

The *Chevron* Doctrine, the U.S. Supreme Court & Justice Gorsuch: Are Major Changes Afoot?

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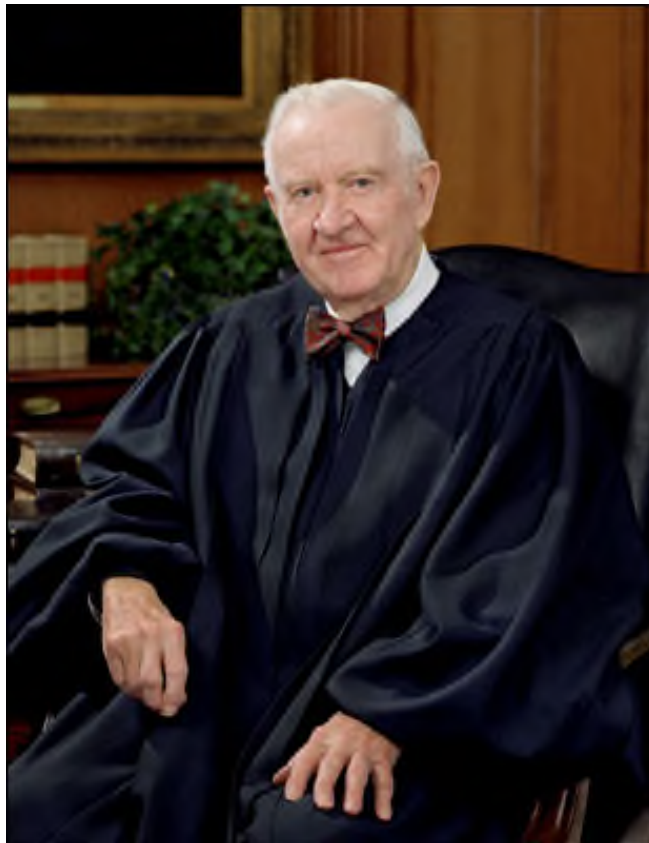
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“Administrative law is not for sissies – so you should lean back, clutch the sides of your chairs, and steel yourselves...”

--Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J., 511, 511 (1989)

*Chevron, U.S.A. v. Natural Res.
Def. Council*
(1984) 467 U.S. 837



The “*Chevron* Two-Step”

When reviewing an agency’s construction of a statute that it administers, courts consider two questions:

- 1) Did Congress directly address the precise question at issue?
- 2) If not, is the agency’s answer based on a “permissible construction” of the statute?

USSC Expansions of *Chevron*:

- *Auer v. Robbins* (1997) 519 U.S. 452
 - *Chevron* applies to administrative agency's interpretation of its own regulations
- *National Cable & Telecommunications Assn. v. Brand X Internet Services* (2005) 545 U.S. 967
 - *Chevron* applies even if a court has previously interpreted statute at issue
- *City of Arlington v. FCC* (2013) 133 S.Ct. 1863
 - *Chevron* applies to agency's interpretation of its own jurisdiction

Justice Scalia:
Chevron Deference Defender



Antonin Scalia,
Judicial Deference to Administrative
Interpretations of Law,
1989 Duke L. J., 511, 521 (1989)

“I tend to think . . . that in the long run *Chevron* will endure and be given its full scope — not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.”

Justice Scalia: Later Skepticism

- *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1015-17 (2005) (Scalia, J., dissenting) (expressing concern about “judicial decisions subject to reversal by executive officers.”)
- *United States v. Mead*, 533 U.S. 218, 246-49 (2001) (Scalia, J., dissenting) (stating that the Supreme Court has never “allowed a judicial interpretation of a statute to be set aside by an agency.”)

Justice Thomas

Michigan v. E.P.A. (2015) 576 U.S. ____

(Thomas, J., dissenting)

“Chevron deference raises serious separation-of-powers questions.”



Chief Justice Roberts

Decker v. Nw. Env'tl. Def. Ctr.

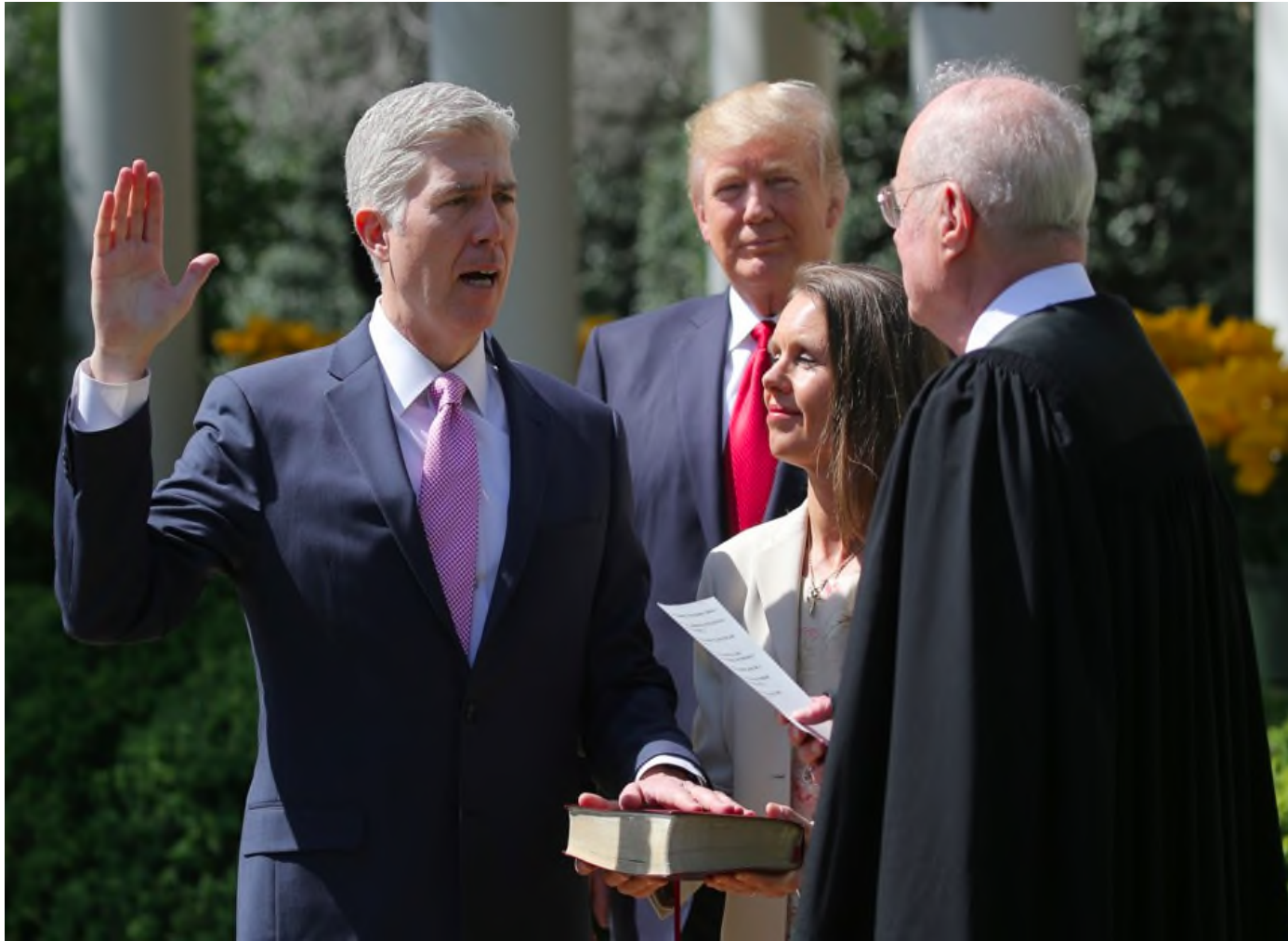
(2013) 568 U.S. 597, 615-16

(Roberts, C.J., concurring, joined by Alito, J.)

“It may be appropriate to reconsider [the *Seminole Rock/Auer*] principle in an appropriate case. . . . [t]he bar is now aware that there is some interest in reconsidering those cases . . .”



Justice Neil Gorsuch



Caring Hearts Pers. Home Servs. v. Burwell
(10th Cir. 2016) 824 F.3d 968, 969

[The number of regulations issued by federal agencies has] “grown so exuberantly it’s hard to keep up. . . . And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal [guidance] might be found floating around these days... [Given the breadth and scope of federal agency power there are] questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing ‘law.’”

De Niz Robles v. Lynch

(10th Cir. 2015) 803 F.3d 1165, 1171-72

- Rejecting application of *Chevron* doctrine to permit federal agency's *retroactive* application of agency's statutory interpretation
- While acknowledging binding nature of USSC precedent on lower courts, Judge Gorsuch willing to "cabin in" application of *Chevron* to new facts & circumstances

Guitierrez-Brizuela v. Lynch
(10th Cir. 2016) 834 F. 3d. 1142, 1149
(Gorsuch, J., concurring)

“[T]he fact is *Chevron* and *Brand X* permit 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 framers’ design.”

Gutierrez-Brizuela v. Lynch

(10th Cir. 2016) 834 F. 3d. 1142, 1149–56

(Gorsuch, J., concurring)

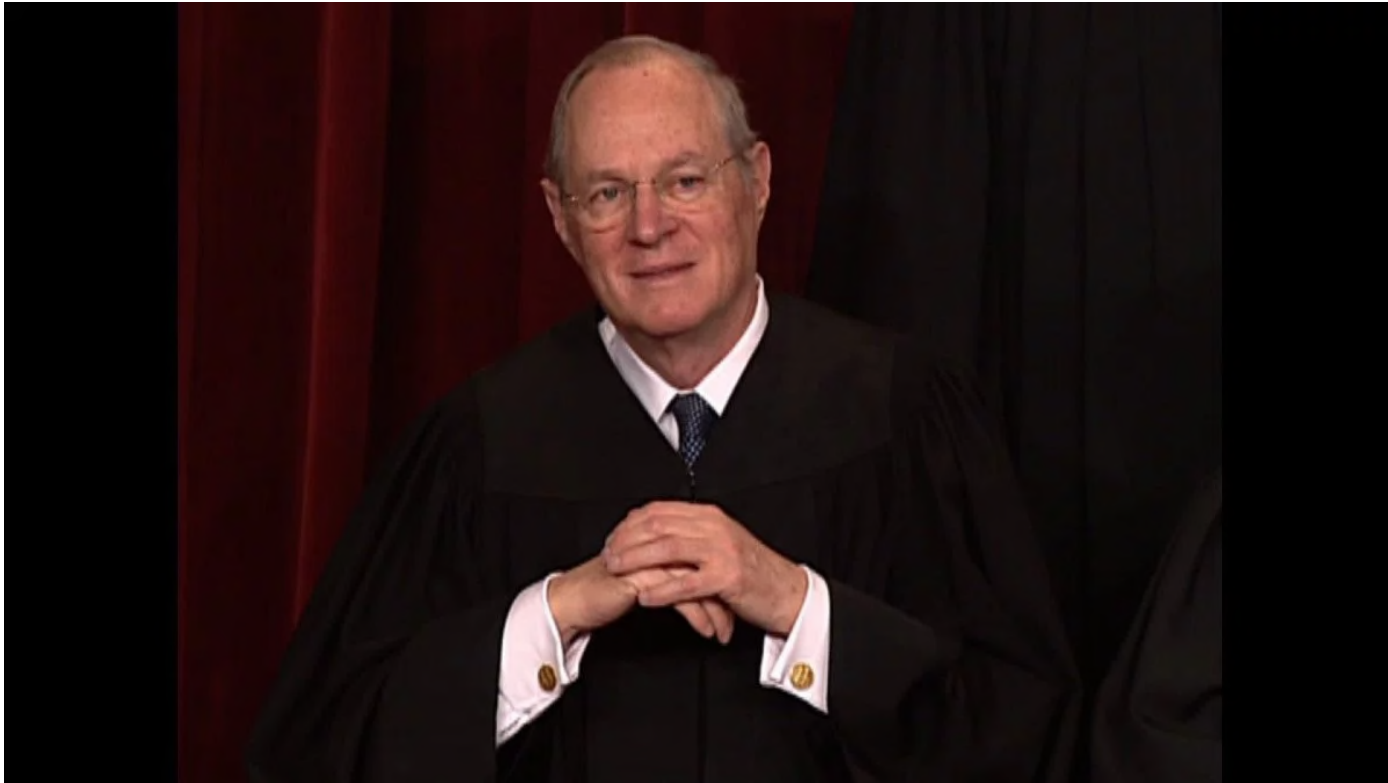
Judge (now Justice) Gorsuch's concerns with *Chevron* are predicated on:

- Its perceived contravention of separation of powers principles; and
- Its perceived violation of the non-delegation doctrine

What does the future hold for the *Chevron* doctrine in the USSSC?

- Four likely votes in favor of continued adherence to *Chevron* (Breyer, Ginsburg, Sotomayor, Kagan)
- Four possible votes to limit or even overrule *Chevron* (Roberts, Thomas, Alito & Gorsuch)

The key USSC Justice?



Anthony Kennedy

Justice Kennedy

Justice Kennedy's Votes in Cases Citing *Chevron* During The Roberts Court*

<i>With Agency</i>	<i>Against Agency</i>
20.5	11.5

*See Jack M. Beermann, *Chevron at The Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014) (numbers have been updated through July 25, 2017)

Justice Kennedy

- Justice Kennedy's voting record since 2005 seems to indicate continued adherence to Chevron in the majority of cases.

But...

- "[T]he danger posed by the growing power of the administrative state cannot be dismissed."
City of Arlington v. FCC (2013) 133 S. Ct. 1863, 1879 (Roberts, C.J., dissenting, joined by Kennedy, J.)

Questions?

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