07/10/24 / The Supreme Court’s power grab

[HALF SECOND OF SILENCE]

[BILLBOARD]

SEAN RAMESWARAM (host): The Supreme Court is in its messy era.

SCORING IN The Piano Has Been Tweaking

SEAN: On its way to overturning Roe v. Wade, it let the decision leak out. It held a whole investigation to figure out whodunnit. But ultimately couldn’t crack the case. Fast forward to this term and the Court itself accidently posted an abortion decision early. No word yet on an investigation into what happened there.

The list goes on and on: Making corrections to decisions after they’re posted, confusing nitrogen oxide with nitrous oxide, Clarence Thomas and his billionaire benefactor, Justice Alito and his free $100,000 jet ride.

Remember that one time someone flushed a toilet during Zoom-preme Court?

*SCORING OUT*

*<CLIP> THE SUPREME FLUSH*

*SCORING BACK IN*

SEAN: The highest court in the land loves to remind us of its own fallibility. But even with all the fails, it just decided to take over a huge chunk of the federal government’s workload!

Why that math isn’t mathing – on Today, Explained.

[OYEZ THEME]

SEAN: It’s Today, Explained from Vox, where Ian Millhiser writes about the Supreme Court. His latest opus is titled “The Supreme Incompetents”, just to give you an idea of his opinion of the institution these days. Suffice to say, he was not thrilled to see the Court expand its power this term.

IAN MILLHISER (Vox reporter): So there was a decision called Loper Bright, which was handed down. It overruled a very, very important case called Chevron.

*<CLIP> US SUPREME COURT:*

*Paul M Bator, on behalf of the petitioner: Mr. Chief Justice, and may it please the Court, this case involves the validity of an important regulation issued by the Environmental Protection Agency under the Clean Air Act Amendments of 1977.*

IAN: Chevron was decided in the Reagan administration. And it said that, generally speaking, when Congress delegates the power to make some sort of policy decision to a federal agency, the court should butt out of that decision and let the agency do its job. So the first thing that you need to understand, to understand Chevron is that there are just scads of federal laws, hundreds, possibly even thousands of federal laws that announce some sort of broad policy objective and then tell a federal agency, go and figure out how to implement this. And these laws concern very important things, like, you know, who gets overtime pay or how we're going to fight climate change. They also involve like very, very small questions like what the cable rates will be on a certain island in Hawaii, or how much nitrogen can be emitted by a wastewater treatment plant in Massachusetts. So everything from the grandly important to the very, very small Congress has said, we want these federal agencies to be making these decisions about all these important policy questions.

SEAN: And somehow this question ends up in front of the Supreme Court.

IAN: That, that's right. The issue was you had a federal statute which said that EPA is supposed to impose certain permitting requirements on stationary sources of pollution. That was the language that the statute used. Stationary sources.

*<CLIP> US SUPREME COURT:*

*Stationary Sources*

*Stationary Sources*

*Stationary Source*

*Stationary Sources*

IAN: What the hell does that mean? Well, the Carter administration came up with one answer. The Reagan administration had a different answer. And the key to understanding Chevron is to understand both of these reinterpretations of this term – statutory sources – were equally permissible. Someone had to pick what the meaning was. And the Supreme Court said in Chevron, we want the agency to do it. Congress told the agency to do it. The agency knows what it's talking about, and the agency is led by political appointees who can be thrown out of office if the president loses, loses election. So we want them making the decision and not the courts.

SEAN: Okay, that all sounds reasonable, because it's how our government has looked for the intervening decades, right? How important a precedent does Chevron become?

IAN: I mean, Chevron is a foundational precedent. Chevron was arguably as foundational to the development of U.S. administrative law as Brown v Board of Education was to the development of the law of racial equality in the United States. It is the backbone or, I guess, was the backbone of U.S. administrative law. This notion that federal agencies, democratically accountable agencies staffed with experts, should be making these policy decisions and not unelected judges.

SEAN: Was it at all controversial? Were there people on either side of the aisle complaining about this legal precedent?

IAN: I mean, there were certainly were scholars who, you know, thought Chevron was a bad idea, but it was a unanimous decision.

SEAN: Hm!

IAN: And some of the biggest cheerleaders for it were Republican.

SCORING IN - GLASS FUNYUN, BMC

IAN: Justice Antonin Scalia, the conservative icon, was a huge advocate for Chevron.

*<CLIP> CSPAN:*

*US Supreme Court Justice Antonin Scalia: Before we even had these inflated delegation notions, it was always the case that courts deferred to executive action.*

IAN: And in retrospect, it's not hard to figure out why. Because when Chevron was handed down Ronald Reagan, you know, a conservative deregulatory president was in office.

*<CLIP> FORMER US PRESIDENT RONALD REAGAN: Well when government gets too big, freedom is lost. Government is supposed to be the servant.*

IAN: And the courts still had a number of Carter and Johnson appointees who were very liberal and were striking down a lot of the Reagan administration's deregulatory agenda. So when a court decision saying federal agencies and not courts should be deciding these important policy questions came down. That was, at least in the immediate term, a big victory for Republicans, because it meant that the Republican president would get to make all these decisions without interference from all these judges.

SCORING OUT

IAN: By Obama's second term, I would cover the Federalist Society's annual convention. That's the conservative legal organization. That's basically the legal arm of the Republican Party. And by Obama's second term, their annual convention just became an endless series of proposals to rein in federal agencies, to overrule Chevron, to make sure that the Obama administration didn't have the power to set policy.

*<CLIP> MR. MARK CHENOWETH, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NEW CIVIL LIBERTIES ALLIANCE: Article 3 Judges have a duty to provide independent judgment. And if a judge is deferring to something that someone in the executive branch said about the law, that judge is not providing independent judgment.*

SEAN: Okay. And this ends up reaching the Supreme Court, perhaps in a case called Loper. Could you tell us about this particular case? What's it about? Is it about, you know, climate policy?

IAN: There is a rule saying that sometimes fishing vessels need to have a federal observer on board to make sure that the fishing vessel is complying with various federal rules.

SEAN: Seems reasonable.

IAN: Seems reasonable. No one questions that the observer’s allowed to be there. The specific question in this case is whether the fishing vessel or the government has to pay for this individual to be on the boat.

SCORING IN - TAKE ME TO THE RIVER, BMC

*<CLIP> US SUPREME COURT: Paul D. Clement: Commercial fishing is hard. Space onboard vehicle -- vessels is tight, and margins are tighter still. Therefore, for the -- for the --for my clients, having to carry federal observers on board is a burden, but having to pay their salaries is a crippling blow.*

IAN: That's it. That is the specific policy question at issue in Loper Bright. I guarantee you that unless you own a fishing vessel, there's absolutely no reason at all that you should care about the answer to that question.

SEAN: <<chortles>> How does that question even make it to the Supreme Court?

IAN: Well, the reason it makes it to the Supreme Court is because under Chevron, NOAA, I believe, was the federal agency, had determined that the fishing vessel has to pay for these observers. The fishing industry obviously didn't like that, but under Chevron, there wasn't much that they could do because, you know, if the federal agency makes that decision, Chevron said the court should defer to the federal agency.

SEAN: Mmmmmm.

IAN: And so they went to the they filed a lawsuit. Eventually, they brought it to the Supreme Court. And they said ‘Courts, you should stop deferring to these federal agencies. You should have the final word on whether you're not just whether or not these observers are on fishing boats, but on every other policy question that Congress has delegated to federal agencies.’

*<CLIP> US SUPREME COURT: Paul D. Clement: My point is it's really convenient for some members of Congress not to tackle the hard questions and rely on their friends in the executive branch to get them everything they want.*

IAN: And what the Supreme Court said in Loper Bright:

*<CLIP> US SUPREME COURT: Supreme Court Justice Brett Kavanaugh: The other concern for any judge is abdication to the executive branch running roughshod over limits established in the Constitution or in this case set by Congress. That’s why it’s hard, find the right balance between restraint and letting the executive get away with too much…*

IAN: They said, ‘Yeah, no, I, I think we, the justices of the Supreme Court should have this power because we are so wise. And why would anyone not trust our judgment over the judgment of an expert at an agency that actually knows something about fishing vessels?’

SCORING OUT

SEAN: So the Supreme Court has once again set the clock back – this time to a world before this pivotal 1984 Chevron decision. We have lived in this world where these kinds of administrative questions were decided by the court before. Why is this a problem in 2024? Or 2030? Or 2040?

IAN: You just have to understand the history of the Chevron doctrine. When Ronald Reagan was president, the court said, oh, we're going to step back and make sure that Ronald Reagan could do what he wants. When Barack Obama was president, they sudden – you know, the Federalist Society organized it, decided it had to get rid of this deference. And now, with Joe Biden in office, the court is sweeping away his regulations left and right.

*<CLIP> NBC NEWS: Tonight the Supreme Court dealing a major defeat to President Biden, striking down his plan to erase more than 400 billion dollars in federal student loan debt.*

*<CLIP> NBC NEWS: By a vote of 6-3, the Supreme Court is blocking the Biden administration from carrying out the rules imposed by OSHA that would require companies that employ more than 100 workers to make sure that all their employees either get vaccinated for Covid or wear masks and be tested once a week.*

IAN: And they're overruling seminal precedents. So, given the court's very partisan treatment of this issue throughout its history, you know, I'm just not optimistic that if we have a Republican president in a year that the Supreme Court's going to apply Loper Bright in an evenhanded way.

SCORING IN – The Gentle Push 2

IAN: I also think the court is just going to be overwhelmed, because it's going to get a firehose of cases that no one cares about. I mean, again, like, remember the issue with Loper Bright was this tiny ass issue. There are thousands of issues that are just as small. And the justices with 36 law clerks simply do not have the personnel that they need to to address all these questions in a responsible way.

SEAN: Life after Loper Bright when we’re back on Today, Explained.

[BREAK]

*SEAN: What's the difference between a Supreme Court and a regular court?*

*PATRICK BOYD (Today, Explained engineer): I don’t know, Sean, what?*

*SEAN: Sour cream, lettuce, and tomatoes*

*<<laugh track>>*

*OYEZ OYEZ OYEZ*

SEAN: Today, Explained is back with Vox's Ian Millhiser. Ian, what kinds of questions will this Supreme Court now be answering? What kinds of legal issues will they be dealing with now, instead of maybe the federal agencies that would have been dealing with them prior?

IAN: So the impact of the Loper Bright decision will basically be that a ton, like potentially thousands of really small bore issues that like few people care about any one of them, but when you take them all together, they really matter, are now going to be just hitting the justices over and over again. I mean, questions like, ‘Does the process of mixing and bagging sand constitute milling or manufacturing?’ ‘Which electrical facilities are used only in local distribution?’ These are some really wonky questions. And these are issues that you would think would be beneath the notice of the nine most powerful officials in the most powerful nation that has ever existed, but instead, they're just going to be inundated with these questions that they know nothing about. And I you know, I think that the result is going to be that, you know, in thousands of different, smaller ways, U.S. governance is going to be much, much worse because instead of having people who know what they're talking about making these decisions, you're going to have these nine imperious justices making them.

SEAN: Are these the kinds of decisions that are, like, vulnerable to lawsuits, though?

IAN: They are now!

SEAN: Hm.

IAN: That's the issue, is that before Chevron, if an agency made a decision that you didn't like, I mean, it's not like you were without a recourse. You know, if you didn't like what Ronald Reagan did, you could campaign for Walter Mondale, you could donate to Walter Mondale’s campaign. If, you know, if you didn't like what Barack Obama did, you could campaign for, for Mitt Romney. Like, you know, the idea was that these, these decisions should be resolved through the democratic process. Now, if you don't like what Joe Biden does, you file a lawsuit.

SEAN: Why would the Supreme Court do this? This is an institution that loves to take its summers off famously. Why would they say ‘We want to work way harder! We want to do the work of potentially, you know, dozens of federal agencies’?

IAN: Yeah, it's an excellent question, and I wish I knew the answer to that. Because the court has not shown a capacity to stay on top of its current workload. And it has shown that despite the fact that his workload has been rapidly diminishing. So there's this great quote that I love to bring up whenever I can from when Chief Justice Roberts was a young lawyer in the Reagan White House, and he wrote this great line in a memo:

*TODAY, EXPLAINED producer Amanda Lewellyn: The generally accepted notion that the court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the court in July, when we know that the Constitution is safe for the summer.*

SEAN: <laughs>

IAN: Man, I have never agreed more with John Roberts in my life.

SEAN: <laughs more>

IAN: But like one thing about this very good joke that stands out is Roberts refers to a court, a court in the early 1980s that was hearing roughly 150 cases each term. That number has been in steady decline since the 1960s. This term they heard they only heard 59 cases. The court is hearing fewer cases now than it's heard at any period since, like the Civil War era. It's a … they're just not that busy. And despite the fact that they're not that busy, this is one of the slowest terms in memory in terms of just how fast they would get court cases to come out. The court always finishes up in June. The only other term I'm aware of when the justices went into July and at least in recent memory, was the pandemic term, and that was because there was a pandemic going on that, you know, obviously made it harder for them to do their jobs.

*<CLIP> THE SUPREME FLUSH*

IAN: So like these guys, they're hearing fewer and fewer cases. They're barely able to keep up on their workload as it is. And now that workload is going to, going to balloon enormously.

SEAN: How certain are we that this is how it goes? How certain are we that the federal government's functionality just fundamentally changed?

IAN: Having lived through the last three weeks that we live through, I am out of the business of making predictions. But the reason why Chevron happened in the first place was because the justices, you know, again, it was a unanimous decision, and I think that the justices who decided were very wise, you know, they had been through the experience. It's not like federal regulations, you know, simply fell out of a coconut tree in the Reagan administration.

SEAN: <laughs>

IAN: You know, they had been around for a really long time. You know, courts had been wrestling with these questions of who should decide this. What, what should we do when the law was ambiguous and like, how do we figure out how to parse this statute where it can be read in multiple ways? And finally, the justices in Chevron said, ‘We don't actually know what we're doing here. Like, the reason why this is hard is because we, the judiciary, are not equipped to answer these questions. These should be handled by people who know what they're talking about.’ So like Chevron was something that, like, emerged from many decades of experience of justices being forced to decide these really hard questions over and over again, not being able to figure out a good answer. You know, arguing amongst themselves, you know, ‘Does this vague statute mean X or Y when really it could be read to read either x or y?’ And finally they realized, ‘Oh, the problem here isn't that some of us didn't read the statute correctly. The problem here is that the judiciary is ill served to be in this business altogether.’

SEAN: So federal agencies can still make rules, but now it just got a lot easier to challenge them up to the Supreme Court, which you would argue, based on their staff size and legal backgrounds, is ill equipped to take on the various minutia of all of these federal agencies. Is that right?

IAN: That's right. I mean, and I think two things are going to happen, you know. One is that, you know, the justices are just going to be overwhelmed. You know, they're going to wind up having to resolve more cases than they can handle. But the other thing that I'm afraid of happening is, I mean, how do most people react when you give them a difficult policy question that they haven't thought about before, and that they have no expertise in? You know, typically they fall back on ideology. If you ask a Democrat like is a good idea to regulate the environment, you know, they're going to say yes. If you ask a Republican, is this environmental regulation a good idea? And they don't know enough to know whether it's a good idea or not, they're probably going to say no. And it's not because there's anything wrong with Democrats or Republicans. It's just that when you're confronted with a difficult question that you don't really know the answer to, ideology is a nice thing that you can fall back on in order to come up with some answer. And so I fear that these justices, you know, they're not just going to be overwhelmed, but we're going to get a ton of ideological decisions because without the, you know, without the expertise and without the, the ability to discover the correct answer, they're gonna have to fall back on something.

SEAN: But that phenomen you're describing, just to push back a little bit here, isn't that also how federal agencies work under different presidents? You didn't see a lot of environmental regulation under the former president, and you did under the current president.

IAN: I think that's a fair critique. And the response to that is that if you don't like what the Biden administration is doing, vote for a different president. If you don't like what the Trump administration is doing, vote for a different president. Chevron ultimately left that decision in the American people. And yes, it is true that Democratic administrations are going to want more environmental regulation, and Republican administrations are going to want less environmental regulation. The voters know that.

SCORING IN - HAUS IM SEE, BMC

IAN: Let them make that choice instead of doing what the Supreme Court did in Loper Bright, which is to say, we, the six Republican justices, will make these decisions, you know, potentially forever.

SCORING BUMP

SEAN: Ian Millhiser. Vox punto com.

Victoria Chamberlin made the show today.

Amina Al-Sadi, Laura Bullard, Andrea Kristinsdottir, Patrick Boyd and I helped. The rest of the team includes Haleema Shah, Avishay Artsy, Hady Mawajdeh, Amanda Lewellyn, Miles Bryan, Peter Balonon-Rosen, Denise Guerra and Rob Byers.

Matthew Collette is a supervising editor. Miranda Kenedy is our executive producer. And Noel King is our chief justice.

We use music by Breakmaster Cylinder, and we have a favor to ask!

Vox is making a new show that will answer questions from Vox readers and listeners. The questions can be about ANYTHING - heavy, silly, personal, systemic. We'll cover culture, finance, politics, technology, more. You can ask why dating feels harder these days. Were the Star Wars prequels actually good? How can I tell if my dentist is scamming me? You get the point. If you want something in your world explained, and Google and the robots can't get you the answer, submit questions to askvox@vox.com, askvox@vox.com or give us a call at 1-800-618-8545. 1-800-618-85-45. Today, Explained is distributed by WNYC. This show is a part of Vox. Support our journalism by joining our membership program today. Go to vox.com/members to sign up.

[10 SECONDS OF SILENCE]