The Heritage Foundation

LEGAL MEMORANDUM

No. 186 | SEPTEMBER 8, 2016

The World After *Chevron*

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Abstract

In its landmark decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the U.S. Supreme Court adopted a two-step test to decide whether an administrative agency had correctly interpreted a statute. Step 1 asks whether Congress resolved the particular dispute in the relevant law; if so, Congress's answer ends the matter. If not, Step 2 asks only whether the agency's interpretation is reasonable; if so, it must prevail even if a court would have read the statute differently. Many Members of Congress and scholars believe that* Chevron *delegated the courts' responsibility to "say what the law is" to unelected members of the administrative state. But while overturning* Chevron *would return final decision-making authority to the federal courts, it would not eliminate the influence of administrative agencies. The courts will likely agree with an agency's consistent, long-standing interpretation of a statute governing a technical field. Courts may wind up regaining the authority to say what a statute means, but they could often find an agency's interpretation to be persuasive.*

Administrative law has been a greenfield for scholars for quite some time because it stands at the confluence of American constitutional law and political theory regarding the proper structure of American government.[1] Most administrative law is made not by Congress, but by the federal courts, particularly the Supreme Court of the United States. The last major statute that Congress enacted was the Administrative Procedure Act (APA),[2] and it became a part of the federal code 70 years ago. Since then, the Supreme Court has principally been responsible for the development of administrative law. Some of the Court's decisions interpreting the APA—such as

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Key Points

- The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* adopted a two-step test to decide whether an administrative agency had correctly interpreted a statute: Did Congress resolve the particular dispute at issue in the relevant law, and is the agency's interpretation a reasonable one?
- Members of Congress and many scholars believe that *Chevron* improperly delegated the courts' responsibility to "say what the law is" to unelected members of the administrative state, and they have introduced legislation to overrule Chevron or have urged the Supreme Court to do so.
- Overturning *Chevron* would return final decision-making authority to the federal courts, but it would not eliminate the influence of administrative agencies. A consistent, longstanding interpretation of a statute governing a technical field will likely always persuade the courts because they will conclude that the agency has figured out what is in the public interest.

Citizens to Preserve Overton Park v. Volpe[3] and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[4]—are landmark decisions in the administrative law field because they defined the "arbitrary and capricious" standard for review of federal agency actions and prohibited the federal courts from imposing rulemaking requirements on administrative agencies that Congress chose not to adopt itself.[5] To some extent, those decisions have become so closely allied with the meaning and role of the APA in governance that they might as well have been written into the text of the statute itself.

But the Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[6] stands head and shoulders above any other administrative law decision rendered during the past several generations. *Chevron* created a new two-step test for courts to use when interpreting a statute that Congress has directed an agency to implement. The test gave federal agencies a potentially commanding role in the interpretive process even though American jurisprudence had long vested that authority in the federal courts.

Like most issues of administrative law, *Chevron* was largely noncontroversial for most of its early life. Times have changed, however, and *Chevron* is now the subject of considerable legal and policy debate. Its elevated treatment of agency interpretive authority rests uncomfortably alongside a long tradition of judicial primacy. Its foundation in the Progressive-Era belief in the wisdom of delegating vast amounts of decision-making authority to expert agency officials is jarring to a public that has become distrustful of losing any control of or influence over an increasingly vast portion of American life that is now regulated by remote, unknown officials.

What perhaps brought that dispute to a boil has been President Barack Obama's oft-repeated resort to administrative lawmaking when he could not achieve the same legislative success that he enjoyed during the early portion of his first Administration. Over the past five years, the question whether *Chevron* was wrongly decided and, if so, whether its two-part analysis should be abandoned has been a subject of considerable ferment among certain members of the Supreme Court and the academy. Whether *Chevron* will survive may well turn on what happens this November.

It might be useful to ask, however, what the world would look like if *Chevron* were legislatively or judicially overruled. Would the federal courts still give deference to an agency's interpretation of a statute? If so, how much deference? Would the courts defer to an agency even if they would have construed the statute differently? Would the courts treat the agency's opinion as if it were a law review article? Does all the hoopla over *Chevron* matter very much in the long run?[7]

The Rise of *Chevron* and Deference to a Federal Agency's Interpretation of an Act of Congress

The issue in *Chevron* was whether the Environmental Protection Agency (EPA) could reasonably interpret the term "stationary source" for purposes of the Clean Air Act Amendments of 1977[8] as an entire plant rather than as each separate smokestack, an interpretation that had come to be known as the "bubble" concept. The Reagan Administration had interpreted that term to apply to each facility, not each smokestack, while the environmental organizations took the contrary position. Unfortunately, neither the text of the statute nor its legislative history offered more than a wisp of evidence as to what "stationary source" meant, and the competing policy arguments seemed to wrestle themselves to a draw. All of the traditional tools of statutory interpretation left the Supreme Court in equipoise. The result was that the Court found itself with only two choices: flip a coin or devise a new approach to statutory construction.

In an opinion written by Justice John Paul Stevens, the Supreme Court chose the latter approach. In reviewing the validity of the EPA's interpretation of the statute, the Court wrote, a court should not follow the traditional approach to the construction of a law set forth by the Court's 1803 decision in *Marbury v. Madison*,[9] which had explained that the courts have the responsibility "to say what the law is."[10] Instead, in *Chevron*, the Court established a two-step test for judicial review of an agency's interpretation of a statute. The first step is to ask whether Congress has answered the particular question in dispute in the statute itself.[11] If so, that answer (absent some constitutional flaw) is dispositive.[12] But if the statute is ambiguous on the issue, the next step for a reviewing court is to ask whether the agency's interpretation is reasonable.[13] If so, that ends the controversy. The court may not disagree with the agency as long as its interpretation is a plausible construction of the

act. Why? When a statute is ambiguous, the Court wrote, there is a presumption that Congress implicitly delegated to the agency the authority to fill in the blanks,[14] which is a policymaking function.[15] Unlike courts, agencies may make policy judgments, and if Congress empowered an agency to do so, the courts may not overrule the agency's decision.[16]

Having identified how it would answer the question, the Court then applied its new two-step test to the Clean Air Act. Applying *Chevron* Step 1, the Court concluded that neither the statute nor its legislative history defined the term "stationary source," nor did either one prohibit the EPA from adopting its "bubble" concept.[17] Moving then to *Chevron* Step 2, the Court decided that the agency's "bubble" concept was a reasonable interpretation of the term "stationary source" and entered judgment in the agency's favor.[18]

Chevron adopted a two-step test, but in *King v. Burwell*[19] the Court added a third step, which some commentators have labeled "*Chevron* Step 0."[20] *King* involved an interpretation of the Patient Protection and Affordable Care Act of 2010,[21] known to some as Obamacare.[22] The question before the Court was whether the phrase "[e]xchange established by a state" included an exchange established by the federal government. The Internal Revenue Service had promulgated a rule answering that question in the affirmative, and the Solicitor General argued that the IRS's interpretation was entitled to *Chevron* deference. Although the majority, in an opinion written by Chief Justice John Roberts, reached the same conclusion on statutory grounds, the majority declined to defer to the IRS's interpretation. Instead, the Court concluded that this was one of those "extraordinary cases" in which it would be unreasonable to presume that Congress delegated interpretive authority to an agency instead of resolving an issue itself.[23] The Court stated that it had reached this conclusion because the phrase "[e]xchange established by a state" was critical to one of that act's "key reforms," involved "billions of dollars in spending each year," "affect[ed] the price of health insurance for millions of people," and was therefore "a question of deep economic and political significance that is central to [the Obamacare] statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."[24]

King therefore adds a new step to *Chevron*, one that asks whether the matter is of such importance that a court should not presume that Congress implicitly delegated interpretive authority to an agency to resolve it. Given the plasticity of that inquiry, that step could render *Chevron* inapplicable in an unknown number of cases.[25]

The Steady Transfer of Lawmaking Power from Congress to Administrative Agencies

Chevron did not appear at first to be a major decision in administrative law.[26] The Supreme Court had been interested in how an agency construed a statute long before *Chevron* was decided, and the Court often gave the agency's interpretation deference in a variety of circumstances.[27] For example, the Court was likely to defer to an agency's position that was consistent, long-standing, or technical in nature. Even *Chevron* acknowledged those points.[28] Moreover, a court would not reach *Chevron* Step 2 unless it found that Congress did not itself answer the issue in the case. Instances in which Congress had directed an agency to promulgate regulations to implement a statutory program were the most likely to receive judicial deference. Yet since the Court decided *Chevron* in 1984, the decision has taken on enormous importance. One reason why is that, given the deep political disagreements in American politics today, Congress has not passed any major legislation since Obamacare in 2010, and the President has stepped forward to take up the slack, whether or not he possesses the statutory authority to do so.

The Framers anticipated that Congress would be the principal lawmaking body for the federal government. That explains why they spent most of the Convention of 1787 debating how to select Members of Congress[29] and what legislative powers Congress should have.[30] Early on, President Barack Obama accepted that norm, working with Congress to enact as law policies that he believed were necessary to benefit the nation. An example is his economic stimulus package. Yet since his party lost control of the Senate and House of Representatives, President Obama has shifted gears and used executive orders and administrative regulations or decrees to create law. In fact, he has issued some decrees that are inconsistent with the very laws he helped enact in his first term.[31]

The result of the President's resort to lawmaking by administrative regulation or order has been to cause several Members of Congress to attempt to reclaim their principal role in the federal lawmaking

process. Various commentators have also decried the administrative state's usurpation of Congress's lawmaking authority.[32] Along the way, lawmakers and scholars have focused on *Chevron* as epitomizing the out-of-kilter nature of federal governance, one in which unelected administrative officials exert more effective lawmaking power through their interpretation of statutes than either Congress or the federal courts are able to exert. Members of Congress have introduced legislation that would overrule *Chevron*,[33] and members of the academy have urged the Supreme Court to clean up the mess it created by overruling the decision itself.[34]

Critics of *Chevron* have offered several arguments to show why they believe it was wrongly decided and should be abandoned.[35] But the central argument against *Chevron* is that it conflicts with a fundamental principle of our constitutional system: The federal courts have the responsibility to interpret federal law and enter final judgments reflecting how that law applies to the facts in a particular case. The Constitution's text, its English and American common-law history, and the need for (and textual guarantees of) judicial independence, the argument goes, make it clear that the third branch of government must have the final say as to a law's meaning.[36] *Chevron*, critics correctly say, gave no weight to any of those concerns. In fact, Justice Stevens's opinion does not even mention them.

So far, neither the full Congress nor the Supreme Court has taken up those invitations, and it is uncertain whether they ever will. Presidential and congressional elections are just over the horizon, and the outcome of those races could decide whether any legislation to overrule *Chevron* advances in either chamber of Congress. The death of Justice Antonin Scalia earlier this year left the Court with only eight members, which meant that some cases were decided by a 4-to-4 vote[37] and some might as well have been for all of the clarity that the Court's decision provided.[38] It is unlikely that the Supreme Court would be willing to reconsider a precedent with the significance of *Chevron* without a full complement of justices. The appointment of a new justice will occasion debate in the Senate over the role that administrative agencies should play in the interpretation of law, but it is unlikely that the nominee will say very much about the matter or that Congress will resolve it during confirmation proceedings (in which the House of Representatives plays no part).

Accordingly, the eventual fate of *Chevron* is a question mark. Yet equally important to the debate about whether the *Chevron* doctrine should ride off into the sunset like Shane[39] or remain firmly in place like Horton[40] is this question: Where would we be if Congress or the Supreme Court overruled *Chevron*?

What Would Follow *Chevron*'s Demise?

Bills introduced in the Senate and House of Representatives would overrule *Chevron* by modifying the APA to make clear that federal courts must independently resolve any legal issue posed by a case.[41] The goal of those bills is to eliminate *Chevron* Step 2 and reestablish the default position in administrative law that applied before the Court in *Chevron* devised its new two-step analysis. Were one of those bills to become law, the federal courts would no longer be free to avoid deciding the meaning of a statute by relying on the agency's interpretation. That would also be true if the Supreme Court were to overrule *Chevron* and return administrative law to its pre-*Chevron* status quo. The federal courts would once again have final decision-making authority over the interpretation of federal statutes—at least in the short run. But two features of the *Chevron* decision suggest that the Supreme Court may be unwilling over the long haul to reassume the burden of final responsibility for the interpretation of acts of Congress that are meant to be implemented by the administrative state.

The first one is that the *Chevron* two-step analysis represents an odd marriage of common-law decision-making and statutory construction at a time when the former has largely become a thing of the past. The common-law courts resolved disputes by inching their way along from the guideposts set by analogous precedents in cases involving comparable facts. The courts did not defer to the position of the government (including an executive branch agency) as a litigant because they saw their role as being that of an impartial referee: an adjudicator charged with deciding cases based on the strength of a party's arguments rather than on the identity of a litigant.

That approach made sense at a time when Congress had not yet begun to turn out statutes like so many loaves of bread for executive branch officials to manage economic and social affairs through a distinct "fourth branch" of government. But the world changed during the New Deal. The birth of the administrative state forced the Supreme Court to

decide how to treat the opinions of officials who were not parties to litigation but were held out as experts and utility infielders[42] with congressionally assigned rulemaking, management, and adjudicatory responsibilities, thereby effectively becoming junior varsity versions of Congress, the executive branch, and the judiciary. The result was to give agencies deference in their area of expertise in order to give effect to Congress's judgment that agency officials, not courts, should manage the economy at the granular level.

The effect of *Chevron* was to mix all of that together into one approach to statutory analysis. Since *Erie R. Co. v. Tompkins*, the federal courts have been unable to engage in the type of common-law lawmaking necessary to fill the gaps left by legislation.[43] But *Erie* does not limit the power of agencies to assume that role. Accordingly, where an issue arises that Congress did not answer, whether due to an unforeseen problem or to a crevice between two parts of a statute, *Chevron* directs the federal courts to leave the responsibility for filling that gap to the agency that Congress chartered to perform that task. That is, given the administrative state, the task of filling in the blanks—the role that courts performed when the law consisted of judicial decisions rather than statutes—now falls to the agencies. In other words, federal administrative agencies have become the new common-law courts in "the age of statutes,"[44] authorized to engage in the same "molar to molecular" lawmaking that the pre–New Deal courts had long performed.[45] The role for the federal courts was now the subsidiary one of making sure that an agency remained within the bounds of reason. Otherwise, agencies had the power to act interstitially.

The second noteworthy feature of *Chevron* is closely related to the first one. The Supreme Court's decision in *Chevron* represents a renewed belief in the Progressive-Era dogma that agency officials are subject-matter experts who know better than anyone else what a statute means and how it must be read so that it can work.[46] The problem with such a canon is that it is neither always right nor always wrong. Some agency officials—biochemists, epidemiologists, hydrogeologists, nuclear engineers, astrophysicists, and so forth—will know more about a particular subject matter than even Supreme Court justices think they know and also will have a better grasp of the on-the-ground tasks that must be accomplished to make a regulatory program work. Other agency officials will be no smarter or better equipped to manage a complicated regulatory program than are the people behind the counter at your local DMV. Uttering that conclusion certainly is not politically correct, and it is highly unlikely that the Supreme Court would ever endorse it in a written opinion published for posterity in the United States Reports. But Supreme Court justices are people—actually, very savvy people—and like everyone else, they will hold a personal view of the different competencies of various agencies and administrative officials.

The consequence is that even if *Chevron* were overruled, the Court is likely to defer to different federal agencies based on the factors to which it pointed before *Chevron*.[47] When did the agency first adopt its interpretation (e.g., when the statute was adopted or 50 years later)?[48] How long has the agency had that position (e.g., for 50 years or since last year)?[49] Has the agency interpretation remained consistent over time?[50] Is the field at issue one that is evolving or highly technical?[51] Did Congress instruct the agency to decide what was in the "public interest"?[52] And so forth. A contemporaneous, consistent, long-standing interpretation of a statute governing a technical field is likely to receive deference because it reveals that—from the outset and through Administrations of both parties—the agency has figured out what is in the public interest.

Here is another way to answer the question of what the world will look like after *Chevron*. The Supreme Court may replace *Chevron* deference with what has been (mis)labeled as *Skidmore* deference, after the case that first articulated the standard, *Skidmore v. Swift & Co.*[53] *Skidmore* involved the question of whether employees were entitled to overtime pay for the hours they spent at or nearby their job in a state of readiness in case of a fire. The Fair Labor Standards Act of 1938[54] did not expressly answer that question, but the relevant federal official, the Administrator of Wages and Hours, had concluded in an agency bulletin that a flexible approach was the best way to decide whether such "waiting" time should be deemed overtime. No statute identified the weight that the Administrator's opinions should receive, but his views reflected his experience in applying the act.[55] For that reason, the Supreme Court decided that it would be guided by the persuasiveness of the Administrator's interpretation:

> We consider that the interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[56]

Were *Chevron* gone, the Supreme Court would likely apply the *Skidmore* standard to an agency's interpretations of one of its organic statutes. Pre-*Chevron* Supreme Court case law suggests as much.[57]

Overturning *Chevron* by statute might prevent the Supreme Court from delegating responsibility for statutory interpretation to an agency, but no act of Congress could force the Court to completely disregard what an agency says a law means. At a minimum, the Court would likely place an agency's construction of a statute on a par with the interpretation adopted by a learned member of the bar or a scholar in the academy. A persuasive agency position would carry the same weight as an opinion by Arthur Corbin on contract law, Herbert Hovenkamp on antitrust law, William Prosser on tort law, David Shapiro on federal jurisdiction, Herbert Wechsler on criminal law, or Charles Allen Wright on federal civil procedure. Each one is a recognized and highly regarded expert in his field whose opinions are valued and sought throughout the legal community.

Of course, each of those experts could be wrong about a particular point—even Homer nodded[58]—and the courts would have the responsibility to accept or reject their opinions. But it would be irrational to disregard a persuasive argument of theirs just because their views are not final. It would be equally irrational to reject an otherwise persuasive argument just because an agency made it, not a law professor. Under *Skidmore*, a federal court would likely give an agency's opinion whatever persuasive force its reasoning deserved. The difference between *Skidmore* and *Chevron* is that *Skidmore* lets a court decide what is persuasive. A persuasive agency argument is no less persuasive just because the court has the final say.

Conclusion

The Supreme Court's *Chevron* decision has generated considerable controversy over the past decade because it has the effect of transferring the final interpretive authority from the courts to the agencies in any case where Congress did not itself answer the precise dispute. The effect of *Chevron* was to transform agencies into common-law courts because only agencies can engage in the blank-filling necessary when Congress has failed to answer a question.

Overturning *Chevron* would return that ultimate decision-making authority to the federal courts, but it would not eliminate the importance of an agency's interpretation of a statute. The agency's position would have the same status as the interpretation offered by a scholar in the particular field: an opinion that must be considered and should be endorsed if it is persuasive, even if is not controlling.

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Endnotes

1. The literature in the field, to use a colloquialism, is "ginormous." *See, e.g.*, Stephen Breyer, Regulation and Its Reform (1984); Kenneth Culp Davis, Administrative Law and Government (1975); David R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014); Philip Hamburger, Is Administrative Law Unlawful? (2015); Philip K. Howard, The Death of Common Sense: How Law Is Suffocating America (2011); Jerry L. Mashaw, Creating the Administrative State: The Lost One Hundred Years of American Administrative Law (2012); Thomas K. McCraw, Prophets of Regulation (1986); Peter Schuck, Why Government Fails So Often: And How It Can Do Better (2014); Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy (2009); Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (1993); James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It (1991); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549 (1985); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113 (1998); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001); Richard B. Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193 (1982); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975); Peter L. *Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).
2. The Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified, as amended, at 5 U.S.C. § 500 et seq. (2012)).
3. 401 U.S. 402 (1971).
4. 435 U.S. 519 (1978).
5. *Overton Park* directed federal courts to ensure that agency decision-making complies with the "arbitrary and capricious" and "substantial evidence" APA standards, while *Vermont Yankee* prohibited the courts from imposing additional requirements on agencies or reviewing their decision-making more strictly than the APA requires. *See also*, *e.g.*, Michigan v. EPA, 135 S. Ct. 2699 (2015) (ruling that the EPA's failure to consider the costs imposed by its proposed rule was "arbitrary and capricious" and therefore invalid under the APA); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (ruling that the APA "arbitrary and capricious" standard of review applies to an agency's rescission of a regulation); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) (ruling that a federal agency need not consider "risk qua risk" under the federal environmental laws).
6. 467 U.S. 837 (1984).
7. A closely related but legally distinct issue is the standard of review of an agency's interpretation of one of its own regulations or some other sub-statutory form of law, such as an agency guidance manual. One of the leading cases is *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which ruled that an agency's interpretation of such forms of law (there, a contract) should be accepted if it is persuasive. *Id*. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). A later case, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), held that when an agency's interpretation of its own regulation is at stake, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id*. at 414. The Court has reaffirmed and applied the *Seminole Rock* standard in numerous later cases in a diverse variety of settings: when the agency acted in a formal or informal proceeding, when it interpreted a rule in the context of litigation, when its later interpretation appeared to conflict with a different one, and when the "agency" was a nontraditional regulatory agency. *See*, *e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) ("[W]e concede that the Department may have interpreted these regulations differently at different times in their history.... But as long as interpretive changes create no unfair surprise[,]...the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.") (citations omitted); Stinson v. United States, 508 U.S. 36, 44–45 (1993) (U.S. Sentencing Commission); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); Udall v. Tallman, 380 U.S. 1, 16–17 (1965) (oil and gas leases). The Supreme Court recently reaffirmed *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452 (1997). The *Seminole Rock* standard, however, has been controversial of late. Several justices and scholars have questioned its legitimacy. Their argument is that *Seminole Rock* allows an agency to draft a regulation whose text is ambiguous, shepherd that regulation through the APA notice-and-comment process without identifying a controversial interpretation, and then obtain virtually complete deference for that interpretation in an enforcement action. *See*, *e.g.*, Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito. J., concurring in part and concurring in the judgment); *id*. at 1212–13 (Scalia, J., concurring in the judgment) ("I am unaware of any such history justifying deference to agency interpretations of its own regulations. And '[T]here are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means.... I would therefore restore the balance originally struck by the APA.'") (citation omitted); *id*. at 1213–25 (Thomas, J., concurring in the judgment) ("That line of precedents, beginning with *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945), requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine affects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). Justice Scalia expressed a willingness to reconsider *Seminole Rock* before his death, but it is uncertain whether a majority of the Court is willing to do so. As a matter of policy, the best defense of *Auer* deference is the same one that is offered to support *Chevron*. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 83 U. Chi. L. Rev. (forthcoming 2016). Accordingly, if *Chevron* falls so does *Auer*.

8. Pub. L. No. 95-95, 91 Stat. 685 (1977).
9. 5 U.S. (1 Cranch) 137 (1803).
10. *Id*. at 177.
11. *Id*. at 842.
12. *Id*. at 842–43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (footnote omitted).
13. *Id*. at 843.
14. *Id*. ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted).
15. *Id.* at 843–44 ("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…. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (citation and footnotes omitted).
16. *Id*. at 865–66 ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").
17. *Id*. at 845–64.
18. *Id*. at 864–66.
19. 135 S. Ct. 2480 (2015).
20. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006).
21. Pub. L. No. 111-148, 124 Stat. 119 (2010).
22. And to others as "SCOTUScare." *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting).
23. *King*, 135 S. Ct. at 2488–89 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
24. *King*, 135 S. Ct. at 2489 (citations and internal punctuation omitted).
25. There is also the question whether an agency's action pursuant to its interpretation of a statute is arbitrary and capricious, which some have labeled a fourth step in the analysis. *See* 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, 834–35 (2010) (noting the discussion about whether arbitrary-and-capricious review should be collapsed into *Chevron* Step 2 or be a separate final step in the analysis). That debate does not bear directly on the issues discussed herein.
26. Aside from the absence of any statement in the opinion to that effect, two facts support the conclusion stated in the text above. One is that only six of the nine justices participated in that case; three were recused. 467 U.S. at 866. It seemed unlikely that the Court intended to make a tectonic shift in the law with a third of its members on the sidelines. The other fact is that the Court was unanimous. Dissenting opinions tend to challenge the reasoning of the majority, which forces the majority to address what one or more colleagues deem flaws in the majority's reasoning or unfortunate consequences that will follow from the Court's decision. Justice Stevens's opinion did not have to undertake any such burden in *Chevron*, perhaps because the other five justices were just happy to find some way to dispose of the case without playing the role of a referee.
27. *See infra* notes 44–50 and accompanying text.
28. *See*, *e.g.*, *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (footnote and internal punctuation omitted); *id*. at 844 n.14 (collecting cases in which the Court deferred to an agency's interpretation of a statute).
29. *See* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id*. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people

thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

30. *See* U.S. Const. art. I, § 8 (specifying the powers of Congress).
31. Numerous commentators have criticized President Obama's "I don't need no stinking statute" approach to governance. (For his possible muse, see *The Treasure of the Sierra Madre* (Warner Bros. 1948), https://www.youtube.com/watch?v=nsdZKCh6RsU.) For two excellent, detailed treatments, see David E. Bernstein, Lawless: The Obama Administration's Assault on the Rule of Law 81 (2015), and Written Statement of Elizabeth Slattery Before the Task Force on Executive Overreach of the House Judiciary Comm., *Executive Overreach in Domestic Affairs Part I—Health Care and Immigration* (Mar. 18, 2016), http://www.heritage.org/research/testimony/2016/executive-overreach-in-domestic-affairs-part-ihealth-care-and-immigration.
32. *See, e.g.*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Am. U. Admin. L.J. 1 (1996); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994); Cory R. Liu, Chevron*'s Domain and the Rule of Law*, 20 Tex. Rev. L. & Pol. 391 (2016); Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 Va. Tax Rev. 813, 818 (2013).
33. Parallel bills were introduced in the Senate and House of Representatives. *See* S. 2724, The Separation of Powers Restoration Act, 114th Cong. (2016); H.R. 4768, The Separation of Powers Restoration Act, 114th Cong. (2016). The House passed an amended version of the House bill on July 12, 2016. Congress.gov, https://www.congress.gov/bill/114th-congress/house-bill/4768 (last accessed Aug. 9, 2016). The Senate has not yet acted on its version.
34. Professor Jack Beermann has been a particularly vocal critic of *Chevron*. *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 Fordham L. Rev. 731 (2014); Beermann, *supra* note 25. But he is not alone. *See supra* note 32.
35. Other criticisms of *Chevron* include the following: (1) *Chevron* is inconsistent with the APA, which directs courts to review and set aside unlawful agency actions; (2) *Chevron* mistakenly assumed that Congress intended to vest interpretive authority in agencies when Congress gave no thought to the matter; (3) the Court has manipulated the *Chevron* test whenever it does not like the result that *Chevron* would require by creating exceptions to its supposedly all-encompassing standard; (4) *Chevron* gives Members of Congress an unnecessary and undesirable incentive to punt to unelected agency officials the answers to important policy issues; and (5) *Chevron* encourages dishonesty by everyone involved—Members of Congress, agency officials, and the lower federal courts—because it enables each one to deceive the public that a policy dispute never the subject of a vote on the floor of the Senate or the House is actually a legal issue. For an entertaining example of how the *Chevron* doctrine can tie up in knots any effort to make sense of it, see Kenneth A. Bamberger & Peter L. Strauss, Chevron's *Two Steps*, 95 Va. L. Rev. 611 (2009); Mathew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597 (2009); Cass Sunstein, Chevron *Step Zero*, *supra* note 20.
36. *See*, *e.g.*, Lawson, *supra* note 32, at 1247–48.
37. *See* United States v. Texas, 136 S. Ct. 2271 (2016) (affirming the judgment below by an equally divided Court); Friedrichs v. Cal. Teachers' Ass'n, 136 S. Ct. 1083 (2016) (same).
38. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam decision sending the case back to the lower federal courts and effectively telling the parties, in a manner of speaking, to "go work it out").
39. *See* Jack Schaeffer, Shane (1949).
40. *See* Dr. Seuss, Horton Hatches the Egg (1940).
41. *See supra* text accompanying notes 33–34.
42. For readers unfamiliar with the national pastime, a "utility" infielder is a baseball player who is sufficiently skilled to play multiple positions in the infield (ordinarily, but not exclusively, second base, third base, or shortstop) but not a good enough hitter to be in the starting lineup. Think Luis Sojo, New York Yankees, 1996–1999 and 2000–2001.
43. Under *Erie R. Co. v. Tompkins*, the federal courts generally lack authority to create federal common law. They may do so only in connection with subjects of peculiarly federal interest, such as admiralty, federal sovereign immunity, the obligations of the federal government, and interstate disputes over geographic boundaries and water rights. *See*, *e.g.*, Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95–98 (1981) (collecting cases).
44. *See* Guido Calabresi, A Common Law for the Age of Statutes (1985).
45. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
46. Yes, the *Chevron* opinion does not use those terms explicitly, talking instead of a "presumption" that Congress delegated interpretive authority to an agency. But Justice Stevens pulled that presumption out of thin air because there is no more reason to presume that Congress delegated decision-making authority to an agency than there is to presume that Congress did not give the matter a moment's thought. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517. The Court's use in *Chevron* of a "presumption" of congressional intent was a "fictional, presumed intent." *Id.* A wag might say that "legal fiction" is the term that courts use to label what, when spoken by others, courts call a "lie."
47. *See*, *e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.") (citation and internal punctuation omitted). The difference between what the Court wrote in *Tallman* and in *Chevron* is like the difference between dusk and twilight.

48. *See, e.g.*, Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL–CIO, 367 U.S. 396, 408 (1961) ("Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.") (citation and internal punctuation omitted).
49. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 737 (1978) ("Not only did the Federal Radio Commission so construe the statute prior to 1934; its successor, the Federal Communications Commission, has consistently interpreted the provision in the same way ever since.").
50. *See, e.g.*, NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 289 (1974) ("In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that managerial employees are not covered by the Act. We agree with the Court of Appeals below that the Board is not now free to read a new and more restrictive meaning into the Act.") (footnote and internal punctuation omitted).
51. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 219–20 (1943) ("Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.").
52. *See, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) ("[T]he physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the public interest. And the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.") (internal punctuation omitted).
53. 323 U.S. 134 (1944). *Skidmore* is mislabeled as a form of deference because, as the opinion makes clear, it states that a court should agree with an agency's interpretation only insofar as it finds that opinion *persuasive*. *Id.* at 140 (quoted *infra* at text accompanying note 56). Under *Chevron* Step 2, an agency can receive deference even if a court is unpersuaded that the agency's position is the one that the court would have adopted in the first instance. *See* 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted).
54. Ch. 676, 52 Stat. 1060 (1938).
55. *Skidmore*, 323 U.S. at 139–40 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.").
56. *Id.* at 140.
57. *See, e.g.*, *Tallman*, 380 U.S. at 16 (quoted *supra* at note 47); NLRB v. Hearst Publications, 322 U.S. 111, 130–31 (1944) ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.").
58. That is, even the most intelligent person can make a mistake due to a brief lack of alertness or inattention. *See* Even Homer Nods, Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/even-homer-nods.