

Should *Chevron* be Overturned? Excerpts From the Special Podcast Recording Session at the FBA Annual Meeting & Convention

Transcript adapted by Dominick Alcid



Dominick Alcid is the director of membership and marketing at the Federal Bar Association.

Following the lively debate from the Midyear Meeting on the federal judicial nominations (see the October/November 2018 issue of *The Federal Lawyer*), the Federal Bar Association and the National Constitution Center teamed up again at the 2018 FBA Annual Meeting & Convention to host a bipartisan discussion about the 1984 Supreme Court decision *Chevron v. Natural Resources Defense Council*. Lana Ulrich, in-house counsel at the National Constitution Center (NCC), moderated the administrative law debate between two leading experts on this complex but increasingly important topic: Columbia Law School professors Philip Hamburger, the Maurice and Hilda Friedman Professor of Law, and Gillian Metzger, the Stanley H. Fuld Professor of Law.

The Sept. 13, 2018, recorded session is part of the National Constitution Center weekly series on constitutional debate, *We the People*, and is available in their podcast library.

LANA ULRICH: I'd like to thank the Federal Bar Association for inviting We the People to record live at its Annual Meeting & Convention conference here in New York. We've got a great show for you today on a hotly debated topic: Should *Chevron* be overturned? Our two guests, professor Philip Hamburger and professor Gillian Metzger, are two of the leading scholars in this area. The motion is: Should *Chevron* be overturned? The 1984 Supreme Court decision *Chevron v. NRDC* created a judicial deference doctrine to agency action commonly known as *Chevron deference*. *Chevron* doctrine has been implicated in crucial debates about the modern administrative state and separation of powers. First to you professor Hamburger, can you briefly summarize what *Chevron* doctrine is and why should it be overturned or not?

PHILIP HAMBURGER: Thank you and it's a great pleasure to be here not least with my distinguished panelists, one of whom actually is not only a colleague

but a neighbor, so it's a great pleasure to be here. She happens to be the most formidable person on the other side of this debate and that I think will make it all the more fun. So *Chevron*, the 1984 Supreme Court case, is a very odd duck. It's a case decided by the Supreme Court that requires judges to defer to an agency's reasonable interpretations of ambiguous statutes. Ordinarily when a judge encounters a statute that's a little uncertain, the judge decides it and if it's too uncertain the judge will simply let it go and say there's no meaning there. But *Chevron* does something different. When an administrative agency has already interpreted the statute and put that interpretation into a rule, the Supreme Court requires all judges, Supreme Court judges and lower court judges, to defer to the agency's interpretation within a few guidelines—not very narrow guidelines—and the effect of this is twofold. One, it enlarges agency power to make rules. Under *Chevron* agencies that did not have express authorization in statute to make rules on the subject now can make rules that control all of us and reduce our liberty. And second and I think of particular importance for our purposes: it limits judicial power, barring judges from judging where they ordinarily would do so. So that's what *Chevron* is. I hope that's a succinct description of it.

Why should it be overturned? Well how can I count the ways? I could dwell on the fact that it is contrary to statute, it's contrary to the Administrative Procedure Act, quite clearly contrary both to its text and intent. I'm not going to linger on that. I could talk about the perversion of justice that it produces. I'm not going to talk about that. I could talk about the violation of separation of powers and other structural constitutional problems. I don't want to talk about that either. There are thousands of law review articles on this. They are all equally tedious.

I want to focus on the really interesting reasons why *Chevron* is unconstitutional. First it requires judges to violate their duty of independent judgment.

What is a judge? Well a judge is someone who has a duty, an office and a duty, to judge, to exercise his or her own judgment. And this is implicit not only in long traditions of British judicial duty but in judicial power itself. As James Iredell, one of our first Supreme Court justices, said, this is the duty of the power. With the power to the courts comes the duty of the judges to exercise their judgment. And the result as put by John Marshall in *Marbury v. Madison* as we all know is, as he puts it, it is emphatically the province and the duty of the judicial department to say what the law is. But then *Chevron* comes along and says *oh no no no judges can't do this* where the executive in the form of an agency has said what the law is, where an agency interprets. And this is very odd. Why are we requiring judges to give up their judicial office and duty? And so this alone is reason for thinking this is unconstitutional under Article III which establishes the judicial power as we all know. But it gets even worse.

There's a second and independent reason to think that *Chevron* is unconstitutional. It requires judges to engage in judicial bias. I actually wrote an article, it's called not *Chevron* deference but *Chevron* bias, and for those of you who are lawyers I recommend it. It details the sort of arguments we're making today. Where the government is a party to a case, *Chevron* requires judges to favor the government's interpretation. This is very odd. Can you imagine a rule requiring a judge in a criminal prosecution to favor the interpretation of law put forward by the attorney general? It would be perverse. This is systematic bias in favor of the legal position of one of the parties, indeed the most powerful of parties in violation of Fifth Amendment due process of law. The Fifth Amendment requires unbiased judging if nothing else. And there are very few provisions of the Constitution to which I think there is more general commitment than the due process of law. And the Supreme Court has said even the appearance of a potential conflict of interest violates the due process of law. That's *Caperton v. Massey* in 2009. Well here we have systematic institutionalized bias in favor of the government in cases. I can go on. The code of judicial conduct requires a judge and I quote to disqualify him or herself in a proceeding in which the judge's impartiality might reasonably be questioned including but not limited instances in which the judge has personal bias or prejudice concerning a party. Now this isn't personal bias. It's worse. It's institutionalized bias. In effect this is an abnegation of judicial power and a violation due process. In fact even the defenders of *Chevron* more or less admit this. Peter Strauss, another of my distinguished colleagues, calls *Chevron* deference *Chevron* obedience. The judges must obey. Adrian Vermeule, another former colleague, expressly calls for the judicial abnegation of power, something that I think would seem grotesque to most lawyers. I'll stop here. I have a lot more to say. I think eventually we should get to the question of *Chevron* and equal voting rights. But let's just stop right here. I look forward to hearing what my colleague has to say.

GILLIAN METZGER: Thanks to the Federal Bar Association and also to the National Constitution Center and I'm particularly pleased to be helping in the wonderful work that the NCC does. So I think *Chevron* should not be overturned.

It shouldn't be overturned because the constitutional attacks on it are unfounded and, in fact, under a proper constitutional understanding *Chevron* deference or forms of deference are actually constitutionally compelled. It shouldn't be overturned because the attacks on *Chevron* deference rest on a conceptual confusion, on the

idea of a very strict distinction between law and policy, which is one that simply doesn't exist and denies the indeterminacy in law that is a basic aspect of our legal system. It shouldn't be overturned because those who attack it really exaggerate what impact it has, exaggerate both the attacks on the judicial role but also exaggerate and ignore the extent to which *Chevron* has been in various ways domesticated and is simply a legal framework that will wax and wane over time. And finally it shouldn't be overturned because the effects of doing so, depending on the basis, either has a tremendously radical disruptive potential or will have little effect in practice.

So let me expound a little bit on each of those as to why the attacks on *Chevron* are constitutionally unfounded. Those attacks rest, as my colleague and neighbor Philip Hamburger just recounted, on an idea of the role and duty of the courts. Philip has talked about in terms of the office of being a judge. One thing that ignores is that we've got a long standing precedent of deference by courts to executive interpretations, long standing acceptance that, actually if you think about the early years of the country in the early centuries, quite a lot of administrative activities including administrative interpretation wasn't reviewed at all. But in addition there has been and historians have documented patterns of judicial deference to interpretations including interpretations issued by executive branches over time. Now there is some debate about whether or not that's just contemporaneous executive interpretation or whether it's a result of the operation of devices such as the writ of mandamus which was how you brought challenges to executive action over time, but the more important thing is that for many, many years and for much of the early centuries of this country until well into the 20th century and then manifested in *Chevron* we have had a long-standing tradition and practice of deference. So if indeed that was all at odds with Article III a lot of people would be surprised.

Second reason why it's not an Article III problem is because it ignores that *Chevron* itself gives substantial room for judicial independent judgment. When people talk about *Chevron* they tend to attack it by focusing on *Chevron* deference, the second step of *Chevron*. Well the first step of *Chevron* instructs a court to determine whether or not Congress has spoken clearly, to address the question the agency is addressing giving the agency power to address that question. That is all done using a court's independent judgment about what the statute means. Some judges do it—as I'm sure many in this room know, a quite robust inquiry at that step. And that is all independent judgment, right? You only defer once the court has determined that in fact Congress has given this question to the agency. The reason why in fact *Chevron* is constitutionally compelled turns on that very aspect of Congress and many of the attacks on *Chevron* point to it as a battle between the courts and the agencies. But actually the critical factor here is Congress, right? The key point is that Congress, using its constitutional power, has delegated authority to an agency to implement and determine policy in an area subject, of course, to a governing statute. When courts defer to an agency's interpretation of a statute that is ambiguous, they are acknowledging that agency role in policy setting that Congress has instructed the agency to undertake. Given that the court has long upheld Congress' power to delegate authority in this way, the court is then bound to acknowledge the implications of that delegation which are that agencies have room to establish policy and that judges, recognizing that Congress—once they recognize that Congress has left this question to an

agency, judges at that point need to defer to not just any interpretation—a reasonable interpretation, a permissible interpretation by the agency.

And it also bears noting that *Chevron* is simply one of the many administrative law doctrines that apply and courts regularly also require agencies to provide a reasoned explanation of their decision making. That fact, about recognizing that what is going on when an agency interprets is an act of policy setting, reveals the conceptual confusion underlying the attacks on *Chevron* which posit an idea of law and policy as conceptually distinct and are based on the idea that giving agencies control over law is fundamentally at odds with our constitutional structure. If you recognize that there is really no such clear distinction between law and policy, that conceptual foundation for the attacks on *Chevron* dissipate. Why don't I stop there and leave my comments about the exaggerated impact and the potentially radical potential of the attacks for later.

ULRICH: Great. Thank You. So, professor Hamburger, I invite you to respond to anything that Gillian said. But also she mentioned the history of deference and you've written on history as well. Is there anything that the history of this case or of administrative law in general has to say about your views on *Chevron*?

HAMBURGER: Oh my. There's a lot to be said there. Just for clarification I should begin by saying, in this whole debate, I take no position on the difference between law and policy. That can be clear, it can be amorphous. There can be indeterminacy and some things yet are also clear. We all know that spectrum fairly well.

One thought on a point Gillian raised, which is I think very important and interesting, *Chevron* itself actually requires the judges to interpret. I think that's absolutely true. It requires the judges to interpret, to determine the extent of authority in an agency to engage in their own rule making interpretation, and one might think, oh that's enough. But of course it's rather odd isn't it? A rule that requires the judges to interpret only so far as then to cut off their power to interpretation and not actually interpret the core of the question, the substance of the statute. It's not just any sort of interpretation. In fact it leaves a giant hole. It's like a doughnut. Yes you can eat around the edges but in the middle there's a giant hole and that's where you'd expect judicial interpretation. So the fact that *Chevron* leaves some room for some interpretation at the edges really does not resolve the problem which still remains. My argument isn't that judges cannot interpret under *Chevron*. It's rather that they give up their judgment, they give up their power of interpretation, indeed their duty to interpret and do justice between the parties, at the core and the things that really matter. And any application of judgment by a judge let alone in a way that is biased toward one of the parties seems to me utterly incompatible with Article III and due process. What sort of country do we live in when judges commit themselves to decide in favor of one of the parties simply because that party declared its position of what the law is prior to the other one and because that one happens to be the government?

Now in the history, we could delve into the history at length. I don't really want to do that except to say that I think the defenders of *Chevron* tend to misread the precedents. Yes there are 19th century cases that use the words respect and deference but they do so for entirely other purposes. It has to do with deference and respect to contemporaneous opinion, in other words it's an originalist

position of 19th century judges. If there's contemporaneous opinion by anybody, not just the executive, they'll pay some respect and deference to that because that's illuminating as to what a statute might mean. And if there's been long-standing interpretation, not singularly from the executive or an agency but generally, they pay a certain respect to that. That's what these 19th century cases are about. I'll quote you from one, *Decatur v. Poldean* 1840, which states very bluntly the Supreme Court position on such things: if a suit should come before this court which involved the construction of any of these laws, the court would not be bound to adopt the construction given by the head of a department. And in fact I've gone through all the Treasury papers when the Treasury was run by Alexander Hamilton. And it's very interesting. He doesn't think there's deference to agency interpretation, and this is the man with the boldest vision of executive power one could imagine.

Now, I want to get to a slightly different sort of history: contemporary history. What I want to emphasize now is that *Chevron* is already dead. This is the walking dead. It's like some sort of horror film. It's still walking but it's dead. What do I mean by that? Two justices, [Clarence] Thomas and [Neil] Gorsuch, have already said this is unconstitutional because it deprives judges of their independent judgment. You might think, oh it's just those two. Well not so fast. It's not just them. For nearly half a decade, the Supreme Court has been reluctant to rely on *Chevron*. It's been obvious to everybody watching the court. It was obvious to me already in 2014. It's dead in the Supreme Court but the court doesn't want to acknowledge this because this would be to admit error and they're very reluctant to admit error, aren't they? They should be more honest and candid shouldn't they? So it's still binding in other courts and that's why I call it the walking dead.

And there's deep concern about this in—amongst the judges, the other judges, right? *Harvard Law Review* recently published a survey of 42 lower court federal judges conducted by Abbe Gluck and Dick Posner, one a distinguished Yale Law professor, the other a former Seventh Circuit judge, both former colleagues of mine, I think widely respected left and right. And what they found was widespread judicial discontent with *Chevron* below the Supreme Court. I'm going to give you some key quotes just to give you a flavor of this. Most judges are not fans of *Chevron*. The exception is the D.C. Circuit. They have drunk the *Chevron* Kool-Aid. This is from a federal judge. But the vast majority of non-D.C. Circuit judges we spoke with seriously questioned the wisdom and even legality of *Chevron*. All but one of the judges interviewed did apply that rule on opinions but most were decidedly anti *Chevron* and in fact just earlier this summer with the Wisconsin Supreme Court, in a case called *Tetrattech*, held their state version of *Chevron* deference unconstitutional and they did so on two grounds: judicial independence and judicial bias. They focused on both grounds and what's more they took a very rare step. They basically admonished the Supreme Court of the United States to do the same thing, essentially complaining that they hadn't set the record straight on this.

And I want to conclude this little point about the walking dead by saying it's entirely nonpolitical. It seems political because of some of the nomination battles, but it isn't. The survey in the *Harvard Law Review* found, and I quote, the judges expressing skepticism regarding *Chevron* divide equally among liberals and conservatives. And just to quote two very different justices on this, about the danger: Justice [Stephen] Breyer has said *Chevron* would result in a greater

abdication of responsibility to interpret the law than seems wise, and Justice [Antonin] Scalia wrote, *Chevron* may require a striking abdication of judicial responsibility. This is the walking dead and just no one at the very top court wants to admit it.

ULRICH: So Gillian, I'd like you to respond to Philip's assertion that *Chevron* is the walking dead. Do you agree with that statement? And is there anything from the court's recent terms, for instance you filed in *Lucia*, maybe not right directly on *Chevron* but other administrative decisions that tend toward maybe greater skepticism of the court toward the administrative state and administrative law doctrines.

METZGER: Well first of all I want to be quite clear. I am going to be using the term walking dead without attribution in my administrative law class next semester. I probably will even include a slide from the show just to really jolt them because I can tell you right now, the ins and outs of *Chevron* deference are not the way to sustain engaged student attention in an administrative law class.

So I definitely want to get into the question of whether it's the walking dead, and I do think it's very important to see the attacks on *Chevron* in part of the broader judicial and particularly Roberts court approach to the administrative state. But I want to first just say a couple of other comments in response to some things Phillip said. One is I never engaged with his point about bias. I think the answer there is simply the point I made about delegation. What courts are doing when they are deferring is recognizing a choice that Congress made. Congress is the entity that is given the ability to set policy, the ability to legislate. Congress is the democratically accountable branch. Congress has chosen to give that policy setting power to an agency and the courts are simply acknowledging that. We can go into the ins and outs of bias. I think if this counts—to defer in this way—counts as bias in the way we understand bias then we have dramatically expanded the understanding and scope of due process in a way that would have really phenomenal implications. So that's on the bias point.

On the history point, I think it's important to note that there's increasing, really interesting scholarship on the history and this is actually to my mind the best benefit from the current debate over *Chevron* and people are really delving into the history of these doctrines and how they emerge. But in fact the evidence is hard to pin down and it's hard to pin down because there are many overlapping strands. When you hear a reference to deference or weight in early opinions, part of that is because our current model in which the action of administrative agencies is subject to the sort of immediate review by a federal court simply did not exist. That appellate model really comes about at the end of the 19th century, beginning of the 20th century. It's a real development of our modern administrative state and prior to that you had a system of traditional writs, the main one being mandamus which only allows review—doesn't allow review really of discretionary judgments and only allows review in this really clear air that's being attacked.

Now it's worth noting the courts didn't think only challenging administrative action under mandamus when there is a clear error was at all problematic with Article III. That goes to my idea, my point earlier that in fact there's a lot of historical support for limited judicial review here. But it does make it hard to know whether or not the standard of review was actually independent judgment or deference

in some instances, or it was a result of the framing of the challenge. Either way, administrative agencies had a whole lot of ability to set the meaning of statutes. I can quote some early precedent to back that up. I think it's more important to realize that cases that have quite expressly engaged and said deference is due go back, if you've just focused contemporaneously on the 20th century, they go back to the early decades of the 20th century. It has been consistent. *Chevron* is not a novel decision in that regard. It is part of a long-standing line of precedent under which some forms of deference are greater and some are less. Sometimes it's the power to persuade. Sometimes it's a little bit stronger right. That matters because I think it goes to this point of whether or not *Chevron* is dead, which also connects to my point about the impact of *Chevron* is exaggerated. And the potential implications of the challenges. So I actually agree with Philip.

I think we've seen a pretty significant curtailment in *Chevron* deference. A lot of exceptions have been written in. The major questions, exception recently in the case involving the Affordable Care Act, *King v. Burwell*, is just one example. If you look at the Supreme Court *Chevron* actually never had the kind of binding effect that it is claimed to have had at the Supreme Court. This is not a surprise, right? You think the Supreme Court is going to consider themselves always bound by their own precedent? Please. But even if you look at the different justices, they had very different forms of *Chevron*, right? So Breyer, who actually defers most probably of anyone on the court, never really bought into the two level framework of there's one step where you look at—the court is supposed to look at the statute and determine if Congress spoke clearly, and then if not, defer. Breyer's approach has always been much more of a multi-faceted weighing of whether or not deference is appropriate, is it interstitial, how important is the question to the statutory scheme, and so forth. He coexisted with Scalia who is adamant on two levels and adamant because he thought it was very important to curtail judicial policy choices and that the point of *Chevron* was a way of curtailing judges interjecting their own views. So we've always had a variety. Right now if you look at the attacks on *Chevron* there is also a variety. There are some very extreme attacks on constitutional grounds essentially arguing that *Chevron* is fundamentally unconstitutional along the lines of Philip. You have that from most prominently Justice Clarence Thomas and now Justice Neil Gorsuch. He made the point when he was a judge but now obviously a justice. Chief Justice [John] Roberts has expressed a lot of skepticism about sort of the overweening administrative state and at times, particularly his dissent in *City of Arlington*, really critiqued the court's application of *Chevron* deference. But in fact he's willing to go along with *Chevron* and accept *Chevron* but just in a narrower sphere. And he has not been taking the position of a dramatic overturning of *Chevron*. My own guess is that probably most likely Justice [Brett] Kavanaugh will be in a similar camp. So I don't think *Chevron* is going away. It has been domesticated, it has been pushed to the side, and the Supreme Court has always been willing to deviate from it when it so chooses. But it still plays an important role on the lower courts and it plays an important role in ensuring certain kinds of consistency and constraints on judges.

This final point, or final two points I want to make: one is, there will always be deference. Part of the problem—and this is why in some sense the attack is not going to be effective is because deference is a reflection of delegation. If you delegate—if Congress delegates power to agencies—courts will understand there are some

kinds of questions that are just not in their bailiwick. They don't have the competence. It's not legitimate. They are not legitimate, democratically legitimate policy-makers. They will defer to agencies. They always have, they always will, ok? So in that sense if you see *Chevron* as just maybe a more formalized version of the overall trend of deference, it's not going to go away. It may be domesticated, it's not going to go away.

The possible dramatic impact of the attacks on *Chevron* is that the way those attacks have gone is, they've gotten to the point of saying Article III and then the response is delegation and then they say, "Oh but that delegation by Congress is unconstitutional," and fundamentally what the fight is about is a fight over Congress' ability to delegate. If you try to overturn that, which the Supreme Court has not done, delegation—support for delegation is long-standing. Nor do I think there is an appetite other than one or two justices on the court to overturn Congress' ability to delegate. But if the court were to do so that would be dramatic. That would transform the nature of our government today in fundamental ways, very undemocratically I would argue. And so that's the potential radical impact of this attack.

Just one last word because I never got to the overarching challenge but I think you can see how the attack on *Chevron* fits in with what we're seeing on the Roberts court which is a fair degree of skepticism about administrative government governance and the administrative state. There have been a number of structural constitutional challenges that the Roberts court has engaged in. They've been particularly active when it comes to administrative adjudication. That's the *Lucia* case. And so we could talk about that if there's interest. But you can see once you understand the attack on *Chevron* as fundamentally implicating Congress' power to delegate policymaking and implementation to agencies, that's the broader potential attack on the administrative state that the *Chevron* criticisms invoke.

ULRICH: Philip feel free to respond to any of the points that Gillian made but also to whether Justice Kavanaugh, if he is confirmed, will that be the final nail in the coffin of *Chevron* or will there still be, as Gillian mentioned, some level of deference? And if not, what will replace it? Will there be some kind of revival of nondelegation doctrine or how will courts sort of fill that gap?

HAMBURGER: Will this be the last nail in the coffin? We've all seen the movie right. There's no final nail in the coffin, the beast always lies there, it's within us ultimately, the desire for judicial prejudice to favor our own cause, to get away with murder. So that beast will always be there. There is no final nail. I wish all the justices well in thinking about these problems and I think all of them are worrying about it. I don't think it's particularly Kavanaugh. They all have this on their mind and they don't really know what to do because they don't want to admit that they made a mistake. I understand that. But actually it's the job of the Supreme Court to correct error including their own.

Now there's so much to be said here in response to those thoughtful comments. Just one little point, is this not really bias, it's just an illusion? I just have a conceptual error. Well yes we should recognize the choices Congress makes but not when they conflict with choices that we the people make in the Constitution and one of those choices, which I think should resonate with people right and left and anywhere else, is that we should have unbiased judges. Whether you believe in one version of due process or another,

unbiased judging is the core. Without that we're all in deep, deep trouble. One might say and many scholars have said don't worry it's just delegated policy-making, no interpretation here. Just keep on whistling past the graveyard. Well the awkwardness is of course *Chevron* is very ambiguous on this. It mentions interpretation a lot and policymaking, but the opinion rests ultimately on interpretation. I'll quote. If the statute is silent or ambiguous on an issue a judge must defer to the agency's reasonable interpretation. It even says the case turns on the principle of deference to administrative interpretations. You can't run from this. This has been repeated in case after case, as Gillian mentioned, and there is now such a body of law on deference to agency interpretation that the fact that there's bias in favor of government interpretation cases is inescapable. Some of the most prominent defenders of administrative power have conceded this. Thomas Merrel, another colleague and neighbor, writes, even *Chevron's* most enthusiastic champions admit that the idea of an implied delegation is a fiction, I quote others but you get the drift of it.

I have a plea for all of those who have a lingering love of the administrative state. I understand there is a certain appeal to it. But my first plea to you is to consider your own principles. The underlying principles that justify administrative power are congressional authorization and judicial review. These are the principles that over the past century justified having so much power in agencies including *Chevron* deference, but *Chevron* is the opposite of this. *Chevron* says even where a statute is silent there is authorization for agency lawmaking and interpretation. And as for judicial review, well it all slants in favor of the government. Live up to your principles. If you want to defend the administrative state, stick to your principles because those are at least plausible principles even if they're not quite in accord with the Constitution.

Now I'd like to finish this little comment by getting back to something I mentioned earlier, namely equal voting rights. We don't think of administrative power in connection with voting rights. I'd like to force the question to face up to the grim reality. Since the Civil War there have been two main developments in American law. Equal voting rights from 1870 onwards. It took about a century or so just to get the principles carried out halfway in reality and it's still a struggle. But we're far beyond where we were in 1870 obviously. And the other major development in American law is administrative power. And the question no one wants to ask but we need to ask is, is there a connection? Equal voting rights allowed almost all Americans to vote for their lawmakers. But administrative power shifted lawmaking out of Congress into the hands of unelected administrators. Is this a coincidence? Of course not. And *Chevron* is part of the story. Now part of the answer to this is simply racism. I want to quote you from Woodrow Wilson. Certainly at the beginning administrative state, racism is a key element. Woodrow Wilson wrote one of the most important essays on administrative power in our history. "The reformer is bewildered" by the need to persuade, I'm quoting, "a voting majority of several million heads." He was particularly worried about the diversity of the nation, which meant that reformers needed to influence, and I quote, "the minds not of Americans of the older stocks only but also of Irishmen, of Germans, of Negroes." I quote again, "in order to get a footing for new doctrine, in other words to win politically, one must influence minds cast in every mold of race. Minds inheriting every biased environment warped by the histories of a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe." Now I'm not claiming that

today administrative power is racist. All along even more important than the issue of race was class and that is still predominant and it underlies doctrines such as *Chevron*. *Chevron* is part of a sweeping shift of power to the knowledge class, a shift of power out of the hands of folks who vote in local elections for the representatives and think that they actually make law, into the hands of people well like us in this room who have university degrees and are more attached sometimes to the authority of our knowledge than to the authority of the voters. And if we're going to deal with *Chevron* and related doctrines we should recognize that one of the reasons they go so far even beyond the principles of administrative power to shifting power to agencies and why this seems so acceptable to people well like those of us in this room. It's because of class and that's an ugly fact we can never never forget.

METZGER: So this is one of the reasons why I love having Philip as a colleague because his ability to span vast areas always is challenging. He did not however bring in his study of Quakerism. So unfortunately on this one I think, Philip, you are fundamentally wrong there. If you look at the advent of what we now consider the modern administrative state it came to be expanded in the progressive era to the turn of the century. But of course the modern dramatic expansion of the modern administrative state happened with the New Deal with FDR. It was an expansion that was fundamentally driven by popular desires for more regulation, popular fights over things like business versus labor. Who opposed the administrative state? The administrative state was opposed by industrialists. If you go back and you look at the Liberty League, which was a leading group that was attacking FDR and bringing all sorts of constitutional challenges against administrative actions and new statutes. Who were they? They were the DuPont brothers, that's who they were. They were the DuPont brothers and all of their wealthy industrialist friends. That's what the opposition to administrative government has always been rooted in. And the impetus for administrative government has been for—a desire for greater government protections, for greater government benefits, greater government regulation by those who have not been those traditionally elites with power or wealth. If you particularly go back and look there, the real fights were about labor and it's fascinating if you study the debates over the birth of administrative state, today it's much more over environmental regulation and other areas but it was profoundly fraught over labor at the time it was born. And it is simply mistaken to think that the reason why the administrative state came to be was a way of siphoning off power from the newly empowered working class or lower working classes into the hands of elites.

The point about racism. Philip is absolutely right that there were many racist features of key parts of our administrative state. There were many racist features about our country. The problem is that racism is a deep thread in our natural political history and culture. The reason why, for example agricultural workers were not extended coverage under the NLRA was because of the power of Southern Democrats who would not support FDR if he challenged the race relations in the south. His willingness to go along to get something underway is something many people criticize. But it is nothing inherent in administration. It is inherent in many other political factors and in fact if you think about many of the significant moves that our country has made at times to combat racism actually come from administrations. So think about Truman's order, right, ordering that the military

desegregate. What was that? That was an administrative action with profound implications. Just one example. There is a whole area of scholarship called administrative constitutionalism and a number of historians who have studied how administrative actors, people at low levels, people at high levels in agencies really thought, sought to use their executive administrative powers to address racial imbalance in this country.

So finally on this question of whether or not administrative government fundamentally undertakes takes away power from those who vote. Again it goes back to Congress. It is Congress, for whom people vote, who has created the administrative state. It is Congress responding to Democratic desires for regulation and for programs that help create new agencies and create new requirements a new statute. That is all very democratic. In fact the administrative state is probably the most democratic in that sense result of our politics that you could imagine. And what is not at all democratic is a bunch of courts striking down administrative measures on grounds of a constitution. There may be very good reasons to do that. We are a constitutional system. But to argue that this is a battle over democracy with administrative government on the side opposing democracy is simply not an accurate portrayal.

ULRICH: So your final thoughts on the future of *Chevron*—what change would you like to see in the ways that judges interact with or review both agency decisions and the administrative state more broadly?

HAMBURGER: Thank you very much. And I should begin by saying what a pleasure it is to have been discussing this with Gillian. So first the history. I don't want to delve into the history now. Suffice it to say I think the other view of the history is profoundly mistaken. Just to put it simply, when one transfers lawmaking power from the electorate and their elected officials, diverse elected officials, into the hands of a homogenized class it doesn't matter whether that homogenized class considers itself above racism or not. Inevitably there'll be consequences for a diverse populace—a diverse populace cannot be represented through an administrative state. They need to have representatives who are worried about being re-elected to respond to them and that's avoided when you put the power into the hands of a marginalized class of administrators. And this is a severe problem. It's not so much about race these days it's about education and knowledge. And we all know these days that there is deep resentment about some of this and some of that actually comes out of the administrative state and doctrines like *Chevron*. *Chevron* is now a bad word out there. People hate *Chevron* even though they don't even fully understand what it is because they do have an innate sense, an accurate sense that this is incompatible both with our representative system of government and of course with judicial independence and a due process and freedom from bias. Now, so much for the history.

Now let me talk about the current affairs and the constitutional question. The question is very simple. Do we want to have an independent judiciary that decides cases on their merits fairly between the parties with full due process for both, that is not biased in favor of the government? Wherever the government proceeds against you I think the answer to this is very, very easy. If someone really wants to stand up against due process, let them explore. Let them do so and let them explain why *Chevron* is all about interpretation and all that

affiliated doctrine is about interpretation. The Supreme Court can't walk away from this, right? That's one of their problems. They've said it's interpretation for decades. What are they going to say now. It wasn't really interpretation and that's why we're not biased. They have imposed bias in the federal judiciary and therefore on the rest of us. And we all have to live with this terrible terrible mistake.

Chevron is an abomination not merely because of what it does in particular cases. Because it undermines our confidence that we can get a fair hearing in a federal court. And the answer is currently we cannot. When the government moves against us administratively because of doctrines like *Chevron*, and *Chevron* of course the worst, what's the future? I don't have high expectations that the Supreme Court will have the gumption to admit its own error. It should. I don't think it will. So I think the action is going to be in the lower courts and we've already seen this. We've seen it in lower federal courts and we've seen it in the state supreme courts as well. The Wisconsin Supreme Court reprimanded the Supreme Court.

Chevron as I said is an abomination. It's a destruction of everything we love about due process and unbiased judging. Thank you.

METZGER: Thank you and thank you everyone for listening to us. It has been a lot of fun as it always is debating Philip. But one nice thing to say in conclusion, I think there is something that Philip and I agree on which is, I actually think that thinking creatively about ways of making agencies responsive and attentive to the needs of different communities, in the different ways programs are implemented, is important. I think the fundamental way to do that is actually through thinking about the structures of the administrative state. There's a lot of ways of bringing in the states and localities into national programs. The whole nature of administrative rulemaking actually provides much more room for feedback and for comments. People are thinking creatively about how to make it more responsive. But to go down that route is to accept the fundamental constitutionality of administrative governance and that indeed is why I am frustrated by attacks on *Chevron* or broader constitutional attacks because they think we are missing the urgent questions by fighting these battles about constitutionality that go back to the 1930s. I doubt very much that there will be a popular uprising over *Chevron*.

I have been struck by the extent to which *Chevron* has come into Senate confirmation hearings. And if it goes beyond that, well look it's great for me. I'm an ad law person. Then I'm suddenly way cool. But I don't think so. In terms of what I do think we will continue to see in the courts a lot of contestation about this and we will see some in Congress. There have been measures in Congress, the Separation of Powers Restoration Act, to try and peel back at *Chevron* so I think we will see that. But I think it will be at the level of elites. In terms of what the courts will do. I think we will see continuing further domestication of *Chevron*. You know the Supreme Court hasn't really relied on *Chevron* since at least 2006-2007. But there is one case in 2016 that may count. And so it's not as I said before it's not been that much of a force recently in the Supreme Court. It's been more more relevant in lower courts. But I think what we're going to start seeing is more robust inquiries at the first step is *Chevron* into what the text of the statute says and the narrowing of the extent to which questions are being read by courts is left to agencies. That's part of the play of *Chevron*. It won't be overturning it. I don't think the fundamental constitutional attack on *Chevron* is going to succeed. Because as I've said I don't think it's constitutionally founded.

I don't think the justices agree with it across the board. And I think they recognize that deference in another form would simply arise.

The broader constitutional attack on the administrative state I think is really one to keep your eye on. That is something that the Roberts court has really been pursuing. And here I think the ultimate outcome will depend a lot on what happens in politics but you know if we have politics that move in a very democratic, more progressive, more pro-regulatory direction and we have a court which is trending very much in the opposite direction that leads to the kind of clash that we saw in 1937. That leads to the Supreme Court being more out of touch with the government and with the populace than is healthy for the institution. And I'm not sure what the court would do then. My own inkling is probably Roberts is enough of an institutionalist he will pull it back. But that turns on politics and right now the government that we have elected is actually profoundly not pro-regulatory. So there isn't that disconnect right now. The Supreme Court is very much in keeping with governing administration in D.C. So on that one I honestly think we just can't tell what's going to happen.

ULRICH: Philip, Gillian thank you so much for joining us.