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Ending Deference to the Administrative State in State Legislatures

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The Problem of Administrative Deference

A fundamental tenet of our legal system is that when two parties appear before a court, they are on equal footing. That is, the court ought to apply the law equally to both parties, weigh the merits of each case impartially, and not be predisposed in favor of one party's legal arguments over another. Yet in judicial actions that involve decisions from administrative agencies, a series of deference doctrines require courts to defer to the government when the government is prosecuting or defending an action from an administrative agency. In other words, in cases in which a court applies deference to administrative agencies, the court is obligated to put its proverbial thumb on the scale for the government and its legal arguments.

The most pernicious of these deference doctrines are known as *Chevron* [1] and *Auer* [2]. *Chevron* deference requires courts to accept an agency's interpretations of arguably ambiguous statutes. *Auer* deference requires courts to defer to an agency's interpretation of its own regulations.

These doctrines raise core due process and separation of powers concerns because they prevent meaningful and impartial review of decisions from executive branch agencies by the judiciary. Courts are supposed to exercise their independent judgment when interpreting the laws created by the legislature, but deference short-circuits this process and bars courts from questioning the executive branch's interpretation of laws the legislature enacted, or worse, the agency's self-created rules. As Columbia Law School Professor Philip Hamburger observed, "When the government is a party to a case, the doctrines that require judicial deference to agency interpretations are precommitments in favor of the government's legal position, and the effect is systematic judicial bias." [3]

This structural accountability problem is accompanied by a practical one. Namely, regulators in the executive branch know they can create expansive rules, investigate borderline violations, and adjudicate close cases in their favor because if those rules are challenged, the regulators will likely win. [4] This results in more and more rulemaking, much of it arbitrary. It results in more investigations and more findings of violations. And ultimately, it results in bigger, more intrusive government. In the absence of judicial deference, however, agencies and the regulators who staff them would be more constrained in their rulemaking, more measured in their interpretations, and more principled in their enforcement actions. In other words, they would be more careful because they would be more accountable.

State-based Legislative Reform

While much commentary has focused on the myriad problems that judicial deference has created at the federal level, deference to administrative power is not a uniquely federal problem. Many state courts have either expressly adopted *Chevron* or other forms of deference doctrines or have fashioned similar versions. [5] This has turned judicial deference into a nationwide foundation for a large and powerful administrative state at both the federal and state level.

Efforts to reform deference doctrines have traditionally been focused on the judiciary, but a solution need not come only from the courts. [6] Deference doctrines are based on judicial interpretations of the Federal Administrative Procedures Act (APA). [7] That law sets out the legal framework for how courts review administrative decisions, and clarity in the statute could direct courts on how to address deference or whether to apply it at all. Because many states model their state-level administrative procedure statutes on the federal APA [8], state legislatures can play a key role in scaling back or eliminating this centerpiece of the administrative state. This provides a unique opportunity for state legislatures to lead the way in this important area.

This is precisely what was done in Arizona. In 2018, based on legislation developed by the Goldwater Institute, Arizona became the first state in the country to eliminate the state equivalent of *Chevron* and *Auer* deference by statute. That was accomplished by including a new sentence in the scope of review section of Arizona's APA:

In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency. [9]

This change eliminates both *Chevron* and *Auer* types of deference at the state level and reinforces the courts' obligation to exercise their own independent judgment when interpreting the law.

Is Arizona's Statutory Revision Effective?

Now that the courts and state agencies have had an opportunity to interpret and apply Arizona's law, a key question arises: Is it effective?

Research conducted in the first three years of the law's operation from both the courts and the state attorney general's office suggests that it is. [10] Specifically, the courts appear to be faithfully applying the law by not deferring to the administrative agencies on legal questions, and the state does not appear to be seeking deference in cases involving agency actions.

Prior to the adoption of the amendment to Arizona's APA, Arizona courts applied a form of both *Chevron* and *Auer* deference. In *Arizona Water Co. v. Arizona Dep't of Water Resources*, citing *Chevron*, the Arizona Supreme Court held that in cases where "the legislature has not spoken definitively to the issue at hand, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" [11] The state Supreme Court went on to write, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." [12] In other words, the Arizona Supreme Court applied *Chevron* and deferred to a state agency's legal interpretation of an arguably ambiguous statute. The court also previously held that when agency rules are in dispute, state courts should defer to an "agency's reasonable interpretations of its own regulations," thus adopting the *Auer* doctrine in Arizona courts. [13]

The revisions to Arizona's APA made clear that Arizona courts should do neither of those things. And the courts appear to be interpreting that law as intended.

Since the statutory revisions have been in place, decisions from state appellate courts in 10 cases have directly cited the law as part of their legal analysis. [14] And the cases make clear that no deference is accorded to an agency's interpretation of a statute it is charged with implementing, [15] or to an agency's interpretation of its own rules. [16] In citing the statutory revision and rejecting deference to agency interpretation of statutory provisions and agency rules, Arizona courts, including the Arizona Supreme Court, therefore appear to have firmly rejected the previous application of *Chevron* and *Auer* deference that existed prior to the adoption of the new law.

The rejection of deference doctrines appears to have had a significant impact on the outcome of several cases in a manner favorable to the regulated party. For example, in *Saguaro Healing LLC*, the Arizona Supreme Court rejected the Arizona Department of Health Services' interpretation of the medical marijuana statute it is charged with administering, as well as an agency rule that implemented that statute, because "we do not defer to the agency's interpretation of a rule or statute." [17] The court then went on to grant a license to the regulated party. Similarly, in *Maricopa Cnty. v. Viola*, the Arizona Court of Appeals rejected the Maricopa County Assessor's interpretation of the statutory definition of "full cash value" to find in favor of a lower tax assessment for a taxpayer operating low-income housing. [18]

One Arizona court also discussed the legislative intent underlying A.R.S. § 12-910(E) as an important accountability measure for agency actions that specifically involve occupational licensing. In *Ruben v. Arizona Medical Bd.* [19], the Court of Appeals cited both A.R.S. § 12-910(E) and the Right to Earn a Living Act [20], another measure developed by the Goldwater Institute and passed by the Arizona Legislature in 2017 that raises the standard of judicial review in occupational licensing cases, as evidence of legislative intent to rein in the administrative state. The court cited the Arizona Governor's approval message upon signing the Right to Earn a Living Act, which read in part, "It is simply unjust for government to decide who can and cannot earn a living except when absolutely necessary to protect public health and safety." [21] It then went on to read the statutory revisions to the APA and the Right to Earn a Living Act together to observe that "subsequent actions of the Governor and legislature provide additional evidence of the intent of both elected branches of government to change the law in favor of increasing judicial scrutiny of—and agency accountability for—occupational licensing actions." [22] The court, therefore, not only read the plain lanauge of A.R.S. § 12-910(E) as eliminating deference to agency actions, but also affirmed the legislature's intent to increase both judicial scrutiny of and accountability for decisions from Arizona's administrative agencies.

In addition to the judicial decisions that have applied the language of A.R.S. § 12-910 to eliminate deference to agencies, the state also appears to be appropriately applying the law by not seeking deference in cases involving agency actions. Shortly after A.R.S. § 12-910(E) was enacted, the Goldwater Institute submitted an ongoing public records request to the Arizona Attorney General's Office seeking all court filings in which the state cited the new law and discussed deference.

A review of those court filings reveal that the state generally did not ask the courts to defer to administrative agencies on disputed questions of law. Unlike the appellate decisions, in most instances, the Arizona Attorney General's Office did not cite directly to A.R.S. § 12-910(E), but simply did not seek deference on legal questions. [23] In one instance, the Attorney General cited A.R.S. § 12-910(E) and observed that no deference applied to the agency's legal interpretations because "the agency's legal conclusions concerning questions of law and statutory interpretation do not bind this Court." [24] More predictably, regulated parties cited to the APA statutory revisions directly, emphasizing the law's clear language eliminating deference. [25] Thus the state has not generally sought legal deference in light of the new law, and other litigants have made use of its favorable standard for regulated parties.

The implementation and interpretation of Arizona's APA revisions show that the law is working as intended. As a result of this reform, courts are plainly declining to afford deference to agency actions involving disputed questions of law. At the same time, state agencies, while not regularly citing the law directly, do not appear to be seeking deference on legal questions. And litigants and regulated parties are making use of the law in arguing for a fair opportunity to challenge or defend against regulatory actions in court.

A Model for Congress and Other States

The statutory change that was made in Arizona can be made in other states that model their administrative procedure acts after the federal APA, or as stand-alone legislation in states that do not. It can also serve as a model for federal reform. In fact, the U.S. House of Representatives introduced and passed legislation in 2016 that would address and eliminate *Chevron* deference, although the measure never got a vote in the U.S. Senate. [26] Other state legislatures should take up this measure as a way to rein in courts that have misapplied the APA's original language and intent, as should Congress.

Judicial deference to agency actions is a significant problem in American jurisprudence that has greatly expanded the size and scope of the administrative state. But it is not only a federal problem with a judicial solution. Instead, as the statutory reforms in Arizona show, state legislatures can and should lead the way to ensure that regulated parties get a fair hearing in court, and that administrative agencies are accountable for the decisions they make.

Works Cited

1. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).
2. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
3. Philip Hamburger, *The Administrative Threat*, 43 (2017).
4. William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 545 (2018) (finding that government agencies won 78% of cases from 1993-2005, when *Auer* deference was most permissive compared to 71% of cases after 2005, when the Supreme Court began to limit that deference doctrine).
5. See, e.g., *QCC, Inc. v. Hall*, 757 So.2d 1115, 1117 (Ala. 2000); *Bell Atl. Mobile, Inc. v. Dep't of Pub. Util. Control*, 754 A.2d 128 (Conn. 2000); In re Water Use Permit Applications, 9 P.3d 409, 456–57 (Haw. 2000); *Canty v. Idaho State Tax Comm'n*, 59 P.3d 983, 988-989 (Idaho 2002); *People ex rel. Birkett v. City of Chicago*, 779 N.E.2d 875, 881 (Ill. 2002); *Reifschneider v. State*, 17 P.3d 907, 913 (Kan. 2001); *Davis v. State Bd. of Certified Pub. Accountants*, 131 So.3d 391, 399 (La. 2013); *Md. Aviation Admin. v. Noland*, 873 A.2d 1145, 1154–55 (Md. Ct. App. 2005); *Project Extra Mile v. Neb. Liquor Control Comm'n*, 810 N.W.2d 149, 163 (Neb. 2012), overruled on other grounds, *Griffith v. Neb. Dep't of Corr. Servs.*, 934 N.W.2d 169 (Neb. 2019); *In re Town of Sebrook*, 44 A.3d 518, 524–525 (N.H. 2012); *TAC Assoc. v. N.J. Dep't of Envtl*. Prot., 998 A.2d 450, 455 (N.J. 2010); *Lorillard Tobacco Co. v. Roth*, 786 N.E.2d 7, 10 (N.Y. 2003); *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 821 S.E.2d 376, 379–380 (N.C. 2018); *Indus. Contractors, Inc., v. Workforce Safety & Ins.*, 772 N.W.2d 582, 585 ¶ 6 (N.D. 2009); *In Re Protest of Betts Telecom Okla, Inc.*, 178 P.3d 197, 199 ¶ 10 (Okla. Ct. App. 2008); *Seeton v. Pa. Game Comm'n*, 937 A.2d 1028, 1037 (Pa. 2007); *In re Williston Inn Group*, 949 A.2d 1073, 1077 ¶ 11 (Vt. 2008).
6. In recent years, some state courts have begun to scale back various deference doctrines. For example, the Wisconsin and Mississippi Supreme Courts issued decisions in 2018 that repudiated their versions of *Chevron* deference. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 496, 54–55 ¶¶ 83–84 (Wis. 2018); *King v. Miss. Military Dep't*, 245 So.3d 404, 407–08 ¶¶ 8–12 (Miss. 2018).
7. 5 U.S.C. § 706.
8. See, e.g., Colo. Rev. Stat. § 24-4-106; Conn. Gen. Stat. § 4-183; D.C. Code § 2-510; Ga. Code § 50-13-19; Haw. Rev. Stat. § 91-14; Idaho Code § 67-5279; Ind. Code § 4-21.5-5-14; Iowa Code § 17A.19; Kan. Stat. § 77-621; Ky. Rev. Stat. § 13B.150; La. Rev. Stat. § 49:964; Me. Rev. Stat. tit. 5, § 11007; Md. Code, State Gov't § 10-222; Mass. Gen. Laws ch. 30A, § 14; Mich. Comp. Laws § 24.306; Mo. Rev. Stat. § 536.140; Mont. Code § 2-4-704; Neb. Rev. Stat. § 84-917; Nev. Rev. Stat. § 233B.135; N.C. Gen. Stat. §§ 150B-43, 150B-51; N.D. Cent. Code §§ 28-32-46, 28-32-47; R.I. Gen. Laws § 42-35-15; S.C. Code § 1-23-380; Tenn. Code § 4-5-322; Tex. Gov't Code §§ 2001.172, 2001.174; Utah Code § 63G-4-403; Wash. Rev. Code § 34.05.570; W. Va. Code § 29A-5-4.
9. A.R.S. § 12-910(E).

10. The Goldwater Institute has reviewed all published decisions from the Arizona Court of Appeals and Arizona Supreme Court that cite to the A.R.S. § 12-910(E) amendment from the effective date of that legislation through July 1, 2021. The Institute has also reviewed responses to public records requests submitted to the Arizona Attorney General's Office that sought "copies of all publicly filed court documents, including pleadings, motions, briefs, and other filings, submitted by the Office of the Attorney General, or any other party in a case where the Office of the Attorney General represents any party or otherwise appears in the case, that cite Ariz. Rev. Stat. Ann. § 12-910(E) and include the words 'deference,' 'defer,' or 'de novo'" over that same period.
11. 91 P.3d 990, 997 ¶ 30 (Ariz. 2004) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, Inc., 467 U.S. 837, 844 (1984); but see *Stambaugh v. Killian*, 398 P.3d 574, 578 ¶ 25 (Ariz. 2017) Bolick, concurring ("I write separately only to note that this Court has never expressly considered whether *Chevron* or its progeny establish standards for administrative deference under Arizona law").
12. *Ariz. Water Co.*, 91 P.3d at 997 ¶ 30 (citation omitted).
13. *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 119 P.3d 1027, 1031 ¶ 18 (Ariz. 2005).
14. *Gelety v. Ariz. Med. Bd.*, No. 1 CA-CV 20-0387, 2021 WL 734735, at *2 ¶ 9 (Ariz. Ct. App. Feb. 25, 2021); *Carter Oil Co., Inc. v. Ariz. Dep't of Revenue*, 460 P.3d 808, 815-16 ¶ 25 (Ariz. Ct. App. 2020); *JH2K I LLC v. Ariz. Dep't of Health Servs.*, 438 P.3d 676, 679 ¶ 9 (Ariz. Ct. App. 2019); *Ruben v. Ariz. Med. Bd.*, No. 1 CA-CV 18-0079, 2019 WL 471031, at *6 ¶¶ 29–30 (Ariz. Ct. App. Feb. 7, 2019); *Waltz Healing Ctr., Inc v. Ariz. Dep't of Health Servs.*, 433 P.3d 14, 18 ¶ 15 (Ariz. Ct. App. 2018); *Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348, 356 ¶ 28 (Ariz. 2018); *Simms v. Ariz. Racing Comm'n*, 482 P.3d 1049, 1053 ¶ 19 (Ariz. Ct. App. 2021); *Maricopa Cnty. v. Viola*, No. 1 CA-SA 21-0023, 2021 WL 2005913, at *2 ¶ 11 (Ariz. Ct. App. May 20, 2021) ; *Saguaro Healing LLC v. State*, 470 P.3d 636, 640 ¶ 21 (Ariz. 2020); *Heritage At Carefree LLC v. Ariz. Dep't of Health Servs.*, 471 P.3d 658, 661 ¶ 9 (Ariz. Ct. App. 2020).
15. *Saguaro Healing LLC*, 470 P.3d at 638 ¶ 10 ("We do not defer to the agency's interpretation of a rule or statute." Citing A.R.S. § 12-910(E)).
16. *Simms*, 482 P.3d at 1053 ¶ 19("Arizona courts interpret the Commission's rules de novo … We accord no 'deference to any previous determination that may have been made on the question by the [Commission].'" *Citing* A.R.S. § 12-910(E)).
17. 470 P.3d at 638 ¶ 10 (*citing* A.R.S. § 12-910(E)).
18. 2021 WL 2005913, at *2 ¶ 11 (*citing* A.R.S. § 12-910(E) for the proposition that "court reviewing final administrative decision owes no deference to agency's interpretation of statute").
19. 2019 WL 471031, at *6 ¶ 29 .
20. A.R.S. § 41-1093–1093.05.
21. *Ruben*, 2019 WL 471031, at *6 ¶ 29.
22. *Id.* ¶ 30.
23. See, e.g*., Opukoku v. Ariz. State Bd. of Nursing*, No. 1 CA-CV 19-0699 (Ariz. Ct. App.), Def.-Appellee's Answering Br. at 14 ("This Court reviews questions of law de novo."); *Ariz. State Veterinary Med. Examining Bd. v. Stinnett*, No. 1 CA-CV 20-0219 (Ariz. Ct. App.), Def.-Appellant's Op. Br. at 16 (same).
24. *Arrowhead Mobile Healthcare, Inc. v. Ariz. Dep't of Health Servs.*, No. 1 CA-CV 19-0640 (Ariz. Ct. App.), Appellees' Cross-Appeal Op. Br. and Answering Br. at 41.
25. See, e.g., *Manahan v. State*, No. LC2018-00217, Maricopa Cnty. Super. Ct., at 15 ("On April 11, 2018, Governor Ducey signed into law a significant amendment to A.R.S. §12-910(E) … which requires that Arizona courts give *no deference* to agency interpretations of their own governing statutes.") citing A.R.S. 12-910(E) (emphasis in original); *San Carlos Apache Tribe v. State, No. LC2019-000264, Maricopa Cnty. Super. Ct.*, at 15, citing A.R.S. § 12-910(E).
26. The Separation of Powers Restoration Act of 2016, 114th Cong., 2d Session, available at https://www.congress.gov/bill/114th-congress/house-bill/4768/text.