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Doomed Deference Doctrines: Why the Days of *Chevron*, *Seminole Rock*, and *Auer* Deference May Be Numbered

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Abstract

The U.S. Supreme Court famously declared in Marbury v. Madison *that it is "emphatically the province and duty of the judicial department to say what the law is." In a series of decisions, however, the Court has adopted a controversial rule allowing administrative agency officials—rather than judges—to have the final say in the interpretation of statutes and agency rules. This turns* Marbury v. Madison *on its head and has contributed to the accumulation of power in administrative agencies. The modern administrative state touches nearly every aspect of Americans' daily lives, from highways to electricity to health care, but as of late, all three branches of the federal government are paying close attention to the excessive power delegated to agencies. Fortunately, the day of reckoning may be coming for these deference doctrines.*

The U.S. Supreme Court famously declared in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."[1] In a series of decisions, however, the Court has adopted a controversial rule allowing administrative agency officials—rather than judges—to have the final say in the interpretation of statutes and agency rules. This turns *Marbury v. Madison* on its head and has contributed to the accumulation of power in administrative agencies. The modern administrative state touches nearly every aspect of Americans' daily lives, from highways to electricity to health care, but as of late, all three branches of the federal government are paying close attention to the excessive power delegated to agencies. Fortunately, the day of reckoning may be coming for these deference doctrines.

Key Points

- The Supreme Court has contributed to the accumulation of power in administrative agencies by deferring to agency officials using deference doctrines, instead of exercising independent judgment about what the law requires.
- The Supreme Court has applied deference doctrines without reconciling the command of the Administrative Procedure Act that judges, rather than agency officials, "determine the meaning" of agency actions.
- There appears to be interest among several members of the Supreme Court in revisiting the *Seminole Rock* and *Auer* decisions.
- The Supreme Court should overrule any case that prevents judges from saying what the law is and requires them to defer to the judgment of federal bureaucrats.
- Removing the incentive for agencies to play interpretive games will go a long way toward correcting the imbalance of power among the branches of government.

This paper, in its entirety, can be found at **http://report.heritage.org/lm221**

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Members of Congress troubled by agency overreach have started the Article I Project[2] to regain authority ceded to agencies and have used a little known federal law to roll back numerous regulations. President Donald Trump has prioritized deregulation by signing an executive order requiring agencies to identify two old regulations to be cut before they may enact a new regulation.[3] A number of current Supreme Court justices have expressed concerns about the constitutional problems with allowing agencies to exercise legislative, executive, and judicial functions. The Supreme Court will play an important role in any effort to correct this imbalance of power. The Justices may be looking for cases challenging the following deference doctrines that have contributed to the proliferation of agencies' power.

Administrative Agencies Say "What the Law Is"

Chevron. The best known doctrine, *Chevron* deference,[4] instructs a court reviewing an administrative agency's interpretation of laws it is charged with carrying out to defer to the judgment of agency officials if (1) the law is not clear, and (2) the agency's interpretation is a reasonable one. The Court explained in *Chevron* that the "power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[5] The case involved a challenge to the Environmental Protection Agency's interpretation of "stationary sources" in the Clean Air Act. The Court found that such a challenge "must fail" when it "really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress."[6]

Under *Chevron*'s two-step test,[7] a court reviewing an agency's statutory interpretation must first determine "whether Congress has directly spoken to the precise question at issue."[8] If Congress has spoken, then the court "must give effect to the unambiguously expressed intent of Congress."[9] But if Congress was silent or ambiguous on the matter, the court should uphold the agency's interpretation as long as it is a reasonable or permissible reading of the statute. This doctrine has aptly been described as the "counter-*Marbury* for the administrative state."[10]

Thus, the rationale for judges not carrying out their duty to "say what the law is" is that they would defer to impartial, scientific experts in charge of highly technical areas of regulation. These experts, so the argument goes, are better equipped to understand the statutory language they are charged with implementing. Unfortunately, this has led to judges shirking their duty and Members of Congress shifting their responsibility of legislating by enacting vague laws with aspirational language[11] that delegate to agencies the task of working out the details.

Another problem with the *Chevron* decision is that the Court completely ignored the Administrative Procedure Act (APA), which is the federal law governing agency rulemaking. The APA makes clear that judges "shall decide all relevant questions of law, interpret constitutional and statutory provisions" and "determine the meaning or applicability of the terms of an agency action."[12] Yet the Court has never reconciled its holding with the command of the APA that *judges*—not agency officials—"determine the meaning" of agency actions.

Chevron deference is just the tip of the iceberg. Through several cases, the Supreme Court has given increasing authority to administrative agencies. Under *National Cable & Telecommunications Association v. Brand X Internet Services*,[13] an agency's interpretation of a statute can supersede a court's interpretation. *City of Arlington v. FCC*[14] requires courts to defer to an agency's jurisdictional determinations. Under *Bowles v. Seminole Rock & Sand Co.*[15] and *Auer v. Robbins*,[16] courts defer to an agency's interpretation of rules it has promulgated as long as that interpretation is consistent with the text of the rules.

Seminole Rock. The 1945 *Seminole Rock* decision predated passage of the APA. In a case concerning the Office of Price Administration's interpretation of a World War II–era price-control regulation, the Supreme Court held that an agency's interpretation of regulations has "controlling weight" unless it is "plainly erroneous or inconsistent."[17] The Court explained,

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant

> in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation.[18]

Auer. The Court reaffirmed this "controlling weight" principle in its 1997 *Auer* decision. That case involved the Department of Labor's interpretation of a regulation dealing with overtime pay under the Fair Labor Standards Act. The Court concluded that because the applicable regulation "is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling."[19]

Deferring to an agency's interpretation of its own regulations might make sense on one level: The agency made the rule, so it should understand how the rule operates. The Court has acknowledged as much, pointing to an agency's "historical familiarity and policymaking expertise" as reasons for its deference.[20] The rationale of deferring to specialized experts in highly technical areas that supported *Chevron* applies to *Seminole Rock* and *Auer* as well.[21] But agency regulations have the force of law, and judges—not federal bureaucrats—have the duty to say what the law is. Judges should interpret regulations in the light of what their text says, not by the intentions of agency officials who created them. As with *Chevron*, the Court has continued to apply *Seminole Rock* and *Auer* without reconciling the command of the Administrative Procedure Act that judges, rather than agency officials, "determine the meaning" of agency actions.[22]

The problems with giving such broad authority to unelected and unaccountable federal bureaucrats are well known.[23] In recent years, members of the academy, Congress, and a number of federal judges have highlighted the constitutional problem these deference doctrines create. Three recent appeals court opinions raise questions about *Chevron*'s continued viability, and several of the Supreme Court justices also have expressed concerns about *Seminole Rock* and *Auer*.

Chevron's Skeptics

In *Waterkeeper Alliance v. Environmental Protection Agency* (2017), the U.S. Court of Appeals for the D.C. Circuit vacated an EPA rule exempting farms from certain hazardous materials reporting requirements related to animal waste. Judge Janice Rogers Brown wrote separately, flagging the problem of *Chevron*'s two-step analysis being "collapsed into one 'reasonableness' inquiry."[24] She declared that an "Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name."[25] Then in *Egan v. Delaware River Port Authority* (2017), the Third Circuit upheld the Department of Labor's interpretation of the Family and Medical Leave Act to cover retaliation claims. In a concurring opinion, Judge Kent Jordan wrote to express his "discomfort" with deference under *Chevron* and *Auer*, which "embed perverse incentives in the operations of government; they spread the spores of the ever-expanding administrative state; they require us at times to lay aside fairness and our own best judgment and instead bow to the nation's most powerful litigant, the government, for no reason other than that it is the government."[26] Judge Jordan noted that some agencies will have expertise in highly technical or specialized areas that could assist courts—but deferring to an agency's run-of-the-mill statutory interpretation contributes to the "deterioration in the separation of powers."[27]

The third—most extensive—opinion came in *Gutierrez-Brizuela v. Lynch* in 2016. In this case, the Tenth Circuit overruled the Board of Immigration Appeals' retroactive application of its ruling construing ambiguous statutory text that conflicted with the court's precedent. Then-Judge Neil Gorsuch authored this decision months before President Trump nominated him to the Supreme Court. In addition to writing the majority opinion, Gorsuch took the unusual step of writing a concurring opinion, explicitly calling *Chevron* deference into question. He wrote,

> [T]he fact is *Chevron*...permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the [F]ramers' design.[28]

He further asked,

> What would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes.[29]

He continued, "The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is.... We managed to live with the administrative state before *Chevron*. We could do it again."[30] Gorsuch's skepticism about *Chevron* deference was widely publicized throughout his confirmation hearing. Now that he sits on the highest court in the land, there's a good chance he is keeping an eye out for cases that would present an opportunity to revisit *Chevron*.

Seminole Rock and *Auer*'s Skeptics

The late Justice Antonin Scalia, as well as Justices Clarence Thomas and Samuel Alito, have all expressed concerns about *Seminole Rock/Auer* deference.[31] Justice Thomas dissented in a case challenging the Secretary of Health and Human Services' interpretation of regulations involving Medicare reimbursements for hospitals' educational activities. He explained:

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.[32]

In a case dealing with the APA's notice-and-comment requirements, Thomas wrote in a concurring opinion that "giving legal effect to the [agency's] interpretations rather than the regulations themselves...effects a transfer of the judicial power to an executive agency" that "raises constitutional concerns."[33] He noted, "Interpreting agency regulations calls for [judges'] exercise of independent judgment" but *Seminole Rock* prevents this.[34] According to Thomas, "*Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects of the attendant concerns."[35]

In the same case, Justice Alito pointed out that he "await[s] a case in which the validity of *Seminole Rock* may be explored," highlighting the "aggrandizement of the power of administrative agencies."[36] Scalia also wrote separately, maintaining that an agency should be "free to interpret its own regulations.... [B]ut courts will decide—with no deference to the agency—whether that interpretation is correct."[37] In a case challenging the EPA's interpretive regulations dealing with discharge of pollutants into federal waters, Scalia issued a partial dissent, explaining that *Seminole Rock/Auer* deference "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation."[38] Chief Justice John Roberts wrote a concurrence, (joined by Justice Alito) in this case, noting that it "may be appropriate to reconsider" the principles underlying *Seminole Rock* and *Auer*, and he "would await a case in which the issue is properly raised and argued."[39] While Roberts was more guarded in his view of *Seminole Rock/Auer*, he is, nevertheless, open to the possibility of revisiting those decisions.

Although Justice Gorsuch has not written about *Seminole Rock* and *Auer*, the concerns he expressed as an appeals court judge in *Gutierrez-Brizuela* certainly encompass the problem of judges deferring to agency interpretation of regulations. It is also possible that some of the liberal justices may be more skeptical of deferring to agencies under the Trump Administration.

An Opportunity to Chip Away at *Seminole Rock/Auer*

Last term, the Court agreed to hear a case dealing with *Auer* deference. *Gloucester County School v. G.G.* involved the Department of Education's interpretation of Title IX's prohibition on "sex discrimination" to include gender identity in the context of which sex-segregated facilities transgender students may use at school. This interpretation was enunciated in an unpublished letter. The lower court extended *Auer* deference to the Department of Education's interpretation, noting that it is "well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."[40] The Supreme Court agreed to hear the case, although it limited the question presented to avoid addressing whether *Auer* should be overruled. After the Trump Administration withdrew the Obama-era guidance document announcing this interpretation of Title IX, the Court sent the case back to the lower court without evaluating the merits of the case.

The Court has another opportunity to reconsider *Seminole Rock/Auer* deference this term. A petition is currently pending before the justices in *Garco Construction, Inc. v. Secretary of the Army*.[41] In this challenge, a construction company that has a contract with the U.S. Army Corps of Engineers to build Air Force housing in Montana is seeking to recoup extra

costs it incurred due to the Corps' contradictory interpretations of an applicable regulation. The company lost in the lower courts, and now it has asked the Supreme Court to take up the case and overrule the *Seminole Rock* and *Auer* decisions.

The Supreme Court has contributed to the accumulation of power in administrative agencies by deferring to agency officials, instead of exercising independent judgment about what the law requires. While the Supreme Court should overrule any case that prevents judges from saying what the law is and requires them to defer to the judgment of federal bureaucrats, there appears to be more interest among the justices in revisiting the *Seminole Rock* and *Auer* decisions. Removing the incentive for agencies to play interpretive games will go a long way toward correcting the imbalance of power. The justices should seize the opportunity to fix the problem created by *Seminole Rock* and *Auer* deference.

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Endnotes

1. 1 Cranch 137, 177 (1803).
2. *See* Senator Mike Lee, A1P: Mission Q&A (Feb. 3, 2016), https://www.lee.senate.gov/public/index.cfm/2016/2/a1p-mission-q-a.
3. Exec. Order No. 13771 (82 Fed. Reg. 9339 (Feb. 3, 2017), https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs.
4. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).
5. *Id.* at 843 (internal citations omitted).
6. *Id*. at 866.
7. *See* Elizabeth Slattery, Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference, Heritage Foundation Legal Memorandum No. 153 (May 7, 2015). This article explains the two-step analysis and how there are sometimes additional steps.
8. *Chevron*, 467 at 842.
9. *Id.*
10. Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006).
11. *E.g.* "The Administrator shall encourage cooperative activities by the States and local governments for the prevention and control of air pollution." 42 U.S.C. §7402(a) (2013).
12. 5 U.S.C. § 706 (2012).
13. 545 U.S. 967 (2005).
14. 569 U.S. 290 (2013).
15. 325 U.S. 410 (1945).
16. 519 U.S. 452 (1997).
17. *Seminole Rock*, 325 U.S. at 414.
18. *Id*. at 413–414.
19. *Auer*, 519 U.S. at 461.
20. Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 153 (1991).
21. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017).
22. *See, e.g.* Decker v. Northwest Environmental Defense Center, 568 U.S. 597, 613 (2013) "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it 'unless that interpretation is plainly erroneous or inconsistent with the regulation.'" (cleaned up).
23. *See* Philip Hamburger, Is Administrative Law Unlawful? (2014); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010).
24. Slip op. at 3 (Brown, J., concurring), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/2E91F70B0AF28BBE852580FF004E33FF/$file/09-1017-1670473.pdf.
25. *Id*.
26. 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment).
27. *Id*. at 280.
28. 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).
29. *Id*. at 1158. *See* Paul J. Larkin Jr., *The World After* Chevron, Heritage Foundation Legal Memorandum No. 186 (Sept. 8, 2016). This paper discusses how judges would evaluate an agency's interpretation of the law if *Chevron* were to be overruled. Factors that guided judges prior to *Chevron* included when and for how long the agency had held that position, whether the position remained consistent or had ebbed and flowed with the political tides, and whether it involved a highly technical issue, among others.
30. *Gutierrez-Brizuela*, 834 F.3d at 1158.
31. Though Scalia authored the decision in *Auer*, he later admitted he was "increasingly doubtful of its validity." Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); *see also* Decker, 568 U.S. at 616 (Scalia, J. concurring and dissenting).
32. Thomas Jefferson University v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).
33. Perez v. Mortgage Bankers Association, 135 S.Ct. 1199, 1213 (2015) (Thomas, J., concurring).
34. *Id*. at 1219.
35. *Id*. at 1215.
36. *Id.* at 1210–11 (Alito, J., concurring in part and in the judgment).

37. *Id.* at 1213 (Scalia, J., concurring in the judgment).
38. Decker, 586 U.S. at 621 (Scalia, J., concurring in part and dissenting in part).
39. *Id.* at 615–16 (Roberts, C.J., concurring).
40. G.G. ex rel. Grimm v. Gloucester County School Board, 822 F.3d 709, 721 (2016).
41. 856 F.3d 938 (Fed. Cir. 2017).