Consumer Finance Monitor (Season 6, Episode 24): A Look at the Current Challenge to Judicial Deference to Federal Agencies and What it Means for the Consumer Financial Services Industry, With Special Guest, Craig Green, Professor, Temple University School of Law

Speakers: Alan Kaplinsky and Craig Green

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance, what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We launched our blog on July 21st, 2011, a day I guess you could say that we'll live in infamy in that that was the day in which the CFPB became operational. We have a lot of industry content there and the topic we're talking about today, we've written about on several occasions.

We also regularly host webinars on subjects of interest to those in the industry. So if you want to subscribe to our blog, you just need to go on consumerfinancemonitor.com and there will be a place where you can subscribe. If you want to get on our list for the webinars that we do, please visit us at ballardspahr.com. And if you like our podcast show today, please let us know about it. You can leave us a review where wherever you obtain your podcast, whether it's Apple Podcast, Google, Spotify, or if you obtain them directly from our website, ballardspahr.com. Also, please let us know if you have any ideas for other topics that we should consider covering or other speakers that we should consider as guests for our show.

So let me turn now to the topic of the day. In the consumer financial services industry, it's not that often that we have cases of great importance that are pending before the US Supreme Court, but right now until a case that we're going to talk about today in quite some detail, there were two big issues pending before the Supreme Court that will definitely have an impact on the consumer finance industry.

The first is a case that was argued several months ago and will likely be decided by the end of June. And that is the case that will determine the legality of the executive action taken by President Biden and the Department of Education to forgive a certain amount of federal student loan debt. I prognosticate before, I think that the court will invalidate that executive order. Second case of even greater importance will not be heard until next term, probably argued in October in the midst of being brief right now. And that is a case called CFSA versus Consumer Financial Protection Bureau. And that involves a frontal assault on the constitutionality of the funding of the CFPB. The CFPB is not funded through yearly congressional appropriations. Instead, it essentially can write a blank check every year for the Federal Reserve Board to sign.

That's where they get all their funding, that comes from the Federal Reserve directly and the Congress cannot interfere with that. That is, I would say, an existential threat to the continued viability of the CFPB. There too, I think this court is going to find that the funding was unconstitutional, but I do think they will find a way to let that agency survive or at least kick the can over to Congress and have Congress subject the CFPB to annual Congressional appropriations and do some other things that the industry doesn't like about the CFPB. But now, the topic we're going to talk about today, this is really the first time we've delved into it primarily because it's the first time that this issue has really come up before the court in a posture where I think it could be very impactful on the consumer finance industry.

And we're going to be talking about the general subject of when should courts, when are they required to give deference to regulations that are issued by a federal agency? And a lot of you will often refer to the Chevron case or the Chevron doctrine,

which is a very well established doctrine. But one, as you will find out today from our guests, is little by little, it's starting to erode. And we may have reached the end of the game for Chevron by the end of this year. Well anyway, I don't think I could have found somebody more qualified to talk about this topic than Craig Green. Craig is the Charles Klein Professor in Law and Government at Temple University Law School. He clerked for Judge Lewis Pollak in Philadelphia Federal District Court and Judge Merrick Garland in DC before working for the Bush Administration's Department of Justice where he litigated cases in the Court of Appeals.

And he helped with cases that were before the Supreme Court. He earned his JD from Yale and recently a PhD in legal history from Princeton. He's written about federalism, presidential powers, judicial activism and the history of native land. Most relevant for today's program, he's written two law review articles about the Chevron case and an online essay called Greenhouse Gaslighting. And we'll have to find out what that means as I talk to Craig. But Craig, first of all, a very warm welcome, really delighted to have you on our show today.

Craig Green:

Thanks so much. It's a pleasure to be here. And thanks to your listeners for listening.

Alan Kaplinsky:

Okay. So the topic of when should agencies defer to regulations issued by federal government agencies, a lot of people think it all started with this Chevron case, which was a 1984 case, which going to ask you about in a minute. But this is not anything new, right? I mean, the 1984 isn't new, but the Supreme Court and other courts had been considering whether to defer to government agencies and their regulations well before that. Am I right?

Craig Green:

Old as the hills. So if you think of the basic pattern is Congress could just write a statute, could be a vague statute and then courts would be the only ones to interpret it. But in an administrative law setting, courts make a statute and they also make an agency. And that agency is sort of in charge in a certain kind of way of administering that statute. And that's where all this deference talk comes from. When Congress creates an agency that becomes like an expert in administering the statute ever since the 1820s, certainly since the 1940s, and then this Chevron case in 1984, courts defer to the agencies that interpret these vague statutes that they the agencies were put in charge of administering put in charge by Congress. And that's where the whole issue of how much deference comes from this initial decision by Congress, not just to create a statute but create a statute and an agency to which courts should and have deferred.

Alan Kaplinsky:

And when Congress does that, when they create an agency, sometimes Congress does some weird things. But when they create a, let's say the Securities and Exchange Commission that took place decades ago and more recently when they created the Consumer Financial Protection Bureau, they didn't just create an agency, they wrote a this is all part of the Dodd-Frank Act. And the portion of it covers two titles of Dodd-Frank and it's hundreds of pages dealing with all kinds of things. Rulemaking, supervision, enforcement, consumer education, Congress tends to give a lot of thought to it. And ordinarily, although not always, the person that is appointed to head the agency or sometimes it's a multi multi-person commission, Federal Trade Commission, five commissioners, SEC, I think there are five, they're generally pretty talented people.

They generally hire staff that are very smart and who become expert in the area. And I guess at least I've always thought it deferring to a government agency in a lot of cases makes a lot of sense because I often believe that the agency knows a hell of a lot more about the subject at hand than a court who was typically coming to the issue for the first time. Is that a fair statement or do you disagree?

Craig Green:

Yeah, no, I think that there in fact, agencies often both from their leadership and from their staff you were referencing, and they often have enforcement or they make rules or they do adjudications. They're knee deep or hip waders deep in this field, in

this area in a way that almost nobody else's. In a way that certainly Article III judges are not. So that's practical side. The legal side is that's exactly what congress for literally decades if not centuries, that's what they've done and have been intending to do by creating an agency with that kind of haft in the first place.

Judges totally generalists, maybe also smart, but dealing with securities one day and environment the next day and criminal law the third day and employment discrimination the fourth day. And when Congress creates, could be labor unions, it could be the environment, it could be securities. They create these specialists, they give them broad authority to do a lot of things to regulate. And the message is, and again this is exactly what Chevron deference represents. The message is courts, why don't you take a step back? You're still here to supervise, but why don't you take a step back and defer to some of these experts who have a multifaceted set of responsibilities and tools to make this new regime created by Congress to make it work the right way.

Alan Kaplinsky:

And that's my general thinking. But then of course, you practice long enough and you see how agencies change depending upon what party is in charge, whether it's a Republican or a Democrat. And I've seen in the short life of the Consumer Financial Protection Bureau, it's already flip flopped three times, twice I should say. Well, it was created during the Obama administration, Richard Cordray who was the Attorney General of Ohio, very progressive person, was put in charge of the agency per the personal choice of Elizabeth Warren. When she realized that she was too controversial to be made head of the agency, then Trump gets elected and a seat change, I mean things got up interpretations that had existed during the Cordray administration, they just repealed them and said, "We no longer believe this. We no longer believe that." They even changed final regulations.

In fact, the cases that that's in front of the US Supreme Court that I mentioned during my opening remarks, that's a case where a regulation applicable to payday lenders got changed by Mick Mulvaney and Kathy Kraninger who became the acting head of the CFPB. And then later Kraninger became confirmed by the Senate. She became the director of the CFPB. And now under the Biden administration we've got somebody more progressive and liberal than Richard Cordray, almost makes Richard Cordray look like Attila the Hun. I mean very, very liberal, very progressive, has a sweeping view of his powers and isn't at all will utilize those powers at the drop of a hat and has been subject to a lot of criticism, most of it being lodged by the industry who feel that he's pushed the envelope too far. So basically the problem that I see, I don't know if you see this too, the problem with de the idea of deference, one of the major problems is that it tends to get politicized and it blows with the wind. Whichever way the wind is blowing in Washington, the agency can change its opinion very, very easily.

Craig Green:

This is the second really important feature of deference that also goes all the way back to the beginning is the changeability of policy. If Congress has something that they know they want, they can write it in a statute. That's the way it's going to be from now and forever. When they create an agency, that creation of an agency is designed to be adaptable to other circumstances and developing events over time. And that includes, doesn't exclude politics. Here's a quick example from Chevron itself. As an environmental policy, the Reagan administration, a very conservative administration, comes in and wants to change the way that factories are regulated. Now, they don't have the votes in Congress to change the statute, sounds familiar,. So instead what they do is they put a very conservative EPA administrator, much more conservative than anybody before. Turns out that person is Anne Gorsuch, Neil Gorsuch, the Justice's mother.

And she comes in and from day one, she dramatically shifts the EPAs interpretation of relevant statutes in a way that's much more pro-business. And somebody like then, Judge Nino Scalia, is celebrating the Chevron deference up one side and down the other because this is how the Reagan revolution happens. They can't change the statutes. They come in and they steer the governmental wagon to the right. Now that's not necessarily right or wrong or whatever you think about it, but it is the way things have been for 40 years and more. That is to say this is what it was thought to go with winning the presidency was you got a lot of interpretive power over how these big federal statutes got interpreted.

A conservative wins and they shifted into deregulatory direction, a liberal wins and they shifted to regulatory direction. And that's again, thought to be baked in the cake from when Congress creates an agency, doesn't spell it out themselves, creates an agency to interpret and apply a vague statute that, therefore, might change over time. And I think this idea of changeability of

law to modern circumstances, but also to prevailing politics, that really is what the administrative state has done is supposed to have done for 40 or 80 years depending on how you count.

Alan Kaplinsky:

Right. So all right, we've been dancing around Chevron. Let's dig a little deeper into Chevron. I see a tremendous irony developing here when you mentioned Anne Gorsuch being Justice Gorsuch's mother and what she did when she was head of the EPA. But you've talked already given a lot of background on Chevron, so I think let's just get right to the holding. First of all, who wrote the opinion?

Craig Green:

Right. Well, Judge Ginsburg, then it was Judge Ginsburg and the DC Circuit wrote that this was all about whether the source of pollution should be individual smokestacks, let's say on an industrial plant or the industrial plant as a whole. The so-called bubble concept. Bubbles or stinkers, one by one smokestack or the bubble as a whole. She had said, "Look, the Clean Air Act means it goes stinker by stinker. Every individual stinker is a source. And anytime you change that, you have to get an extra permit." The Supreme Court reverses then Judge Ginsburg's opinion. And Justice Stevens writes for the majority and he says all the things that we've been saying. He says, "This is an issue primarily for the agency to decide not for the courts.

This is within a range of ambiguity and reasonableness. They get to say." That's what he said. And he said, "They also get to change their mind from one administration to the next because that's what Congress did when they set up this EPA to administer the Clean Air Act instead of just us." We're here. But if they just wanted us, they don't have to create an agency to interpret. But when they create the EPA, the EPAs interpretation gets deference and no dissenting justices and they codified in a clear kind of analytical way in Chevron how that deference doctrinally should work. And that's why that opinion gets so much attention is because that was the first time the court had really tried to say exactly how and why deference should work for a regulation by an agency interpreting a vague statute.

Alan Kaplinsky:

Yeah. Now, I take it, in that case, Craig, they were dealing with an EPA regulation, a full-blown regulation that had been adopted pursuant to the Administrative Procedure Act notice the comment, the whole thing. Very often agencies will issue things that aren't regulations. They don't put them out for notice and comment. They don't even publish them in the Federal Register. Sometimes they'll do that even for something that's not a regulation. I often rail about and I blogged about the practice of the CFPB and Director Chopra of not issuing full blown regulations. He generally doesn't like to do that because it takes a lot of time and you have to listen to what other people think and he doesn't think other people know better than he does. So he'll issue things, give his opinion in various forms. Sometimes it's called advisory opinion's, guidance, sometimes he'll amend an examination manual. Sometimes it'll be in a blog that he writes or a speech that he delivers, or no action letters, they have that too. But at least in the Chevron case, that was a full blown red, right?

Craig Green:

Yes. And all this deference stuff I believe is going to be reformulated or scrapped, but five, 10 years ago, one would've said there's a sharp difference between stuff that gets Chevron deference, which is rule making or a formal adjudication. So in another context, the NLRB does adjudications that are interpreting that have a lot of the characteristics you're mentioning. They get input from other people, they think really hard about it, they have a formal product. So Chevron was thought to apply to rule making regulations and to formal adjudications, all this other stuff that agencies do, press releases and filing briefs and this kind of relatively informal stuff had all gotten a different kind of deference called Mead deference from a 21st century case or Skidmore deference, which goes back to the '40s. So that different kind of administrative agency product under the old regime had gotten different kinds of treatments from the court that were thought to respond to what Congress would've created and meant to have an agency go through that full blown input process as opposed to something much more off the cuff.

Alan Kaplinsky:

Let's stick with Chevron for a minute and then we can talk a little bit about Mead. But with Chevron I take it if a statute is clear on its face as it would apply to whatever the facts and issue are in a particular case, then you don't get to the issue of deference. It's up to the court to read the language and if it's crystal clear, make a decision. Although very often I'll see opinions that where the court will say, "We think it's crystal clear and we decide this," but even if there is any ambiguity, the agency is already spoken, is issued a regulation. So if there is ambiguity, whatever that means, and that may be an issue in one of the new case that we're going to talk about in a couple of minutes, there is ambiguity. Then the court is required to defer to an agency regulation, is the wording reasonable?

Craig Green:

Absolutely, the Congress is the boss. And so if the Congress says something, that's how it goes and the agency can't change that. And so anytime anyone's talking about deference, it's in this realm of ambiguity. That's the only time anybody even worries about deference or thinks about deference. And absolutely predictably, courts over time have fought about whether something really is ambiguous or is it ambiguous or not. This is grist for the mill, absolutely ordinary cases for 40 years, for 80 years as people debate, what did congress mean? What did Congress say? What did they leave vague? What did they leave undecided? Completely all of those things. The thing that's different now is in addition to having fights about what's ambiguous, there is an attack on the idea of having deference at all.

And an argument that Chevron deference hanging around for 40 years or what would've been called Hearst deference 80 years or Edward's deference back to 1820s, all that deference is unconstitutional that a court is going to step in. And even where a statute might be vague, the court then will take unto itself to say authoritatively with no deference and lasting forever what a particular vague statute means the same way they do, of course, where there is no agency. They do that all the time with statutes and other contexts and they'll do that thing in agency contexts as well and throw out the whole concept of deference, which again only applied where Congress had drafted a vague statute.

Alan Kaplinsky:

Yeah, yeah, yeah. All right, well let's now scoot ahead to the case that really prompted my interest in having you on our program. I call it the Fisheries Case, but that's not the actual title. What is the title?

Craig Green:

The actual title is Loper Bright, and it's a case about herring fishers. And the government issued a regulation pursuant to general statutory authority to make regulations. And they said, "In order to monitor your hall, you got to have a federal official on your boat." And some of those folks are working directly for the government and others are contractors. The larger group of contractors, if you've got a monitor on your boat, you the fisher have to pay the daily rate for that person to be there monitoring your hall. And that is the legal issue, the technical small issue in this case that's pending.

The one other thing I'd add is we've been building to this moment in the administrative law world for about 10 years. There have been cases over time where with increasing volume and increasing sharpness, various justices have offered this constitutional critique of deference and that kind of has brought us to what otherwise a perfectly ordinary case. Do there have to be monitors who has to pay for the monitors? This is the most ordinary administrative law thing there could ever be. But in the background of the last 10 years of building and growing and amplifying constitutional critiques, that's what makes people think, one of the main things makes people think, this case really could be pivotal.

Alan Kaplinsky:

Yeah. And by raising the constitutionality issue, you're referring to separation of powers I assume. And the concern is that the executive branch is usurping the authority of the judiciary and that would make it a constitutional problem. I take it if there is a constitutional issue as you've identified it, that's not anything that Congress could correct, I would guess by your reaction to it. What if Congress said in a statute that gave an agency the authority to promulgate regulations dealing with whatever the

subject matter is and then said, "And courts shall absolutely defer to any regulations issued by the agency." Is that correct? The constitutional issue or still a problem?

Craig Green:

There are two constitutional issues that have been identified. I kind of think they're at loggerheads. One of them is anytime you have an agency that's interpreting a vague statute and getting deference, one argument is that's the agency lawmaking. They're making laws and stealing from Congress in that kind of way. It's an Article I violation, separation of powers. That's one argument. And then the other ones, one you mentioned, which is an idea, anytime the courts defer to agencies interpreting a statute, they're giving away or getting stolen from their article three powers, their judge powers. And so they kind of got the argument that Chevron is in a scissor play. They're either violating Congress's rights or violating court's rights. Your more specific question, can Congress solve it? Congress could presumably pass the Chevron Support Act and say that either a particular agency or agencies across the board should get Chevron deference.

Now putting aside, there's not going to be votes for that, but Congress has thought it's done that for the last 40, 80 years, every time they pass a vague statute, the courts have been telling them for 40, 80 years, when you pass a vague statute as though you had the next clause said, and by the way, agencies should get deference in interpreting it. So you can't pass the statute and what would the conservative courts say about it? But I really want to stress this other point, which is that's been effectively the status quo. That's what the courts have told us since Chevron, that's what it means for a Congress to pass a vague statute and create an agency, is to have the Chevron Support Act.

And so that's why I think everything right now feels very off the rails. It feels very in a tornado because it's not clear exactly what the objections are and it's not clear exactly whether anyone theoretically could fix it. The only reality we know for sure is it's very, very unlikely in the divided country and divided Congress we see that anybody actually will fix it. And so that's why the court's words in a case like this will probably be the last word because in reality, we're doing well to pass the debt ceiling, much less anything more ambitious than that.

Alan Kaplinsky:

Right. So all right, let's get back to this new case, the Loper case. And as I understand it, in the Fisheries Act, there were three instances where Congress spelled out that there needed to be not only a federal monitor on board each boat, but the federal monitor needed to be paid by the company, the fishing company. But the one instance in which Congress didn't spell that out, that's the issue before the court, right?

Craig Green:

Yeah. And this is another case right out of the DC Circuit, and this was a divided panel and the majority was written by Judge Judith Rogers, who's been a judge for 40 years and has really a lot of experience in the area of administrative law. She treated this case just like an ordinary Chevron case, sort of an old regime. And she said, "Yeah, it's true. This particular statute doesn't specifically say you have to pay the monitors, but yeah, monitors have to be paid." And the agency as the boss in charge of how to administer this agency has plenty of power to issue regulations and specify this kind of stuff. The dissenting judge, who actually is a very junior judge and had been, I think voted not qualified by the ABA for both of his confirmation hearings, but he I think really represents the vision of the future where he says something like, "Look, if you're on a boat and the government's making you pay for the monitor to be on the boat, Congress has to do that to you.

It can't just be the agency who says in using their general regulatory authority, yeah, you got to have somebody in the boat and you got to pay for it." And so I think rather than particular language in the statute, I think if you look at this in the Chevron context, it's really, it's solid war between the majority in the DC Circuit, which is just, this is completely ordinary business. And the dissent, which is, this is exactly what's wrong with ordinary business, is that agencies are going around imposing these responsibilities on their own authority, on their own interpretation, on their own vision of how to make the statute work. And not with a specific say so from Congress in advance. And I think that's the issue that sort of carries it forward and makes this a big case.

Alan Kaplinsky:

Well now, we've blogged about this case in our consumer finance monitor, it was a blog I wrote on May 5th, and I identified the actual question they granted cert on. And let me read the question to you, "Whether the court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." So it looks like the court gave itself an off ramp if it decides not to overrule Chevron, but still decide the case in a certain manner. So I'd like to hear your thinking. I mean, I know you do believe that they're going to face this issue head on and as a constitutional issue, but I'd like to hear your reasoning because I have heard other people think they'll do what they usually do. They've had other opportunities to overrule Chevron, they haven't done it, they've chipped away at it by creating various doctrines. And we'll talk about that in a minute.

Craig Green:

Sure. First, to describe the status quo before this case, the last 10 years I think I mentioned justices including the chief justice in 2013 have become increasingly vocal and chipping away and doing this sort of. And you might think the job is pretty well done because now even very, very experienced litigators in the Supreme Court when it favors their case, they will not cite Chevron. They will not cite Chevron to the court. And in other cases, Justice Gorsuch, who's been leading the charge as anti Chevron group, he's written opinions where he said, "I'm so glad and proud that the litigants here didn't cite Chevron because Chevron's baloney." So it really has reached a point where this is a precedent, very peculiar, I think where this precedent, authoritative, ostensibly authoritative, has become almost practically toxic in practice. You don't want to cite it too much or lean on it because it's a recipe for disaster.

This case, so this case had two questions that were brought forward. One is applying Chevron should the agency lose, and two, should you overrule Chevron or this other off ramp. Now it seems to me, if the court was looking for an off ramp, you only need four justices to grant a question. So if any four justices wanted to grant an off ramp, you should grant question one. You should grant judge one and say, "Even applying Chevron, this flunks because it's not implicitly granting this authority." That's what Judge Walker did in the DC Circuit. He said... So fine. But granting the second question, I think has one off ramp. It's true, but not the best off ramp. And it has the really hot question that's been brewing and distilling for a while. And the one additional point I'd make is the quality of legal counsel in this case is extraordinary. Litigating for the petitioners is Paul Clement. I think he's definitely one of the very smallest handful of most talented capable Supreme Court litigators of his generation.

Alan Kaplinsky:

And one who, I would say, is apolitical. You can never predict what size an issue he's going to end up on.

Craig Green:

Well, I work for Paul in the solicitor general's office and I think he's very conservative, but I think he's extremely talented. More than any other thing, he's incredibly talented. So if the court is looking for a good vehicle, somewhere where they really have the best versions of the arguments in front of them to make a decision of this magnitude, I think that another thing that vaults this case forward. They didn't have to grant this case. This case is not that important, a big mix of life. They could have granted both issues and then they would've had a lot of options to them maintain all their flexibility to see how the votes fall and who's ready to do what.

But the idea they didn't grant question one, they did grant question two, which it's true what you said has the possibility of an off ramp but not the best off ramp. And in this case that has such talent and real power to the argument. I think that's what really draws attention. This case, maybe, this is the one, this really might be the one that people have been waiting for at least five years and there have been signals on the horizon for 10.

Alan Kaplinsky:

Do you know whether or not there have been other cases where they teed up, they granted cert on this question of whether to overrule Chevron and then decided not to?

Craig Green:

I don't know of any other case that has presented the question as clearly in black and white as the second question, the one they granted in this case.

Alan Kaplinsky:

Okay. Okay. And in overruling Chevron, I take it, there's a couple ways they could do it. One, they could say, "It's a constitutional problem," or second, they could just say, "As a matter of administrative law, we don't think it is the proper way to analyze the legality of a regulation" and just go and say, "We think we're as capable as the administrative agency in deciding the issue."

Craig Green:

Yeah, I mean there was an article by Henry Monaghan at Columbia decades ago that talked about Chevron as statutory interpretation. That the layer of Chevron deference was like this clause that should be added to every administrative statute. Vague, statutory language, the tie goes to agency regulations. In an area of statutory interpretation, the Supreme Court should not, and almost never overrules itself explicitly overrules itself. If they're just talking about statutory interpretation, they really almost never do that. That's supposed to be a job for Congress.

The second thing to say is this constitutional rhetoric and constitutional argument, constitutional talk has been the dominant mode for anti Chevron justices, for anti Chevron litigation, for anti Chevron scholarship and policy analysis. So I think there are reasons to think that the Constitution is going to do the work for them in this case. I should also say if they take the off ramp, if they take the off ramp, they could just use their ordinary interpretation of precedent to narrow things a little bit here or there. That's been, again, the pattern for the last 40 years is that some courts have broader, narrower interpreting Chevron, but I think to overrule Chevron, the constitutional guns are probably going to come out. Gorsuch is on the Supreme Court because of his opposition to Chevron. That's how he made a name for himself in the 10th Circuit and the White House picked him for that reason. Clarence Thomas has radically reversed his point of view from 2005 until today. He used to be super pro Chevron and now he is super anti Chevron.

Alan Kaplinsky:

Well, he used to just vote whatever Scalia.

Craig Green:

No, I don't think that's it. There was even an opinion called Brand X where actually Clarence Thomas was even more pro Chevron than Scalia. So I think Clarence Thomas, all these folks have been around the administrative state in DC for a long, long time, and Chevron was just absolutely ordinary law. So I think Thomas is against, I think Alito was against, I think that John Roberts is very close to against, and then it's the standard question, is there a fifth vote to overturn Chevron? It's just not clear.

Alan Kaplinsky:

Yes. I take it that the liberal justices will not want to overrule it. That's pretty clear.

Craig Green:

I think that's true. I think Kagan and Sotomayor and Jackson have all been very, I would call it ordinary judges on this issue. They have a precedent that's been around for a long time. You can flex it one way or the other, but there's no reason to throw out that particular bath water.

Alan Kaplinsky:

Yeah, yeah. So let's talk about some of the more recent cases and what their teachings are in terms of what the court may do in the Loper case. And the first case I want to talk about is the EPA case involving the state of West Virginia decision that I think came down about a year ago, roughly, sometime last year. Tell us a little bit about that case and what you think it tells us about what they might do in Loper.

Craig Green:

Sure. And this was the thing that I wrote Greenhouse Gaslighting about, as it turns out, referenced earlier. Almost a year ago, almost exactly a year ago, the Supreme Court had to interpret a term called system, system for emission's reduction. What did the word system mean? Did it mean just attaching filters to the top of smokestacks? Did it mean, which is what the agency said? Does it mean really transforming the way America gets energy, what they call generational shift, moving to a new system of energy production? So the agency had said system includes this broad generational shift that applied under the Clean Air Act, various provisions. And the Supreme Court said, "No," said that, "System cannot mean this broad generational shift from coal to natural gas to solar and wind. It only means these relatively narrow technical onsite things." And they crafted for the first time, a majority opinion, crafted this thing called the major questions doctrine.

And what they meant by that was even if you have a vague statutory term like system, the kind of time when old people would've thought Chevron time, they would've thought, "Oh, this is a time to defer, this vague term system." But they said, "You can't do something so dramatic and big with that vague term," this major questions doctrine, the political and economic significance. The Supreme Court said, "In that area, we actually presume against federal agency power. So not only affirming to the agency, we're going to assume that some vague statutory term like system probably doesn't mean such a big thing as this generational shift for energy." And that major question's doctrine, as you can see, it is not directly on point with Chevron deference, but it's a real way of scaling back agency power on the one hand and scaling back federal power on the other.

And the two big concept blocks that are out there motivating and supporting a broader attack on the administrative state and federal government that Chevron is all part of that. So major question doctrine was another case. The EPA case was a West Virginia case, a case where they could have just rejected Chevron, but instead they actually created a whole new doctrine and then they had a concurring opinion that said, "This has constitutional basis like the non delegation doctrine," a doctrine hadn't been seen since 1935. So they're cooking up really old and unprecedented constitutional ideas. They're scaling back very dramatically federal agency power in the face of what would've been thought to be a very important problem of a climate change in the climate crisis. The Supreme Court says effectively, "You got to go back to Congress and you got to get some specific authorization." This general stuff, that agency in charge is not the model in the major questions doctrine. It happened a year ago, almost to a day, like, a year ago and a month.

Alan Kaplinsky:

Well, ever since that opinion came down, Craig, those of us like myself who focus their practice on consumer finance with a lot of time being spent on regulations issued by the Federal Trade Commission and the CFPB, we've wondered whether that doctrine could be applied because when the Federal Trade Commission issues regulations, very often they're issued under section five of the FTC Act, which is very broad and very general and very often ambiguous, prescribing unfair and deceptive acts and practices. And with respect to the CFPB, Congress made it even fuzzier in Dodd-Frank by prescribing unfair, deceptive or abusive acts or practices. And there's been rulemaking conducted by both the CFPB and the FTC using that as authority, very specific rulemaking and sometimes rulemaking that's of monumental importance. Do you think that the major questions doctrine could be applied in those two contexts?

Craig Green:

Yeah, I think, and the one I would add, of course, which you've mentioned otherwise, is I think the SEC and the FTC, which are very old agencies. The FTC using rulemaking power not since its beginning, but since the '80s. And then the CFPB, which is a very new agency, but all of these agencies have followed a completely standard pattern for congressional agency writing that they have broad authority to regulate, to make rules, to interpret vague statutes, to require things not unlike the fishers and

the monitors and who gets paid. Not unlike tons of features, on airlines, what you can do in an airplane lavatory. Those are all regulations made by agencies. And some of those, to the point of the major questions doctrine, some of those really matter.

They really matter for the economy, they really matter for the environment, they really matter for a lot of things. And the court with this major questions doctrine is almost like a warning shot and says almost like, "Well, if an agency is doing something that really matters, they better have a very specific hook from Congress." When, of course, for a half century or more a general hook has been the order of the day. That's what they've done every single time. So I think there is this real huge gap between the way the agencies are working now and the way that they might work if this major questions doctrine really takes off.

Alan Kaplinsky:

Let's now get even more current. The most recent deference opinion is a case called the Sackett case. The full name is Sackett versus Environmental Protection Agency. Tell us about that case, Craig, and what does that portend in terms of what the court might do in Loper?

Craig Green:

Absolutely. So this is another, from a certain point of view, completely standard pattern case. This is a Clean Water Act, and the question is, what counts as navigable waters? Is it just a lake? Is it a creek that runs to a lake, is a wetland that's adjacent to a lake? How much of that is covered? And again, totally consistent with Chevron, totally consistent with agencies in other contexts. Different agencies over time with different political leadership have had different interpretations of what that term means. And from the early days until now, every court has had an occasion to defer to the agency on that interpretation. But not in this case, in this case, without referencing deference, they never cited Chevron. They just said, "We know what navigable waters mean. And it's not the creek. Wetlands adjacent, we say," says the court, "That's fine. If it's indistinguishable, but if it's not indistinguishable, then it's out."

And just as though they were interpreting the statute on their own in a closet as though no one else were around, as though nothing else had happened, they're citing, as you did, citing dictionaries from 1976 and thesauruses and all kinds of plain languagey type of things. And I think there you have them. And then there's a concurring opinion as often there are in these cases, a concurring opinion that says, "Look, this is about scaling back constitutional power of the federal government. This is about respecting powers of states to regulate wetlands and not just the federal government and not turn the federal government into local zoning board." So in this very particular case about what does navigable water mean, but these same really big themes are there.

And I think those themes, along with the EPA case and the West Virginia Case about the major questions doctrine, and along with the case that are pending now, this is a court that's changing the law and changing the constitutional law, and it could affect a huge range of agencies including those, especially relevant to your listeners that had to do with regulating business and finance and banking. And I think all of those agencies that have leaned on and leveraged the status quo, the way agency business has run for the last 40 years, all of those pillars are shaking, all of those foundations are cracked.

Alan Kaplinsky:

So let's assume you're right. Supreme Court overrules Chevron, what happens to rulings that have been made by other courts, including the Supreme Court years ago? Just to give you an example that I'm very familiar with, because I was involved in litigation relating to this. So Section 85 of the National Bank Act says, "A national bank can charge interest at the rate allowed by the law of the state where it's located." In 1978, they issued an opinion called Marquette National Bank versus First of Omaha Service Corporation. And in that opinion, they for the first time held that a national bank could export interest throughout the country, that it could charge whatever rate was allowed in the state where it was located, typically Delaware or South Dakota. It could charge in Pennsylvania, any other state, even if there were user recaps, that wouldn't allow that kind of a rate to be charged.

So then in the late, well, mid 1990s, actually came to a head in 1996 with a case called Smiley versus Citibank. And in that case, the court dealt with the further question of what does interest mean? And concluded that a flat late fee charged on a credit card account constituted interest, and therefore that could be exported if it was a late fee allowed by Delaware or South

Dakota. That could be exported anywhere else in the country. So I was involved not directly in the Citibank case, but I handled a case for Discover Bank. The time was called Greenwood Trust Company, which was a state chartered bank. And our case, we have several cases around the country, didn't get up to the Supreme Court as quickly as the City Bank case. So the Supreme Court, when they got to our case, they did a grant in hold, they granted cert, but held it to see what the outcome of the Citibank case would be.

So the comptroller of the currency, which was the agency that had regulatory and supervisory authority over a national bank like Citibank, at first they issued an opinion letter of their chief council that agreed with Citibank's position that a late fee is constitutes interest. And there was a well-reasoned explanation for that. And then literally at the 11th hour while the case was pending before the Supreme Court, the comptroller finalized a full-blown regulation on the subject and the court deferred to it. I think they did mention Chevron. And I think back then, we weren't as hesitant about citing to Chevron as people would be today. And the court was very willing the site and rely on Chevron deference. If they now conclude that Chevron was unconstitutional, what happens to an opinion like the one they issued in the Smiley v. Citibank?

Craig Green:

Yeah, I think this is the most important thing to say. The Supreme Court is doing things that no living lawyer has ever seen. This is a dramatic transformation that people did stuff like this in the moving from 36 to 38, but none of those lawyers is around to talk about it. And this is a dramatic profound across the board transformation of American law, including, but not only administrative law. People are more familiar with abortion rights or gun rights. There are dramatic things being done, or a change like Miranda warnings, a change like Erie v. Tompkins. These are profound dramatic changes. And an ordinary person would say, "Maybe the court will take it slow and the court will change things, but maybe they won't apply it retroactively. They'll change things, but they won't apply it to interpretation from the past." But I just think there's no guarantee about that, and especially because the named target of the attack is Chevron deference.

A question for somebody like me is what does this mean for Chevron itself? What does the word source mean? Is it bubbles or is it stinkers? And does the agency get any interpretation over that? And was the Reagan administration, Anne Gorsuch, was she wrong all these years ago and then Judge Ginsburg was right from the grave? I think these are the kinds of questions that you would characterize under judicial activism to use one kind of word or legal process for some other kind of word. But I think there's just absolutely no guarantee. And if you really believe that what's been happening for the last 40, 80 years is unconstitutional, then I think the level to which the wrecking ball rolls is really unclear. I think that really an awful lot of the federal administrative state is at least on the chopping block, and I think the limits will be whatever the fifth vote goes for.

Alan Kaplinsky:

And I guess it's conceivable that they could hold and probably likely they'll hold it unconstitutional, but not deal with whether it's retroactive or not. Wait for another case to raise that issue.

Craig Green:

Absolutely. And that would be very ordinary, again, from sort of Miranda cases or striking on the federal sentencing guidelines to wait for some future cases. And I think that the one thing for sure is litigators and actors in the modern environment, they don't have any real doubt which way statutory ambiguities are going to run. They're going to run, and they're being told over and over again, they're going to be running anti agency, anti federal power, pro-business, pro a certain kind of liberty direction. And I think that that's what one should expect over the longer term. What is this case going to mean in 20 years? What is this case going to mean in 25 years? I think it's going to mark that kind of lasting rightward shift that one should absolutely expect from new personnel in the court and from a dramatic change in American law.

Alan Kaplinsky:

Yeah. Okay. Well, Craig, we've drawn to the end of our program for today, and I learned a lot. I can tell you that. And I'm personally very thankful, but I'm sure our listeners are equally as thankful. Thank you for taking the time to be a guest on our show and enlightening us on this really important topic of when the courts, when they should defer to regs issued by government agencies.

Craig Green:

Thanks very much. It's been such a pleasure to be here. And I do, I think this is such an important topic for consumer finance and quite frankly, beyond as well.

Alan Kaplinsky:

Yeah, sure. So to make sure you don't miss any of our future episodes, subscribe to our show on your favorite podcast platform, be it Apple Podcast, Google, Spotify, or wherever you listen. Don't forget to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. And stay tuned each Thursday for a new episode of our show. Thank you for listening today, and have a good day.