 1984 it has legislated against the backdrop of Chevron, where it reauthorized the hundreds of statutes that govern federal agencies. And so, it would be a really dramatic move for the court to change this on their own.

[00:22:11] Chris Walker: Beyond that, federal agencies rely heavily on Chevron when they draft regulation, courts have, you know, cited it thousands of times, Ken Barnett and I spent three years reading every Chevron decision over an 11-year period. And not just that, the regulated public has internalized has constantly relied on that when they, when they structure their affairs.

[00:22:31] Chris Walker: And so, it would be a dramatic change for the court to get rid of something in this context.

[00:22:36] Chris Walker: I do wanna respond a little bit to Tim, I think Justice Kagan's questions of oral argument really capture what's at stake here. Which is the statutes that govern federal agencies are highly complex. They can't anticipate every single thing that a regulator's gonna run across when they're trying to implement a statute. So, necessarily, there's always going to be ambiguities, implementation details in the statute that someone has to fill in.

[00:23:06] Chris Walker: When Ken Barnett and I were reading these 1,500 cases, a lot of this was what's a reasonable risk assessment? Or, what is the best system of omissions? These are not, like, terms that a court's gonna say, "There's one answer to this." There are terms that are scientific or expert-driven and an agency's gonna be much, much more equipped to deal with that. So I think Tim can point to a few really bad cases. I haven't read the one that he mentioned, in California. My guess is, that was just wrongly decided under the California deference doctrine.

[00:23:44] Chris Walker: But the run-of-the-mill case where Chevron applies is about giving the agency the leeway to apply their expertise, that the general's court just doesn't have. And that's not a new concept, I mean, that's something that has been around since the founding, where the executive branch needs to make judgment calls about how to implement a statute.

[00:24:04] Jeffrey: Tim, Chris has raised two big points: first, that respect for precedent should be higher in statutory than constitutional cases, because Congress can overturn the court if it disagrees. And he also notes that Justice Barrett has written extensively on this subject as a professor. So, response to that, do you think that Justice Barrett and, and other justices might be more sympathetic to the precedent argument here than they were in Dobbs?

[00:24:30] Jeffrey: And then, maybe take up his second argument that, as Justice Kagan argued, that oral argument, agencies are better equipped than courts to fill in ambiguous statutory language.

[00:24:42] Tim Sandefur: No, I do think that stare decisis concerns are going to weigh heavily on the court's mind. And I think that's why, if you listen to the argument, there's so much discussion over how much the courts actually apply Chevron in the first place. Do they really even apply this? There's a lot of back and forth about how many cases this theory actually applies to and all. And that's because they're trying to address the concern about whether or not this will be a drastic change.

[00:25:08] Tim Sandefur: Now I count myself among those, like Justice Thomas, who is much less concerned about stare decisis than I am about getting the law right, and it seems to me that there's no better time to do the right thing than now, and there's no better reason for overturning a legal precedent than the fact that it was wrongly decided, and Chevron was wrongly decided. So, I'm not particularly concerned about the reliance interest. Especially because the reliance interest we're talking about here, are reliance interest by the government.

[00:25:33] Tim Sandefur: Now, of course, the government is always going to want to rely on a doctrine that gives it more power. That's just the nature of human beings. And that's why, to quote Justice Gorsuch, from the argument the other day, "The government always wins under Chevron." The government always wins. And because of that, you are naturally going to find Congress taking advantage and relying on Chevron when drafting these statutes. I'll quote again, from the statute that's issue, at issue in this case, the agency can "prescribe such other measures or conditions or requirements as are determined to be necessary and appropriate."

[00:26:08] Tim Sandefur: In other words, do what you like, bureaucrats. Now, the Congress is going to love a deference doctrine from the courts that allows them to do that, and to wash their hands of this, of whatever problem is at issue, and go home to their constituents and say, "Look, I solved this problem, because I created the, I created this no-bad-things agency, and I passed this no-bad-things act that prohibits any bad things, by creating a bad things agency that will go

and define the term "bad thing", investigate potential bad things, and penalize people for doing bad things, in violation, of course, of the principle of separation of powers, not to mention due process."

[00:26:45] Tim Sandefur: So, of course Congress is going to like this doctrine. Of course they're going to rely on it when deriving statutes, and, of course, the agencies are going to rely on this doctrine, and they're going to love this doctrine, and, of course, the president's going to love this doctrine, because it maximizes the president's power. And so they're going to rely on it.

[00:27:00] Tim Sandefur: The question here is, what about the citizen? What about the individual who is entitled to an impartial judicial system that will protect his or her individual rights against government power? As far as Justice Kagan's point about the, you know, technical application of statutes, I, this strikes me as really just an excuse. Just an excuse for the fact that Congress passes vague statutes that say things like "reasonable", which nobody knows what these terms mean. That means whatever the government says it means. That's what a vague statute means. It means whatever the government says it means.

[00:27:36] Tim Sandefur: And, I'm not in the government. I'm an ordinary citizen. So, I'm against that. That strikes me as a really bad idea to say that we're going to maximize the opportunities and the potential benefits to government officials, to pass broadly worded, vague statutes that act as blank checks, and then have the courts tie their own hands, and refuse to act against that.

[00:27:57] Tim Sandefur: And we've been living under a regime like that, for decades now. And unsurprisingly, we have seen these agencies doing wild and crazy things, defining perfectly dry land as being a wetland for example. I think this is a point, by the way, that came up during Paul Clement's oral argument in a very effective way, when he was saying one of the downsides, is it creates gridlock. It means that Congress does not get around to addressing the major problems, whether you're a democrat or a republican, whether you're liberal or conservative, these problems don't get resolved by Congressional debate, because every incentive is in place for Congress to, you know, talk in a bunch of vague soundbites, and then leave all the power to the bureaucrats who, of course, are maximally insulated against the control of the voters.

[00:28:43] Tim Sandefur: That's why the agencies were created. The progressives created these agencies at, out of the express hope of separating government power from government accountability. From trying to get politics out of government, and hand politics over to, or handing government over to these experts, who are, you know, so-called experts. I use air quotes around the word "experts" because they purport to know how we, you and I, should live our lives. Do that through these regulations that, you know, ought to be subject to challenge in court.

[00:29:16] Tim Sandefur: How does a regulated bureaucrat in a regulatory agency interpret a statute? They do it the same way you and I do. They do it the same way that the courts do, they

apply the ordinary rules of what does reasonableness mean? Et cetera. Et cetera. And it's, they're not going into some sort of machine shop, and doing hi-tech quantum physics to figure out these words. If they could do that, then we should give those quantum physics machines to the judges so that they can use those machines.

[00:29:42] Tim Sandefur: Instead what they're doing is, they're applying the same kind of rational, logical arguments that you and I would apply. Well, there's no reason that the courts can't do that. They do it all the time. And this point came out during the oral argument when Mr. Martinez said, "Imagine that the statute were challenged before the agency had acted in the first place. What would happen then?" The court would have to apply the ordinary tools of statutory construction. And even Justice Kagan conceded that that was true, she said, "Yes, I guess that's what the court would have to do."

[00:30:12] Tim Sandefur: Well, then, that shows that the courts can do it. There's no reason to hand over a government that is supposed to be of, by and for the people, to a bunch of so-called experts, who are not accountable to the voters.

[00:30:23] Jeffrey: Let's talk about the questions in oral argument about how disruptive overturning Chevron would be. Justice Barrett asked Paul Clement whether litigants would be lining up for cases decided under step two, to re-open challenges to agency interpretation? By contrast, Justice Kavanaugh said "The reality of how this works is, Chevron itself ushers and shocks the system every four years, when there's a new administration. That's not stability, that's at war with reliance." Chris, what did you think of the responses to the justice's questions about disruption and whether or not you found them persuasive?

[00:30:57] Chris Walker: Yeah. I found both persuasive, which might actually seem, kind of, internally inconsistent. But, when it comes to Chevron, I think one reason, and I think it was Justice Lee who asked, why it soured on Chevron? And I do think one of the reasons that, is that, you know, the way that it works now is, with Congress not revisiting statutes that govern federal agencies on a regular basis and with them not, kind of, jumping to the challenge to, to work with the president to implement election mandates, and I think Tim's already mentioned this, president's have gone at it alone more. They've always gone at it alone, but I think, from the second term of the Obama Administration, through the Trump Administration, definitely the Biden Administration, when they can't get something through Congress, they go to the agencies, and ask for, you know, to really stretch the statutory mandate to do something through regulation.

[00:31:57] Chris Walker: You might say, at least the way I, kinda, think of it is, when Chevron was created in the '80s, we were thinking about 10 to 30 degree shifts in policy when there is a new president. And that's what Chevron allowed. Today, we're looking at, you know, 90 degree changes of policy, 180 degree changes of policy. I mean, immigration's a classic example. Again,

I'm not just talking about Chevron, I'm talking more generally about how president's use the administrative state to implement policy they can't get through Congress.

[00:32:26] Chris Walker: I do think that Justice Kavanaugh is, is right, that, it is troubling that you can have reversals of the policy, like, straight up reversals without Congress playing, playing any direct role in that. Of course, Congress can still, through appropriations and oversight, and through reigning who the president can appoint to run the agency, they can have some control. I think that is an issue.

[00:32:48] Chris Walker: I love the line in, or argument where Justice Barrett was asking about Brand X, and Paul Clement says, I can't remember the exact quote, but I think, this was, like, the worse decision of all time, and Justice Barrett laughs, he's like, "Sorry, Justice Thomas," because Justice Thomas was the majority wrote the majority of Brand X. And Brand X was a case that said, even if a court has interpreted a statute, an ambiguous statute, and say, this is the best interpretation of the statute, and agency can still come back and wipe out that traditional interpretation.

[00:33:19] Chris Walker: I think that is problematic as a policy matter, absolutely, that we're using agencies to make really dramatic changes in policy, when Congress really should make those value judgments.

[00:33:31] Chris Walker: On the flip side, and Ken Barnett and I have done, and, with Christina Boyd, a local scientist at the University of Georgia, you know, in reading these 1,500 cases in the lower courts, it turns out that Chevron's a powerful tool to create national uniformity in law, when you have one agency that declares what the law means the la- and the lower courts are deferring to that agency's interpretation, you're more likely to have one interpretation that a company or individual can rely on when they live in California or New York or Hawaii.

[00:34:02] Chris Walker: That's, like, a really important value for a business or for how we structure our society, that there's uniformity in the law. And when you don't have Chevron, you have a ton less uniformity.

[00:34:13] Chris Walker: And similarly, it's a, kind of, a parallel to that argument, it turns out that judges are less clinical when you have Chevron. The most conservative judges are more likely to agree with the most liberal judges, in the lower courts, under Chevron, than when you don't have Chevron. So, I do think in a world without Chevron you're gonna see a lot more politics in judging in the lower courts, and a lot less uniformity in law. But I do concede that you might have a lot less predictability, because agencies are gonna be more conservative, more cautious they're not gonna try to push the pocket as much, when they know they're not gonna get deference.

[00:34:53] Chris Walker: And litigants, I completely agree with Justice Barrett, are gonna be running to the courthouse to re-litigate the interpretations that they lost on 5, 10, 15 years ago now that they know that Chevron no longer applies. So, we will have a period of a lot of disruption for a few years, and then something will emerge from that, and the court will find another Chevron because courts aren't gonna make these hard decisions about policy that are so expert driven. They're gonna have to eventually defer again to agencies. But we're gonna, we will have a period of a lot of disruption I think in the lower courts, as they try to sort through, if the court ends up getting rid of Chevron deference.

[00:35:34] Jeffrey: Tim, as Chris says, Justice Barrett got in a traditional conservative argument in favor of Chevron, that it's good to get judges out of policymaking, and leave that to the political branches, he and Ken Barnett have stats to support that argument. What do you think of Chris' argument that, if the court overturned Chevron, there'll be more judges engaged in policymaking, and less uniformity, and therefore it will be quite disruptive?

[00:35:59] Tim Sandefur: Well, I don't know. It strikes me as, kind of, reading tea leaves. I don't know how to predict the future. I agree with what Professor Walker said, that I kind of, agreed with both sides on this point that you might see more, and you might see less.

[00:36:11] Tim Sandefur: But, it's true that something like Chevron creates uniformity. But you can also create uniformity by shutting down the entire federal judiciary, right? So, suppose that we eliminate the entire judicial system overnight, now you've got uniformity, right? Because, for every plaintiff out there, the answer is no. Every single plaintiff the answer is no, there's nothing you can do because there's no court system, right? That's uniformity.

[00:36:34] Tim Sandefur: Well, if we prioritize uniformity over getting the law right, I think we are led to something that amounts to the equivalent of shutting down the courts, which in this situation, is deference doctrines that say that you really, there's nothing that you, the citizen, can possibly do. When the federal government declares your perfectly dry land to be a wetland, and therefore subject to the regulation of the Clean Water Act, there's nothing you can do. Sorry. Sucks to be you.

[00:36:57] Tim Sandefur: Now, that's uniformity, and it strikes me as that, that, that we should prioritize instead, the right of citizens to challenge the legality of government action. As for whether this will actually create a flood of litigation? I very much doubt it, because there are so many other obstacles to litigation against federal agencies. There are other deference doctrines that are not the, not at issue here, that will still remain in place. There's the cost and burden and expense and, and differently of getting a lawyer, and the hassle of dealing with regulatory agencies.

[00:37:35] Tim Sandefur: The agencies have plenty of other ways to deprive you of your day in court, and they will continue to use those. So, I'm not particularly concerned about that.

[00:37:44] Tim Sandefur: With regard to the conservative value of avoiding judicial policymaking, I think this is very much overblown in this context. I don't think that courts are prone to impose their own judicial policies in terms of statutory interpretation as much as they are prone to do that, doing that in other contexts. I think it's less likely here than in situations like due process and equal protection. That's, those are much more likely to lead to this.

[00:38:12] Tim Sandefur: As was mentioned earlier, since these are all statutory cases, if a court, if a judge goes wild, and starts interpreting the statute in some policy-driven way, Congress can change the statute. There you go. Problem solved. You say it can't be done, it can be done. It's done all the time.

[00:38:31] Tim Sandefur: Some time ago, well, this is going back a way, but I remember when the federal courts declared the Do Not Call list to be invalid. It was changed within 24 hours. Congress go together and passed a new bill within 24 hours to overturn that court ruling. This sort of thing is easy to do when there is actual consensus.

[00:38:54] Tim Sandefur: The problem with the pro-administrative state side of this argument, the pro-regulatory side of this argument is that, typically assumes that there's consensus when there's not. And it wraps itself in the mantle of we need to make life easier for government bureaucrats. We need uniformity. We need to reduce judicial policymaking. Everybody agrees with it. No. Not everybody agrees with that. What we need is a more dynamic legal constitutional system, where people get their day in court, and Chevron takes that away from them.

[00:39:21] Jeffrey: Chris, tell us about the evolution in conservative thinking about Chevron. One of Chevron's greatest champions was Justice Scalia, and in an influential 1989 article, Judge Scalia defended Chevron deference on the grounds that, "broad delegation to the Executive is a hallmark of a modern administrative state," and Chevron provides a dependable "background rule of law against which Congress can legislate." Justice Scalia also embraced two values, judicial deference, and taking judges out of politics, and having legislatures rather than judges make policy.

[00:39:55] Jeffrey: Fast-forward to today Justice Gorsuch a leading critic of Chevron has criticized it on the grounds that it defers too much, and that strictly construing federal power is more consistent with the framers' intentions.

[00:40:09] Jeffrey: How can you reconcile these two very different visions of judicial conservatism? What does it say about the ambiguity of what the framers thought on the question?

[00:40:18] Chris Walker: So, at oral argument, Justice Alito asked the question, why have conservatives fallen out of favor with Chevron? And Paul Clement gave two answers that I

actually hadn't thought about before, and I'm not entirely persuaded, but one is the rise of textualism. And I think what he meant by that is, in the 1980s, textualism was just starting to become a growing predominant theory, and today, as Justice Elena Kagan has mentioned, we're all textualists now.

[00:40:46] Chris Walker: And I think what Paul Clement meant by that is, textualist judges, conservative textualist judges, have a pretty easy time finding statutes unambiguous. Justice Scalia was probably the best at this. I think he only had two cases where he got to the second step of Chevron, finding the statute ambiguous. In the criminal law context, he would find words unambiguous by finding them to be terms of art.

[00:41:11] Chris Walker: I think for Justice Scalia, he could say that he believes in deference because if it was truly ambiguous, that was a very small set of cases, and in the rest of them, he'd be able to find the right answer, the best answer the only answer, I guess, along those lines. I think that is part of it. I think that conservatives, at least some conservatives, are much more confident in textualist providing one answer than they were back in the '80s.

[00:41:37] Chris Walker: And therefore, Chevron encourages judges who aren't as textualist to not find statutes unambiguous when they, when they, when perhaps they really are.

[00:41:47] Chris Walker: The second one that he gave, and that was interesting, was that, we are more skeptical about agency expertise today than we were in the '80s. And on that front, I don't know if that's true at all. I think the skepticism has been there forever, and I'm not sure it gets any higher.

[00:42:02] Chris Walker: But I will say that, for me, and this gets back to I was mentioning, kinda, more my reason is, like, that Congress isn't legislating as much, and presidents are, are pushing things through the administrative process when it, that should go through Congress, is that, I think we're seeing, and maybe this is a more charitable of Paul Clement, I think we're seeing agencies say they're exercising expertise, when they're actually instead just making a policy judgment or a political judgment that the president wants them to implement. In other words, like, expertise is used as an excuse to advance certain interpretations.

[00:42:38] Chris Walker: And so, those were the two that, that, that he gave in response. I think another one that Justice Canady gave, in the last opinion he wrote for the court, on the court, is concurrence in *Pereira versus Sessions*, is that the lower courts are applying reflexive deference at times. In other words, they're not doing the hard work of figuring out whether a statute is truly unambiguous or not. They're, kind of, saying, "Oh, this is complex. This is hard. We're just gonna defer to the agency and not really do the hard work of statutory interpretation."

[00:43:07] Chris Walker: So, those are the three or the four stories, in my mind. Maybe Tim has more Congress not doing as much, and the president, kind of, rammy things through.

Textualism provides answers more often. Agency expertise is used as an excuse for big policy changes. And that lower courts don't always work as hard as they should to figure out whether statutes unambiguous.

[00:43:33] Jeffrey: Tim, your thoughts on the debate within conservatism about textualism. There was a famous encounter between Justice Scalia and Richard Epstein in the 1980s at the Cato Institute, where Justice Scalia defended traditional deference, and allowing policymaking to be made in legislature, not courts, and Epstein defended judicial engagement, and said that courts had to resurrect restrictions on the administrative state that had been dormant since the New Deal, and Scalia was appalled.

[00:44:05] Jeffrey: Tell us about this debate. You're obviously on the Epstein side of it, but why, how and why did conservatives switch to the more libertarian and less deferential position? And what does that say about what the framers thought on this question?

[00:44:19] Tim Sandefur: In fact there was kind of bookends with the debate, I think it was three years ago now, at the National Federal Society Convention. I wasn't there, but I think it was Randy Barnett versus, I think it was Judge J. Harvie Wilkinson, I think, over deference. And what was remarkable about that was that, after that debate, when the audience was asked to applaud for which side they supported, they were more on the anti-deference side. I think it shows an evolution of thought within, broadly termed, the conservative or libertarian legal world over the past 40 years or so.

[00:44:52] Tim Sandefur: Justice Scalia was, you know, he was of this generation, of the Bork generation. Bork's influential godfather was Oliver Wendell Holmes. Very pro-deference, very anti-natural rights, and I think that has largely given way now to the world of Justice Thomas, who's much more sympathetic to the idea of an active judiciary. Active in the sense of enforcing the constitution instead of ignoring it. Of enforcing natural rights as protected by the 14th Amendment, and in taking these constitutional issues serious that our, seriously that our framers intended them to take.

[00:45:32] Tim Sandefur: So, as far as Scalia himself is concerned, I can't, obviously pretend to speak for him. I only met him two or three times, but it seems to me, from his work, there was always this, sort of, tension in his mind. He was definitely not 100 percent on the Bork side as far as judicial deference is concerned. He took certain individual rights very seriously, you know. Especially things like search and seizure, he wrote some great opinions on that show that he was not willing to just close his eyes to some things.

[00:46:03] Tim Sandefur: At the same time, he was also very hostile to what he viewed as judicial policymaking or legislating from the bench, and I think those two things were always intention in his jurisprudence, and that tension is revealed by the change in attitudes over Chevron deference.

[00:46:22] Jeffrey: Chris, the liberal case against this new textualism is that it's the old Lochner Natural Rights approach in a new guise, and by trying to resurrect doctrines that have been dormant since the New Deal, like the non-delegation doctrine, and the major questions doctrine the court is just doing an all-out assault on the administrative estate, and making it impossible to regulate. And you combine that with overturning Chevron, and it's basically textualism which is in original understanding, and is just anti-regulatory. Your response?

[00:46:59] Chris Walker: Yeah. It is somewhat surprising and, Kent and I, in our Amicus Brief, and the last part, kind of, walked through this. The problems that people raise about Chevron I thought would die after the major questions doctrine was recognized the last couple of terms, as a real force to constrained agency actions.

[00:47:21] Chris Walker: The way the court has approached Chevron, and adding in the major questions doctrine, I think it addresses all the problems that Tim mentioned earlier about agencies making major value judgments that Congress should make step one has been reinvigorated, so it really, really matters. So, you have to really make sure that the statute's ambiguous.

[00:47:49] Chris Walker: In other words, what a court is doing when it decides a statute is ambiguous is, they're saying the law has run out. And if the law has run out, we assume Congress wanted the agency to fill in the holes. And then, at step two of Chevron, Justice Kagan and others have encouraged courts to make sure that agencies don't act in arbitrary capricious manner. When they say that agencies have to act reasonable, that means they use the procedures that are required, that they considered counter arguments, that they justify when they change their positions that they look at reliance interest, are some of the things.

[00:48:22] Chris Walker: And so, we live in a world now, where, what is Chevron left to do? Chevron means, for minor implementation details in the statute, we're gonna defer to the agency who has expertise and who is supervised by a clinical appointee of the president. In my mind, that is the world that we wanna live in where we have the agencies, you know, flush out those minor details.

[00:48:49] Chris Walker: I think this is part of a larger legal concern of movement at least the libertarian version of it, of trying to, kind of, deconstruct the administrative state. But most of that was already, we know, a mistress that was more reined in with the major questions doctrine. And in some ways, like, this is addressing the problem that, in my mind, just doesn't really exist anymore.

[00:49:14] Chris Walker: And it's fun that last part of our brief is actually just, we might even be plagiarizing, I don't know, we have to run it through the software,, Paul Clement's position two years ago, for the U.S. Chamber of Commerce, where he said, "Chevron is constitutionally

inspired, and a separation of powers, but we have to have some guardrails on it, and here are the guardrails. If we have those guardrails, we're in a good world."

[00:49:39] Chris Walker: So, I just think it's interesting now that those guardrails two years ago aren't good enough anymore from the legal conservative movement.

[00:49:47] Jeffrey: Tim, your account of why the libertarian assault on the administrative state with the goal of resurrecting major questions doctrine, and the non-delegation doctrine, combined with overturning Chevron is a good thing. Is it right that this was the major goal of the movement, and it's now coming to fruition?

[00:50:10] Tim Sandefur: I think it's certainly one of the missions of anybody who takes individual rights seriously, and is concerned about the overreaching of government officials, who are insulated from accountability from the voters.

[00:50:21] Tim Sandefur: I do think that we were just talking about this, the degree to which the major question doctrine had resolved all of this stuff a few years ago, that issue came up at some length in the oral argument, in, in these cases, and I think Justice Gorsuch particularly would, when the Solicitor General said, "Well, all you have to do is make clear, that Chevron is for the minor details." His response was, "Again?" In a rather emphatic tone, because he seems to have thought that we did do that. We already made it clear that Chevron is only for minor details, and major questions doctrine addresses these issues.

[00:51:01] Tim Sandefur: And yet, he said, in the argument, "Here we are with a case where the court went ahead and used Chevron to say that this agency can impose these really quite dramatic costs on this small business, under a statute that gives the agency power to 'prescribe such other measures or conditions or requirements as are determined to be necessary and appropriate.'"

[00:51:26] Tim Sandefur: So, that shows that the major question issue was not sufficient to address these questions. The court has to take action about Chevron, because obviously the lower courts haven't gotten the message, and they've been given that message time and time again.

[00:51:40] Jeffrey: Well, it's time for closing thoughts in this excellent discussion which has been wide-ranging and illuminating. Chris, first to you, tell We the People listeners why you think Chevron should be upheld.

[00:51:54] Chris Walker: Yeah, I mean, it's interesting that Tim mentions this particular case, because, you know, the Chief Justice, at oral argument, asked Paul Clement, he's like, "It sounds like your arguing these should win under Chevron." I think he's entirely right. I mean, this is an easy step one case. Agency was not given the power to impose these monitors on these fishing

boats by Congress, and then Congress gave the power to impose monitors in other context. That's, like, classic textualism. If they give to you one place, they'll give it to you somewhere else they didn't give it to you. And I think that gets to the larger question, when we think about the debate about Chevron, it's a debate about administrative law more generally.

[00:52:31] Chris Walker: You know, administrative law has tried to strike the right balance of empowering agencies to fulfill their statutory duties, in a reasonable, thoughtful manner, and combating against agencies overreaching and acting in arbitrary capricious manners.

[00:52:48] Chris Walker: Chevron, especially with the major questions doctrine, and the way that two steps are playing out before the court today, strikes that right balance. Of trying to encourage agencies to implement statutes. To fulfill their statutory mandates that Congress and the presidents gave them when the statute was enacted.

[00:53:08] Chris Walker: And in a world without Chevron, the folks who are gonna make that decision are district judges, issuing nationwide injunctions in Texas or Hawaii and that's just not the way to run a federal government. And if you don't buy me on that, you can probably, hopefully tell I'm an old-school judicial conservative, I think courts should move slowly and restrained. It should try to get politics out of what they do, and that, really, the political branch should value judgments in our society.

[00:53:34] Chris Walker: But ultimately, if you don't buy that, I'd say at least think about stare decisis here. This question is in Congress' court, not the Supreme Court. If they wanna get rid of Chevron, they can, they have in the past in certain contexts and if they don't, that's a really strong signal about what we, the people want for our form of federal government. And the Supreme Court really doesn't have any business in interfering with that.

[00:53:59] Jeffrey: Tim, last word in this great discussion is to you. Final thoughts for We the People listeners on why you think Chevron should be overturned?

[00:54:07] Tim Sandefur: This is a legal doctrine that is not found in the constitution, or in the writings of the framers, about agencies that are not found in the constitution or in the writings of the framers, that are given powers that are, do not exist in the constitution or in the writings of the framers, and we the people, are supposed to be governed by the constitution. Not by judicially made doctrines, that maximize the power of unaccountable bureaucrats, over whom you have really no control, and yet, who have, effectively, both the Executive, Judicial, and Legislative power to control your life.

[00:54:40] Tim Sandefur: We were all raised under the whole how a bill becomes a law, kind of, theory that, Congress passes something, the president signs it, then it's a law. The reality is that, virtually none of the laws nowadays and by laws I meant he rules that govern your life, virtually none of those are actually adopted that way.

[00:54:56] Tim Sandefur: Almost all of the laws that control our day-to-day actions, are actually just rules that are created by these agencies because they're given power to do what they see, think is right. What we ought to have is a constitutional order that is actually governed by the language of the constitution, the primary purpose of which is to preserve the blessings of liberty to ourselves and our posterity.

[00:55:21] Jeffrey: Thank you so much Christopher Walker and Tim Sandefur for a deep, wide-ranging and great discussion about the future of Chevron. Chris, Tim, thank you so much for joining.

[00:55:34] Tim Sandefur: Thank you, Jeff.

[00:55:35] Chris Walker: Thanks.

[00:55:37] Jeffrey: Today's episode was produced by Lana Ulrich, Bill Pollock and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh.

[00:55:48] Jeffrey: I'm thrilled to share that on February 13th, I'm releasing my new book, "The Pursuit of Happiness: How Classical Writers on Virtue, Inspired the Lives of the Founders, and Define America." Can't wait to share the book with We, the People listeners, and if you get the book, email me at jrosen@constitutioncenter.org, if you'd like a book play for The Pursuit of Happiness.

[00:56:10] Jeffrey: Please recommend this show to friends, colleagues or anyone anywhere who is eager for a weekly dose of constitutional illumination and debate.

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[00:56:40] Jeffrey: On behalf of The National Constitution Center, I'm Jeffrey Rosen.