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Justice Gorsuch's Would-Be War on Chevron

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JUSTICE GORSUCH'S WOULD-BE WAR ON CHEVRON

Heather Elliott

THEN-JUDGE NEIL GORSUCH made clear that he hates the doctrines requiring judicial deference to administrative agencies. He wrote at length against *Chevron* and *Brand X*,¹ suggested that he would revive the non-delegation doctrine² (something that has been firmly and unanimously rejected by the Court³), and hinted at a belief in the unconstitutionality of the administrative state.⁴ His rhetoric was redolent of his disdain: he spoke of “perfumed lawyers and lobbyists”⁵ operating in

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¹ *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to . . . concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”).

² *Id.* at 1154.

³ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (Scalia, J., writing for the Court) (“We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” (internal quotation and citation omitted)).

⁴ *Gutierrez-Brizuela*, 834 F.3d at 1155 (quoting *The Federalist* No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”)).

⁵ *Id.* at 1152. “Justice Gorsuch appears to be appealing to populist resentment against members of the elite who can afford to hire high-priced lawyers . . .” Jonathan R.

“the titanic administrative state.”⁶

At the time, he could do little about any of these doctrines. As then-Judge Gorsuch recognized, he sat on an intermediate appellate court bound to follow Supreme Court decisions such as *Chevron*.⁷

Now-Justice Gorsuch, however, can vote to alter these doctrines (and work to persuade four other Justices to join him), and all indications are that he is champing at the bit to do so. This is not a coincidence: Gorsuch’s anti-agency views are apparently at least part of the reason for his nomination and confirmation to the Court.⁸ He has thus far found no vehicle for actually executing his anti-*Chevron* mission since he joined the Court in April 2017, however: his attacks on the deference doctrines have so far appeared in dissents from and statements on denials of certiorari (in other words, in statements either disagreeing with the Court’s refusal to take a case or inviting petitions in cases that might provide better vehicles for the questions he wishes to address).⁹

Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018).

⁶ *Gutierrez-Brizuela*, 834 F.3d at 1155.

⁷ *De Niz Robles v. Lynch*, 803 F. 3d 1165, 1171 (10th Cir. 2015) (“Still, as a court of appeals, *Chevron* . . . bind[s] us.”).

⁸ See @KevinDaleyDC, Twitter (Feb. 22, 2018, 12:15 p.m.), twitter.com/KevinDaleyDC/status/966738196070584325 (White House Counsel Don McGahn, speaking at CPAC 2018, said that “Gorsuch’s forceful writings on administrative law issues was a decisive factor in selecting him for #SCOTUS, citing Gorsuch’s anti-*Chevron* concurrence in *Gutierrez-Brizeela* [sic]”); Statement of Senator Mike Lee from Utah, 163 Cong. Rec. S562-01, 2017 WL 437511 (Feb. 1, 2017) (Judge Gorsuch “is a critic of an obscure but very significant legal rule known as the *Chevron* doctrine.”).

⁹ See *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018) (statement of Gorsuch, J., joined by Roberts, C.J., and Thomas, J., respecting the denial of certiorari) (should agencies receive *Skidmore* deference for litigation positions?); *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (should *Auer* be overruled?); *Scenic America Inc. v. U.S. Dept. of Transp.*, 138 S. Ct. 2 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting the denial of certiorari) (“Whether treatment under [*Chevron*] is owed to an interpretation of language . . . contained in agreements between the Federal Highway Administration . . . and individual States?”). Notably, Justice Gorsuch did *not* join Justice Kennedy’s concurrence in *Pereira v. Sessions*. 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring) (criticizing lower courts’ use of *Chevron* deference in immigration cases). Some petitions to watch for the 2018 Term are *California Sea Urchin Comm’n v. Combs*, No. 17-1636, and *Berninger v. FCC*, No. 17-498.

Justice Gorsuch's Would-Be War on Chevron

Perhaps the most telling of these is his statement in *Scenic America v. Department of Transportation* (joined by both the Chief Justice and Justice Alito), both for the case's unsuitability as a vehicle and for the way the statement is written. If Justice Gorsuch is motivated to write such a statement in such a case, he must really have a burr under his saddle.¹⁰

First, consider the case as a vehicle for Supreme Court attention. As Justice Gorsuch describes it, *Scenic America* involves the application – or not – of *Chevron*-style deference to agency interpretations of contracts to which they are self-interested parties: “Say an administrative agency contracts with an outside party. Later, the two sides wind up disagreeing over the meaning of an ambiguous term in their agreement. How should courts resolve the dispute?”¹¹ According to Justice Gorsuch, a circuit split has existed for some time regarding the level of deference due when agencies are interpreting such contractual provisions.¹²

That may be true,¹³ and I can certainly see being offended by the idea that an agency can make self-interested contract interpretations and then seek institutional deference under *Chevron*,¹⁴ but it is hard to see how *Scenic America* even presents the question. The “contracts” at issue are not bargains between the agency and some private contractor to provide services or goods, but instead are federal-state agreements required by the federal Highway Beautification Act to regulate the “size, lighting[,] and spacing” of billboards along interstate highways.¹⁵ Thus, while technically agreements negotiated with each state, they operate as regulatory structures; the agreements are apparently the avenue Congress chose to balance the fed-

¹⁰ Cf. Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J. FORUM 551 (2014) (“A Justice’s willingness to take on the additional authorial work of a dissent from or concurrence in the denial of certiorari thus indicates that the views being expressed are strongly held.”).

¹¹ *Scenic America*, 138 S. Ct. at 2.

¹² *Id.*

¹³ *E.g.*, *Muratore v. Office of Personnel Management*, 222 F.3d 918, 921 (11th Cir. 2000) (describing split).

¹⁴ *E.g.*, Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL’Y 203, 211-14 (2004).

¹⁵ See *Scenic America v. U.S. Dep’t of Transp.*, 983 F. Supp. 2d 170 (D.D.C. 2013) (citing 23 U.S.C. § 131(d)). I commend to you the first four paragraphs of Judge Boasberg’s opinion, which provide a remarkable cavalcade of driving and highway puns.

eral regulatory role with state prerogatives.¹⁶ That is, Congress could have allowed the Federal Highway Administration to regulate directly through rulemaking, but instead chose to give the states direct voices in the process by requiring the federal-state agreements. To describe these agreements as “contracts” subject to ordinary contract interpretation misses the point of the Act.

Regardless, the primary questions in the courts below were not whether the FHA was engaging in any self-interested contract interpretation, but, first, whether Scenic America even had standing to bring the case at all; second, whether there had been final agency action; and, third, whether the Federal Highway Administration had properly issued interpretive guidance on highway billboards or should have engaged instead in notice-and-comment rulemaking under the Administrative Procedure Act.¹⁷ The question of *Chevron* deference to contract interpretation does not arise at all in the District Court opinions and appears only in one of the last few paragraphs of the D.C. Circuit’s opinion.¹⁸

Justice Gorsuch largely drives by these problems, mentioning only that “this particular case also comes with some rather less significant and considerably more factbound questions[,] [q]uestions that would, I fear, only complicate our effort to reach the heart of the matter, for these attendant questions include difficult and close jurisdictional issues that would have to be settled first.”¹⁹ That seems to understate the case’s problems, and the degree to which the case was a poor vehicle for resolving the question that so exercises Justice Gorsuch.

Consider also the language Justice Gorsuch used in discussing the issues – language that makes clear his antipathy to the administrative state and

¹⁶ *Scenic America v. U.S. Dep’t of Transp.*, 49 F. Supp. 3d 53, 56 (D.D.C. 2014), *vacated in part* 836 F. 3d 42 (D.C. Cir. 2016). *See also* 23 U.S.C. § 131(d) (deferring to state determinations of what constitutes “customary use” of highway signs).

¹⁷ Although the plaintiff Scenic America did raise challenges directly under the Highway Beautification Act, Judge Boasberg found those issues essentially subsumed under the APA question. 49 F. Supp. 3d at 59. The Court of Appeals found that Scenic America lacked standing to raise its APA challenge but affirmed Judge Boasberg on the subsumed HBA question. 836 F. 3d. at 45.

¹⁸ *Id.* at 56-57.

¹⁹ *Scenic America*, 138 S. Ct. at 3.

Justice Gorsuch's Would-Be War on Chevron

parallels his earlier writings on the Tenth Circuit. Two passages in particular are worth attention.

First, consider the way that Justice Gorsuch discusses *Chevron*. He says at one point: “*Chevron* deference is often defended on the ground that statutory ambiguities reflect a kind of implicit decision by Congress to *delegate lawmaking power to the agency* to handle the problem on its own.”²⁰ Now, we could quibble over whether legislative power can ever be delegated. In the only modern case addressing the non-delegation doctrine, Justice Scalia wrote for the Court that legislative power could *not* be delegated but nonetheless upheld broad agency power to regulate so long as Congress specifies an “intelligible principle” to guide the agency’s work.²¹ Justice Stevens, concurring in part and concurring in the judgment, thought it obvious that agencies were actually exercising delegated legislative power, but not unconstitutionally.²²

But when Justice Gorsuch links *Chevron* to the delegation problem, he hints at a larger agenda, one that was fully aired in his concurrence in *Gutierrez-Brizuela*. That case involved a complicated issue under the federal immigration laws; then-Judge Gorsuch used the case as a springboard for criticizing *Chevron*, *Brand X*, and the administrative state in general: “[s]ome thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as much as a protection against the [improper] delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential.”²³ He goes on to say “Even under the

²⁰ *Id.* at 2 (emphasis added).

²¹ As Justice Scalia wrote for the Court, “the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . . , and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001).

²² *Id.* at 489 (Stevens, J., concurring) (“In Article I, the Framers vested ‘All legislative Powers’ in the Congress, Art. I, § 1, just as in Article II they vested the ‘executive Power’ in the President, Art. II, § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others.”).

²³ *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

most relaxed or functionalist view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government[,]”²⁴ quoting the Federalist: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”²⁵ In other words, *Chevron* seems to be part of a larger problem – namely, that administrative agencies exist at all.

To be fair, then-Judge Gorsuch then concedes that he is arguing for the abolition of *Chevron* and its progeny, not for the abolition of agencies altogether. “We managed to live with the administrative state before *Chevron*. We could do it again.”²⁶ But the hints at a revival of the non-delegation doctrine and the formalist approach to separation of powers bode ill for the modern administrative state.

In the *Scenic America* statement, Justice Gorsuch also suggests that *Chevron* raises an *Article III* non-delegation problem: that agencies are improperly exercising judicial power. He says in the statement: “But even assuming (without granting) the accuracy and propriety of” the deference-to-Congress justification for *Chevron*, “what’s the case for supposing that Congress implicitly delegates to agencies the power to *adjudicate* their own contractual disputes too? Especially when independent judges in our legal order have traditionally performed just that job?”²⁷

This language from Justice Gorsuch first glosses over – or ignores – the complications involved in the *Scenic America* circuit split. The cases Justice Gorsuch cites do not carelessly assume that Congress delegates power to interpret contracts willy-nilly. Instead, though with varying depths of analysis, the cases investigate whether particular agencies in particular contexts have the authority under particular statutes to interpret particular contractual provisions. As Professors Merrill and Hickman point out, for example, cases involving the Federal Energy Regulatory Commission defer to FERC interpretations of utility tariffs (which are contracts between utilities and their customers) because Congress *explicitly* gave FERC authority to interpret those tariffs; the question is always “whether Congress

²⁴ *Id.* at 1155.

²⁵ The Federalist No. 47 (James Madison), *quoted in Gutierrez-Brizuela*, 834 F.3d at 1155.

²⁶ *Gutierrez-Brizuela*, 834 F.3d at 1158.

²⁷ *Scenic America*, 138 S. Ct. at 2 (emphasis added).

has delegated authority to the agency to adjudicate the meaning of the contract.”²⁸ And Justice Gorsuch makes pointed reference to an opinion by then-Chief-Judge Breyer, which refused to defer to an agency contract interpretation, but that opinion makes no blanket assertions regarding deference but instead parses the statute and the circumstances to reach a specific conclusion: that the relevant statute did not authorize deference.²⁹

More broadly, Justice Gorsuch describes agencies as *adjudicating* contract disputes when they provide interpretations of contract provisions, suggesting that those agencies are arrogating to themselves the powers of yet another constitutional branch.³⁰ But, remember, in *Scenic America* itself, the Federal Highway Administration had engaged in no adjudication: it issued an interpretative guidance regarding the regulation of highway billboards.

Is Justice Gorsuch suggesting that *all* interpretation of laws is for judges?³¹ Here, he invokes his general criticism of *Chevron*: that it trenches on the judicial power. “[W]hatever the agency may be doing under *Chevron*, the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.”³² But, as Professor Siegel has shown, *Chevron* does not unconstitutionally interfere with this judicial role: the whole point of *Chevron* is to allow judges to interpret the law in the first instance (Step One) and then decide to defer to agencies (Step Two) when *Congress* has made a textually demonstrable commitment to that deference and the agency earns that deference by act-

²⁸ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

²⁹ *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F. 2d 601, 604 (1st Cir. 1991) (Breyer, C.J.) (“[N]othing in the [special use permit], or regulations, or authorizing statute, suggests that the [Forest] Service is to have some special advantage, not shared by the permittee, in interpreting the meaning of the [permit]’s terms.”).

³⁰ *See, e.g.*, *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

³¹ *E.g.*, Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017) (describing recent cases narrowing *Chevron* as reallocating power from agencies to the judiciary; “in each case, the Court’s seizure of power aligned with its basic distrust of an active administrative state”).

³² *Gutierrez-Brizuela v. Lynch*, 834 F. 3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

ing rationally.³³ A different way to make the same point: the agency's interpretation is *subject to judicial review*. It is hard to see how *Chevron* deference represents an arrogation of judicial power by agencies when it is the courts that decide, on a case-by-case basis in judicial proceedings reviewing specific agency interpretations, whether to give *Chevron* deference.

Scenic America, then, presents us with a puzzle. The case is so unsuited as a vehicle for the question presented³⁴ that it, like the thousands of other denials of certiorari the Court issues each year,³⁵ could have passed without notice. But Justice Gorsuch wrote a statement regarding the denial of certiorari that (1) focuses on a question not properly raised by the cases below; (2) misstates the import of the cases making up the circuit split; and (3) drops a number of unsubtle hints about his anti-deference agenda.

Scenic America is thus of a piece with other actions Justice Gorsuch has taken since he joined the Court. Linda Greenhouse, for example, has recently written with respect to a Gorsuch dissent³⁶ and the Chief Justice's reaction thereto: "My sense is that the Chief Justice reads this heavily freighted political moment as a time to avoid spending the Supreme Court's limited capital needlessly, in contrast to his junior colleague's evident desire to make as much noise as he can."³⁷

³³ Siegel, *supra* note 5, at 941 ("An interpretation that determines that a statute delegates power to the executive is still an interpretation.").

³⁴ See Petition for Writ of Certiorari at 12, *Scenic America Inc. v. U.S. Dept. of Transp.*, No. 16-739 (U.S. Dec. 5, 2016) ("[T]here is a difference between according deference to an agency's interpretation of the terms of agreements between private, third parties and according deference to an agency's interpretation of an agreement to which it is a party. '[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that any agency might offer in a post hoc reinterpretation of its contract.' [National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1571 (D.C. Cir. 1987)]. Here, the paradox of according *Chevron* deference to an agency's interpretation of an agreement to which it is a party moves beyond the problem of self-serving, post-hoc agency views and rises to the level of constitutional concern." www.scotusblog.com/wp-content/uploads/2017/10/16-739-petition.pdf.

³⁵ *The Statistics*, 131 HARV. L. REV. 403 (2017) (in the 2016 term, the Court received 6,289 petitions for review and granted review in 75).

³⁶ 138 S. Ct. 594, 617 (2018) (Gorsuch, J., dissenting) ("[W]e've wandered so far from the idea of a federal government of limited and enumerated powers that we've begun to lose sight of what it looked like in the first place.").

³⁷ Linda Greenhouse, *The Chief Justice, Searching for Middle Ground*, N.Y. TIMES (Feb. 1,