

# Keep Calm and Carry on—Judicial Deference to Agency Interpretations

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## Introduction

What was once a comparatively arcane question limited to administrative-law specialists has burst onto the wider legal scheme: when and how must courts defer to agencies' interpretations of statutes and regulations? The nomination and confirmation of Justice Neil M. Gorsuch, a known and vocal advocate of marginalizing such deference, created a realistic opportunity that the Court might revisit some key administrative-law precedents. The subsequent appointment of Justice Brett M. Kavanaugh enhanced the prospect. The Court's announcement in December 2018 that it would hear a case for the sole purpose of reconsidering one such doctrine—deference to an agency's interpretation of its own regulations—removed any doubts that something is brewing, at least for now.

Everyone attending the conference for which we have prepared this paper is deeply familiar with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, probably to the point of having the full citation memorized (it's in the footnote if not).<sup>1</sup> But we start with a very brief refresher so that we will all be on the same page. In *Chevron*, the Supreme Court announced a standard for courts to use when confronting a statute that a government agency has interpreted. Essentially, the Court articulated a statutory-construction presumption: if the statute is silent or ambiguous about the substantive matter at hand, then courts will presume that Congress intended the agency to fill the gap or prescribe the proper resolution of the ambiguity.<sup>2</sup> The first inquiry—often called “*Chevron* Step One”—is to determine whether a statute is silent or ambiguous in the first place. If so, the agency's *reasonable* interpretation of the statute then is given controlling weight.<sup>3</sup> Weighing whether the agency's interpretation is permissible is “*Chevron* Step Two.” In short, courts under *Chevron* must defer to an agency's reasonable interpretation of a statute if that statute does not speak to the relevant issue.<sup>4</sup> On the flip side, if the statute is unambiguous, then Step Two is never reached; the statute's plain meaning trumps a contrary agency interpretation.<sup>5</sup> Likewise, no deference is given if the agency's interpretation of an otherwise ambiguous statute is unreasonable.<sup>6</sup> As we describe below, this framework has become a flashpoint in the debate about the role of federal agencies.

At first glance, *Chevron*'s framework appears to strike a laudable balance. Agencies are supposed to develop administrative expertise and are in theory accountable to elected leaders. If a complex regulatory statute is unclear on the margins, agencies should be able to render

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<sup>1</sup> 467 U.S. 837 (1984).

<sup>2</sup> *Id.* at 842-43.

<sup>3</sup> *Id.* at 843.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

The views expressed in this paper are solely those of the author (or authors).

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authoritative interpretations better than (and with greater legitimacy than) unelected judges who have little or no technical expertise, lack the ability to go beyond the record of a given case to determine what policy makes the most sense, and lack the democratic authorization to make policy even if they could. Better still, *Chevron* promised that courts would not completely abdicate their role of judicial review. After all, if the usual modes of statutory interpretation show that no genuine ambiguity in a statute exists, then courts will just apply the statute as written. In principle, *Chevron* would help judges stay in their (important) lane.

Over thirty years of experience, however, has shown that as elsewhere in life, theory and practice do not always converge here. *Chevron*'s practical effects challenge its theoretical underpinnings. Courts often appear willing to give up too soon, confusing *complexity* for *ambiguity*, thus deeming complicated statutes ambiguous without much effort to deploy traditional statutory-construction tools to seek a statute's plain meaning. Even worse, it sometimes appears that judges' philosophical predilections can affect whether they view a statute as ambiguous, and neutral methods for determining ambiguity *vel non* have proven elusive.

Given the checkered results, a growing chorus of prominent jurists and academics have begun calling for a doctrinal reexamination. Justices Gorsuch and Kavanaugh have identified what they regard as *Chevron*'s deficiencies and suggested ways to mitigate them. Their presence on the Court—combined with the seemingly increasing skepticism of *Chevron* by Chief Justice Roberts, Justice Thomas, and Justice Alito—should make the Court's administrative-law docket over the next decade a tantalizing watch.

An analogue of the *Chevron* doctrine is the so-called doctrine of “*Auer*” or “*Seminole Rock* deference.”<sup>7</sup> If a regulation is ambiguous, then the court will defer to the agency's reasonable interpretation of the regulation—its own handiwork, after all. In other words, *Auer* deference applies *Chevron*'s mode of analysis to regulations, sort of like a nesting doll—the statute is ambiguous, so we defer to a regulation; the regulation is ambiguous, so we defer to (perhaps) an interpretive rule; and (perhaps) onward.

Like *Chevron*, *Auer* seems sensible at first blush—perhaps, at that first glance, even *more* sensible. Looking to the purveyor of a regulation for an authoritative interpretation appears both logical and practical. But thoughtful scholars and jurists have raised alarm that *Auer* may be even more problematic than *Chevron* itself, at least when taken alongside *Chevron*. That is because *Auer* signals in advance that an agency has much to gain by embedding ambiguity into rules. Principles that may be too hard (politically or otherwise) to achieve via notice-and-comment rulemaking, for example, might be accomplished by means of a vague rule that the agency can then (freed of the rulemaking rigors) interpret as it likes. Such a possibility, many argue, concentrates too much power in the hands of agencies—who get to write, interpret, and enforce their regulations with minimal judicial oversight.

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<sup>7</sup> In *Bowles v. Seminole Rock & Sand Co.*, the Court stated that an administrative interpretation of a regulation receives “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” 325 U.S. 410, 414 (1945). Then, *Auer v. Robbins* essentially reaffirmed (and indeed extended) *Seminole Rock* by applying *Chevron*-type framework to the handling of ambiguous regulations. 519 U.S. 452, 461-62 (1997). For ease, this paper will simply refer to the doctrine as “*Auer* deference.”

The Supreme Court has agreed to rethink *Auer*—whether to overrule it (and *Seminole Rock*) is the sole question that the Court agreed to hear in *Kisor v. Wilkie*.<sup>8</sup> How the Court rules in *Kisor* will likely either intensify the effort to reconsider *Chevron* or else drain that effort of its nascent vitality.

In anticipation of *Kisor*, and the possible changes that it portends, this paper hopes to illuminate the debate about the future of *Chevron* and *Auer*. Part I gives a necessarily limited view of the history surrounding the *Chevron*-deference debate—looking both at academic literature and relevant Supreme Court cases dealing with *Chevron*. Part II then examines the problem with using textual ambiguity as the triggering mechanism for deciding when an agency’s interpretation becomes authoritative—and how this issue has caused many judges to push for reexamining *Chevron* and *Auer*. Part III looks at how the Justices likely to play a crucial role in determining the future of the doctrine have approached it thus far. Finally, Parts IV and V discuss how the doctrine might change.

## I. History of the Debate on Judicial Deference to Agencies

Prior to *Chevron*, courts were relatively free to disregard the interpretations of administrative agencies—mostly because of a “mishmash”<sup>9</sup> of Supreme Court decisions that gave no firm guidance on how courts should review challenges to agency interpretations.<sup>10</sup> Some cases among the “mishmash” could readily serve as the forebears of *Chevron*. Since the 1940s, “there had been a line of Supreme Court authority that reviewing courts should defer to agencies’ constructions of their governing statutes so long as those constructions were ‘reasonable.’”<sup>11</sup> Yet “[i]n contrast to the line of cases which called for judicial deference to agency interpretations was another, equally impressive, line of Supreme Court decisions in which the Court freely substituted its own judgment for that of the agency with no mention of deference,” making it “difficult to discern any single standard for judicial review of agency interpretations” prior to *Chevron*.<sup>12</sup> Indeed, in one 1970s case, the Court struck down an SEC interpretation of the Securities Exchange Act simply because its reading was “‘not the most natural or logical one.’”<sup>13</sup>

Hence, at the time it was handed down, *Chevron* brought much-needed clarity to what was otherwise purposive chaos. Namely, it provided basic rules regarding how courts should treat agency interpretations of governing statutes. And given the limitations that *Chevron* appeared to impose on *judicial* discretion, it is unsurprising that one of its earliest and staunchest supports was Justice Antonin Scalia.<sup>14</sup>

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<sup>8</sup> No. 18-15, 2018 WL 6439837 (U.S. Dec. 10, 2018) (mem.).

<sup>9</sup> Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 995 (2017).

<sup>10</sup> Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1023.

<sup>11</sup> Schuck & Elliott, *supra* note 10, at 1023.

<sup>12</sup> Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 292-93 (1986) (footnotes omitted).

<sup>13</sup> Schuck & Elliott, *supra* note 10, at 1023 (quoting *SEC v. Sloan*, 436 U.S. 103, 112 (1978)).

<sup>14</sup> See Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1745-46 (2010) (discussing how the *Chevron* doctrine molded well with Justice Scalia’s “rules-only approach”).

*Chevron* hardly began as the bane of judges and academics who favor principles of textualism and originalism. To the contrary, the decision was considered a victory for conservatives interested in deregulation.<sup>15</sup> Meanwhile, purposivists decried how *Chevron* would limit a court’s ability to “substitute an interpretation that it views as more consistent with legislative intent.”<sup>16</sup>

*Chevron*’s jurisprudential impact was immediate and has been sustained. The number of remands to agencies dropped by 40% in the year following *Chevron*.<sup>17</sup> Reversals also decreased, while affirmances increased by about 15%.<sup>18</sup> And as *Chevron*’s initial impact on caselaw began to be felt, academic debates about its virtue quickly ensued.

### A. *The Academic Debate*

A comprehensive review of academic and judicial debates surrounding *Chevron* and *Auer* far exceeds this paper’s scope or its audience’s patience.<sup>19</sup> Suffice it to say that some of the more influential arguments driving the ongoing discussion about the future of *Chevron* and *Auer* provide context for conversations happening within the judiciary itself.

Recently, concerns have been raised about whether giving strong deference to an agency’s interpretation of a provision results in courts abdicating their role of judicial review. This worry, however, is not new. Then-Judge Kenneth Starr was among the first to recognize that affording deference to an agency seemed “facially contrary to the fundamental principle” of judicial review as expounded upon in *Marbury v. Madison*.<sup>20</sup> Nevertheless, Judge Starr noted his support for *Chevron*. He explained that federal courts do not have “general supervisory authority over the agencies”—as they are a separate branch of government and not lower courts.<sup>21</sup> Further, unlike federal judges, agencies are part of an electorally accountable branch of government.<sup>22</sup> Judges, therefore, should not be in the business of second-guessing agencies, whose decisions may better reflect the electorate’s desires.<sup>23</sup> Judge Starr also highlighted *Chevron*’s positive impact, writing:

[I]t eliminated a significant ambiguity in the law and cast substantial doubt upon several well-established doctrines that had sometimes permitted courts to overturn agency

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<sup>15</sup> See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549-53 (1985) (discussing the regulatory and jurisprudential context in which *Chevron* was decided); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 11 (1998) (“*Chevron*’s promise of increased deference to executive interpretation generally served the interests of the Reagan administration.”); see also Leading Cases, *Judicial Review of Agency Rulemaking*, 98 HARV. L. REV. 247, 252-53 (1984) (worrying that *Chevron* would allow agencies to shape policy “based on unsubstantiated political preferences”).

<sup>16</sup> Abner J. Mikva, *How Should Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986).

<sup>17</sup> Schuck and Elliott, *supra* note 10, at 1030.

<sup>18</sup> *Id.* at 1058.

<sup>19</sup> For a good summation of leading scholarship and judicial opinions on whether and how *Chevron* and *Auer* should be retained, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018).

<sup>20</sup> Starr, *supra* note 12, at 283.

<sup>21</sup> *Id.* at 308.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

interpretations. . . . The opinion on its face signals no break with the past; it does not explicitly overrule or disapprove of a single case. Nonetheless, *Chevron* has quickly become a decision of great importance, one of a small number of cases that every judge bears in mind when reviewing agency decisions.<sup>24</sup>

While Judge Starr saw the doctrinal developments as essentially beneficial, *Chevron* and its progeny still had a fair share of early detractors. For example, Professor Sunstein criticized *Chevron*'s failure to distinguish between instances where Congress meant to delegate some interpretive responsibility to an agency versus an instance of garden-variety statutory ambiguity infused with no delegative intent.<sup>25</sup> Sunstein was also troubled by the notion that administrators could "decide the scope of their own authority"—claiming this to be a betrayal of *Marbury* and separation-of-powers principles generally.<sup>26</sup>

In the mid-1990s, moreover, Dean Manning began raising questions about *Seminole Rock* deference,<sup>27</sup> arguing that deferring to an agency that has adopted an ambiguous regulation did not comport with our basic constitutional structure because an agency was getting to impose an interpretation of the very regulation it had written (and perforce could have written more clearly).<sup>28</sup> Manning's article came just a few short years before *Auer* was decided. But his line of attack undermined *Auer* by raising significant separation-of-powers concerns. Eventually, Justice Scalia—the author of *Auer* and the Justice for whom Dean Manning had been a prize law clerk—would come to believe that the decision was wrong.

For what it's worth, Manning did attempt to validate *Chevron*—hence the notion, to some, that *Auer* could be threatening while *Chevron* might be benign, and to others that *Auer* is even worse than *Chevron*. Because interpreting ambiguous legislation necessarily involves policymaking, *Chevron* ensures that policy decisions remain in the electorally accountable branches of government.<sup>29</sup> Congress can—at least under modern constitutional jurisprudence—validly delegate to agencies the job of putting into action broad policy goals.<sup>30</sup> Interpreting the statute is a necessary component of the agency's role.<sup>31</sup> Thus, when legislation is ambiguous, and no further direction is given by Congress, courts can properly presume that Congress intended "to vest primary interpretive authority" with the agency.<sup>32</sup> By treating statutory ambiguity as an instruction by Congress to let the agency interpret the text's meaning and

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<sup>24</sup> *Id.* at 284.

<sup>25</sup> See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466-67 (1987) ("The fact that a statute can be read in different ways does not mean that Congress intended the agency to resolve the question.").

<sup>26</sup> *Id.* at 467.

<sup>27</sup> Dean Manning's article predated *Auer*. But his particular concerns about *Seminole Rock* apply equally to *Auer*.

<sup>28</sup> See John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (asserting that "doubts about *Seminole Rock* are well founded, and that the Court should replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning").

<sup>29</sup> *Id.* at 626-27.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

application, “a reviewing court satisfies its *Marbury* obligation simply by accepting an agency’s reasonable exercise of discretion.”<sup>33</sup>

Manning, however, was not so optimistic about giving such deference to an agency’s interpretation of its own regulations. He recognized that such deference raised certain concerns. Specifically, the agency gets to authoritatively determine what an ambiguous regulation *that it drafted* means.<sup>34</sup> By allowing agencies to both write regulations and then construe and apply them, *Seminole Rock* (and later *Auer*) erodes important principles related to the separation of powers.<sup>35</sup> Not only is this troubling from a constitutional perspective, but it also has real implications. As Manning explained, “[T]he right of self-interpretation endows agencies with a significantly enhanced, and potentially destructive, freedom to exercise less care in expression—whether deliberately or by omission.”<sup>36</sup> Over time, agencies that went to the trouble of great clarity in notice-and-comment rulemaking would find themselves punished if they wished to go on a different direction, while those agencies that had been vague or sloppy were rewarded when they wished to “interpret” their own rule.<sup>37</sup> This incentive structure is not one that advances the distinction between executive and legislative functions, and it likewise is not one that is wholly consistent with due-process and other rule-of-law considerations. Yet it is the logical consequence of *Auer*.

While Dean Manning targeted *Auer*-type deference as being inherently problematic, recent scholarship shows why his concerns also can apply to agency interpretation of statutes under *Chevron*. In fact, agencies themselves are heavily involved up front in drafting proposed legislation for Congress.<sup>38</sup> Thus—like Dean Manning’s observations concerning why agencies might be incented to draft vague regulations—agencies have the perverse incentive to draft and propose vague *statutes* which, in turn, give them greater room to operate under *Chevron*.<sup>39</sup>

*Chevron* is also very much on the minds of agency personnel tasked with drafting proposed legislation. As Walker points out, 90% of agency drafters surveyed say that they think about *Chevron* deference when crafting proposed legislation.<sup>40</sup> A substantial majority of drafters also indicated that “a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies.”<sup>41</sup> Indeed, given the role agencies play in drafting statutes and their perverse incentive to craft broad, vague statutes likely to trigger *Chevron*, Walker concludes that abandoning *Chevron* in favor of *Skidmore*’s less-deferential standard is more sensible.<sup>42</sup>

Neomi Rao, President Trump’s newly confirmed choice to succeed Justice Kavanaugh on the D.C. Circuit, has also pointed out a separate but related problem—the power of individual members of Congress over administrative agencies. The issue here is that members of Congress,

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<sup>33</sup> *Id.* at 627.

<sup>34</sup> *Id.* at 630-31.

<sup>35</sup> *Id.* at 631.

<sup>36</sup> *Id.* at 656.

<sup>37</sup> *Id.*

<sup>38</sup> Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1412 (2017).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1419-20.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1419.

in their oversight and relationships with agencies, can essentially create “cross-branch collusion” that allows congressmen to essentially wield individual power through broad delegation.<sup>43</sup> This collusive relationship eviscerates the basic premise that members of the legislature have no individual authority, but instead can only act as a collective body.<sup>44</sup>

While this brief overview of only some scholarship does not intend to come close to representing all that has been said about *Chevron* and *Auer*, we hope that it helps contextualize the points that have been made by various judges and justices. Moreover, the Supreme Court has not been resolutely stalwart about the scope of *Chevron*, to which we next turn.

### B. *Some Cases Limiting Chevron*

Though *Chevron* helped bring needed discipline by reining in the judiciary’s purposivist approaches to administrative-law cases, questions remained. One of the biggest regarded what agency actions would benefit from *Chevron* deference. Ultimately, the Court’s solution left something to be desired—at least for those interested in hard-and-fast rules.

An early case to raise debate about the meaning of *Chevron* was *INS v. Cardoza-Fonseca*.<sup>45</sup> In this deportation case, written by Justice Stevens, who also had written *Chevron*, the INS demanded deference to its interpretation of what qualified as a “well-founded fear of persecution” under relevant asylum provisions.<sup>46</sup> The Court, however, held that case involved “a pure question of statutory construction for the courts to decide.”<sup>47</sup> The Court invoked *Chevron* Step One—explaining that courts are charged with determining whether a statute is ambiguous.<sup>48</sup> Perplexingly, the Court conceded that the phrase “well-founded fear” was ambiguous, but nevertheless refused to defer to the INS’s interpretation.<sup>49</sup> The Court claimed that it was not providing a substantive interpretation—but instead was analyzing whether two different standards were actually identical (they were not, the Court held), rather than address what either of them actually required.<sup>50</sup>

Justice Scalia found the Court’s gymnastics to be both unnecessary and harmful. He agreed that the INS’s proffered interpretation was plainly inconsistent with the statutory text.<sup>51</sup> But that meant, he concluded, that there was no need to proceed past Step One.<sup>52</sup> Justice Scalia was, however, greatly troubled by the Court’s insinuation that it could cast aside an agency’s interpretation of an ambiguous statute whenever it believed that it could come up with a better interpretation.<sup>53</sup> He said that such an approach “would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at

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<sup>43</sup> Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1506 (2015).

<sup>44</sup> *Id.*

<sup>45</sup> 480 U.S. 421 (1987).

<sup>46</sup> *Id.* at 443.

<sup>47</sup> *Id.* at 446.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 447-48.

<sup>50</sup> *Id.* at 448.

<sup>51</sup> *Id.* at 453-54 (Scalia, J., concurring in the judgment).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 454.

issue. This is not an interpretation but an evisceration of *Chevron*.”<sup>54</sup> Justice Scalia also rejected the idea of a distinction between “a pure question of statutory construction” and an agency’s application of a statutory scheme.<sup>55</sup>

In the early 2000s, the Court directly tackled the question of what agency actions and statements receive the benefit of *Chevron* deference. First, in *Christensen v. Harris County*,<sup>56</sup> “the Court held that an interpretation’s formality influenced *Chevron*’s applicability and indicated that informal interpretations were not eligible for *Chevron* deference.”<sup>57</sup> Specifically, the Court, speaking through Justice Thomas, declined to give *Chevron* deference to an agency opinion letter, saying that the letter was not a product of “a formal adjudication or notice-and-comment rulemaking.”<sup>58</sup> Then, citing several cases from the 1990s, the Court explained that “opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>59</sup>

Justice Scalia chided the Court for its refusal to grant the opinion letter *Chevron* deference.<sup>60</sup> He described *Chevron* as a “watershed decision” establishing “the principle that ‘a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.’”<sup>61</sup> Justice Scalia then explained that *Chevron* could only be inapplicable in three situations:

- (1) the statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency.<sup>62</sup>

He therefore concluded that it was a betrayal of *Chevron* to limit deference only to interpretations by formal adjudication or rulemaking.<sup>63</sup> If *Chevron*’s premises were accurate, then Justice Scalia found it incoherent to limit its reach in this way—especially if reducing unauthorized *judicial* policymaking remained *Chevron*’s chief virtue.

The following Term, the Court “doubled down” on its insistence that not every interpretation of a statute by an agency would qualify for *Chevron* deference.<sup>64</sup> In *United States v. Mead Corp.*, the Court reiterated that interpretations issued through formal notice-and-comment rulemaking or adjudication are classic examples of where *Chevron* deference applies.<sup>65</sup> Unfortunately, *Mead* left more questions than answers. The touchstone of when *Chevron* applies

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 454-55.

<sup>56</sup> 529 U.S. 576 (2000).

<sup>57</sup> Kent Barnett & Christopher J. Walker, *Chevron in the Circuits*, 116 MICH. L. REV. 1, 12 (2017).

<sup>58</sup> 529 U.S. at 587.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 589 (Scalia, J., concurring in part and concurring the judgment).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* n\*.

<sup>63</sup> *Id.* at 590.

<sup>64</sup> Barnett & Walker, *supra* note 57, at 13.

<sup>65</sup> 533 U.S. 218, 229 (2001).

under *Mead* is whether Congress intended for the agency to render authoritative interpretations of ambiguous statutes.<sup>66</sup> The fact that Congress provides for formal interpretive processes makes it “fair to assume generally that Congress contemplates administrative action with the effect of law.”<sup>67</sup> But the Court still left the door ajar to *Chevron* deference “even when no such administrative formality was required and none was afforded”—such as when statutes explicitly grant specific authority to an agency.<sup>68</sup> Unsurprisingly, Justice Scalia dissented—decrying both the Court’s perceived hamstringing of *Chevron* and its failure to at least articulate a straightforward rule for when *Chevron* would not apply.<sup>69</sup>

Then, in *Barnhart v. Walton*,<sup>70</sup> the Court indicated that even formal rules may not necessarily obtain deference under *Chevron*.<sup>71</sup> *Barnhart* involved review of a statutory interpretation in a regulation that was the product of notice-and-comment rulemaking.<sup>72</sup> Despite a regulation going through formal rulemaking, the Court’s opinion (written by Justice Breyer) gave considerable focus to the fact that the interpretation was “longstanding.”<sup>73</sup> The Court also highlighted how “the agency’s interpretation was ‘permissible’ because it made ‘considerable sense,’ was of long-standing duration (even if the regulation itself was of recent vintage), and appeared to receive congressional acquiescence in light of the relevant statute’s reenactment and amendment.”<sup>74</sup> Indeed, by implying that the formality of the rule’s implementation was insufficient undermined “*Mead*’s strong suggestion that notice-and comment [sic] rules and formal adjudication always have the force of law to render agency action *Chevron*-eligible.”<sup>75</sup>

Justice Scalia did not let this issue go unnoticed. He was particularly troubled by the Court’s consideration of the longstanding nature of the interpretation, explaining that such consideration was “an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one ‘correct’ interpretation of a statutory text.”<sup>76</sup> He also argued that the Court’s analysis of whether *Chevron* should have ended with the fact that the regulation was produced through notice-and-comment rulemaking.<sup>77</sup> By creating the so-called “*Chevron* Step Zero”

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 230.

<sup>68</sup> *Id.* at 231 & n.13, *see also id.* at 227 (“Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”).

<sup>69</sup> *See id.* at 239 (Scalia, J., dissenting) (“What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.”); *see also id.* at 241 (“The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test.”).

<sup>70</sup> 535 U.S. 212 (2002).

<sup>71</sup> Barnett & Walker, *supra* note 57, at 13.

<sup>72</sup> 535 U.S. at 215-16; *see also id.* 227 (Scalia, J., concurring in part and concurring in the judgment).

<sup>73</sup> *Id.* at 221 (majority opinion).

<sup>74</sup> Barnett & Walker, *supra* note 57, at 13.

<sup>75</sup> *Id.* at 14.

<sup>76</sup> *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in the judgment).

<sup>77</sup> *Id.* at 227.

analysis, asking whether the *Chevron* framework applies to an agency position in the first place, *Christensen*, *Mead*, and *Barnhart* have (to put it mildly) complicated the *Chevron* canon.<sup>78</sup>

Another decision of the early 2000s with important consequences for *Chevron* was *FDA v. Brown & Williamson Tobacco Corp.*<sup>79</sup> This case dealt with whether the FDA was entitled to *Chevron* deference in the context of the agency’s attempt to impose significant regulations on advertising of tobacco products. But the Court, in an opinion joined by Justice Scalia, explained that the FDA had no authority to act and its assertions that it could act were not entitled to *Chevron* deference. Specifically, the Court painstakingly noted how federal drug-safety statutes had structured the jurisdiction of the FDA vis-à-vis other agencies.<sup>80</sup> Over the years, Congress implemented several statutory schemes regarding tobacco products and advertising that did not invite FDA participation.<sup>81</sup> Further, the FDA’s own statutory and regulatory scheme would have required it to label tobacco products “safe” for consumption before it could then make efforts to curtail their use. The Court found this oxymoron inescapable.<sup>82</sup>

As to *Chevron* deference, the Court went out of its way to say that in “extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended” a delegation to an agency—the presumption on which *Chevron* rests.<sup>83</sup> In other words, if the agency is trying to answer a question of major economic, social, or political significance and it is not apparent that Congress wanted the agency to deal with the issue, then the Court may not apply *Chevron*.<sup>84</sup> Because the overall statutory scheme repudiated any notion that the FDA was granted any control over the tobacco market, the Court concluded that the power to take the action sought was not delegated to the FDA in the first place, and that *Chevron* therefore did not apply.<sup>85</sup> Notably, this basis for disclaiming *Chevron*’s applicability had nothing to do with what the agency did, as in *Christensen* and *Mead*; it depended on what Congress did.

For a while, *Brown & Williamson* seemed to be an extraordinary or even *sui generis* case with little actual impact on *Chevron*. But “the Court recently held in *King v. Burwell* that

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<sup>78</sup> See Barnett & Walker, *supra* note 57, at 14-15 (“*Mead*, *Christensen*, and *Barnhart* altogether created the ‘*Mead* Puzzle,’ creating uncertainty for courts and agencies as to which factors are necessary or sufficient to trigger *Chevron* deference. Generally, notice-and-comment rulemaking and formal adjudication have been thought sufficient for *Chevron* eligibility, despite *Barnhart*’s contrary suggestion, and thus should be treated similarly. But lower courts, as Lisa Bressman has highlighted, have struggled with how to go about determining when informal interpretations are *Chevron*-eligible and when they may engage in ‘*Chevron* avoidance’—that is, accept the agency’s view under *Skidmore* or de novo review without deciding whether the agency’s interpretation has the force of law. At the same time, scholars, including one of us, have debated formality’s relationship with congressional delegation. Some have argued that formality provides procedures that, in *Mead*’s words, ‘foster . . . fairness and deliberation’ and provide a salience or transparency to permit congressional oversight. Others have argued that whether Congress wants to have an agency act with the force of law is a separate question from whether Congress wants searching judicial oversight of the agency’s binding actions.” (alteration in original) (footnotes omitted)).

<sup>79</sup> 529 U.S. 120 (2000).

<sup>80</sup> *Id.* at 133-61.

<sup>81</sup> *Id.* at 156.

<sup>82</sup> See *id.* at 143 (“The inescapable conclusion is that there is no room for tobacco products within the FDCA’s regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.”).

<sup>83</sup> *Id.* at 159.

<sup>84</sup> See *id.* at 160 (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

<sup>85</sup> *Id.*

*Chevron* does not apply to questions of deep economic and political significance that [are] central to [the] statutory scheme at issue. . . . [T]his was only the second time that the Court refused to extend *Chevron* deference to an admittedly ambiguous statutory provision based on the significance of the matter.”<sup>86</sup> Thus, like *Mead, Brown & Williamson*’s limitation on *Chevron* has enjoyed staying power—becoming known as the “major questions” doctrine.

## II. The *Chevron* Doctrine’s Achilles Heel—Ambiguity

*Chevron* was not meant to be a blanket means for agencies to assume power whenever the interpretation of a statutory provision was debatable. As Judge Starr recognized:

[A]llowing agencies unbridled discretion would run afoul of the spirit, if not the letter, of the Supreme Court’s non-delegation doctrine, which in broad terms holds that Congress may not delegate power to an agency without providing adequate standards for the exercise of that power. For these reasons, judicial review of agency action should not be toothless. Courts are not, the Supreme Court frequently reminds us, simply to “rubberstamp” agency decisions or to transform deference into “judicial inertia.”<sup>87</sup>

But over the past three decades, agencies have gained nearly that amount of unchecked authority in practice. The main culprit is too quickly concluding that a provision is ambiguous, which is tantamount to handing the interpretive duty to agencies.<sup>88</sup> As Judge Silberman said so bluntly, “virtually any phrase can be rendered ambiguous if a judge tries hard enough.”<sup>89</sup> Lawyers are trained to serve their clients by trying to inject doubt into clarity or to characterize the opaque as abundantly clear, after all.<sup>90</sup> Research since *Chevron* has shown just how prescient Judge Silberman’s concern was.

### A. Statistics on Findings of Ambiguity

Instances where federal appellate courts find ambiguity (*i.e.*, go beyond *Chevron* Step One) and then grant deference to the agency’s interpretation (the agency prevails on Step Two) are far from rare. A recent study of cases reviewing agency interpretations over an eleven-year period found that the courts applied *Chevron*’s framework in 74.8% of them.<sup>91</sup> Of those cases, the agency went on to prevail 77.4% of the time.<sup>92</sup> The study also broke down the application of Steps One and Two. A whopping 70% of cases applying the *Chevron* framework made it to Step Two—meaning that the court found the relevant statute was ambiguous.<sup>93</sup> Of these cases, the

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<sup>86</sup> Barnett & Walker, *supra* note 57, at 16 (internal quotation marks omitted) (first and second alterations in original).

<sup>87</sup> Starr, *supra* note 12, at 308 (footnotes omitted).

<sup>88</sup> See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137-38 (2016) (explaining how judges differ regarding when they would conclude that a statute is ambiguous).

<sup>89</sup> *Id.* at 2139 n.106 (quoting Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990)).

<sup>90</sup> *Id.*

<sup>91</sup> Barnett & Walker, *supra* note 57, at 32.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 33.

agency received a favorable resolution in 93.8% of cases—an unsurprising figure given the deference afforded at Step Two, but still a large percentage.<sup>94</sup>

The amount of cases that make it past Step One has not changed dramatically over time. An earlier study from the 1990s found that only 27.2% of circuit cases were disposed of on Step One.<sup>95</sup> Even when claims were disposed of at Step One, the agency still prevailed in 39% of cases.<sup>96</sup> The earlier study found a similar 42%-win rate for agencies in circuit cases decided at Step One.<sup>97</sup>

One recent study has also noted that the ideology of circuit judges may have noticeable impacts on the application of *Chevron*.<sup>98</sup> Specifically, “for liberal agency interpretations, conservative ideology panels have as much as a 40% chance of finding the statute unambiguous.”<sup>99</sup> But of “the most liberal ideology panels in the data . . . , that number is just 19%.”<sup>100</sup> With “conservative agency interpretations . . . , liberal ideology panels have as much as a 41% chance of finding the statute unambiguous.”<sup>101</sup> Meanwhile, for “the most conservative ideology panels in the data, that number falls to 27%.”<sup>102</sup>

Concerns about—and evidence of—ideological manipulation of *Chevron*’s application is not new. In the 1998, Professors Cross and Tiller found that ideologically unified panels deferred to an agency’s ideologically opposite interpretation only 33% of the time.<sup>103</sup> Professors Sunstein and Miles noted similar results.<sup>104</sup> Specifically, Sunstein and Miles found “a Democratic appointee, sitting with two Democratic appointees, is 31.5 percentage points more likely to vote to uphold a liberal decision than a conservative one—and a Republican appointee, sitting with two Republican appointees, is over 40 percentage points more likely to vote to uphold a conservative decision than a liberal one.”<sup>105</sup> Still, the numbers do indicate that the *Chevron* doctrine does, on balance, provide greater likelihood that the agency’s interpretation will be upheld.<sup>106</sup> Nonetheless, the concerns about whether *Chevron*-type deference can be applied impartially and consistent with our constitutional norms have begun to permeate the judiciary. Naturally, no one contends that all other types of decisionmaking are always neutral

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 34 (citing Kerr, *supra* note 15, at 31 fig.A).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing Kerr, *supra* note 15, at 31 fig.A).

<sup>98</sup> See Kent Barnett et al., *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1469 (2018).

<sup>99</sup> *Id.* at 1514.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2172 (1998).

<sup>104</sup> See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy: An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (“In lower court decisions involving the EPA and the NLRB from 1990 to 2004, Republican appointees demonstrated a greater willingness to invalidate liberal agency decisions and those of Democratic administrations. These differences are greatly amplified when Republican appointees sit with two Republican appointees and when Democratic appointees sit with two Democratic appointees.”).

<sup>105</sup> *Id.* at 827.

<sup>106</sup> See Barnett et al., *supra* note 98, at 1492 (“[I]n cases with *Chevron* deference, the circuit courts favor approximately 77% of interpretations. By contrast, that number falls below 55% for circuit court cases reviewing statutory interpretations with a non-*Chevron* deference standard.”).

and unrelated to considerations other than the purest legal analysis. But when the issue is not what the law is, but whether actual statutory law is “ambiguous,” thus requiring deference, and in turn deflecting responsibility from the judiciary for the outcome of a case, it is reasonable to expect greater rigor in defining ambiguity.

### B. *The Judicial Revolt Against Almost Automatic Ambiguity*

The academy has had much to say about *Chevron* and *Auer* over the past three decades. But the prime movers of the current debate about retaining those precedents have been judges—prominently two former circuit judges who now sit on the Supreme Court. A major complaint among these judges has been how to handle the determination of whether a provision is ambiguous.

At first, *Chevron* seemed to eliminate problems of ambiguity—at least over what standard courts should use in reviewing agency interpretations.<sup>107</sup> But leading judicial minds were quick to recognize that the ambiguity determination would be the greatest source of consternation within the doctrine.<sup>108</sup> And agreeing whether given provisions are ambiguous has continued to be a point of contention among jurists.<sup>109</sup> As such, it comes as little surprise that many thoughtful judges have begun to question the workability of *Chevron* and *Auer*.

#### 1. The Evolution of Justice Scalia

As made evident in his dissents and concurrences in cases like *Mead*, Justice Scalia was once *Chevron*'s greatest champion. For him, *Chevron* was a handy way to constrain judicial power and yield policymaking power back to those in the electorally accountable branches of government.<sup>110</sup> Regarding the underpinnings of *Chevron*, Justice Scalia said:

The cases, old and new, that accept administrative interpretations, often refer to the “expertise” of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate

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<sup>107</sup> See Starr, *supra* note 12, at 292-93 (“*Chevron*'s first effect on the deference principle was to eliminate a long-standing ambiguity in the law. Prior to *Chevron*, it was difficult to discern any single standard for judicial review of agency interpretations. In contrast to the line of cases which called for judicial deference to agency interpretations was another, equally impressive, line of Supreme Court decisions in which the Court freely substituted its own judgment for that of the agency with no mention of deference.” (footnotes omitted)).

<sup>108</sup> See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520-21 (noting that deciding when a statute is sufficiently ambiguous is the problematic element of *Chevron*); Starr, *supra* note 12, at 298-99 (“Indeed, step one of the *Chevron* analysis will be the primary battleground on which litigation over agency interpretations is fought. . . . I therefore cannot agree with the jeremiads that *Chevron* has somehow emasculated judicial review.”).

<sup>109</sup> See, e.g., *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring in the judgment) (“Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense.”).

<sup>110</sup> See Raso & Eskridge, *supra* note 14, at 1752 (“Justice Scalia abhors the positivist notion that when the law ‘runs out’ the judge exercises judgment (discretion!) to fill in the gaps—and the modern regulatory state provides the Justice with a most excellent avoidance strategy: When the text does not answer the interpretive issue (when the law ‘runs out’), defer to the judgment of the agency charged with administering the statute.”).

those purposes. In other words, they are more likely than the courts to reach the correct result.<sup>111</sup>

Of course, Justice Scalia recognized that this practical benefit alone did not legitimize the doctrine. He even conceded that *Chevron* never attempted to follow the letter of the APA.<sup>112</sup> But he also believed it proper to handle ambiguity in statutes effectuated by agencies by simply presuming as a matter of statutory interpretation that Congress left the ambiguity for the agency to resolve.<sup>113</sup> Further, he maintained that strong deference to agency interpretations was consistent with the history of judicial review of agency actions.<sup>114</sup> At the very least, the approach was superior to a case-by-case attempt to divine Congress's "'genuine' legislative intent."<sup>115</sup> Justice Scalia's belief in *Chevron*'s legitimacy was also reflected in other prominent commentary. As Judge Starr explained,

[A]dministrative agencies are not subordinate to the federal courts in the organizational structure established by the Constitution. This alone suggests that Article III judges lack general supervisory authority over the agencies. Neither the framers of the Constitution nor subsequent legislative assemblies, moreover, have seen fit to confer that supervisory power on the courts. For the courts to assume such authority on their own would be inconsistent with the status of the judiciary as the only unelected branch. In part because federal judges are not directly accountable to any electorate, I believe they have a duty voluntarily to exercise "judicial restraint," that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch. Thus, *Chevron* reflects a more self-effacing—and in my view more appropriate—judicial philosophy than that embodied in earlier decisions laying claim to broader reviewing authority.<sup>116</sup>

But a major component to Justice Scalia's commitment to *Chevron* was the belief that a truly ambiguous statute would be rare—that, contrary to the statistics noted above, Step One would be the end of the inquiry quite often. Indeed, as one study found, Justice Scalia was the justice least deferential to agency interpretations.<sup>117</sup> Simply following the usual rules of statutory construction would normally reveal the law's meaning. As such, proceeding to Step

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<sup>111</sup> Scalia, *supra* note 108, at 514.

<sup>112</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.").

<sup>113</sup> Scalia, *supra* note 108, at 516.

<sup>114</sup> See *Mead Corp.*, 533 U.S. at 241-42 (Scalia, J., dissenting) (explaining that review of actions by "federal executive officers was principally exercised through the prerogative writ of mandamus").

<sup>115</sup> *Id.* at 517; see also *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

<sup>116</sup> Starr, *supra* note 12, at 308.

<sup>117</sup> See Miles & Sunstein, *supra* note 104, at 826 ("Consider also a remarkable fact: Justice Breyer, the Court's most vocal critic of a strong reading of *Chevron*, is the most deferential justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential." (footnotes omitted)); see also *id.* at 833-34 ("The justices generally thought to be liberal—Justices Stevens, Souter, Breyer, and Ginsburg—have validation rates in excess of 70 percent. The justices generally thought to be conservative—Justices Scalia and Thomas—have validation rates under 55 percent. The validation rates of justices generally thought to be swing voters—Justices O'Connor and Kennedy—fall in the middle, at about 67 percent.").

Two and deferring to an agency's interpretation would be comparatively exceptional.<sup>118</sup> Actual practice has turned out quite differently.

Perhaps the apex of Justice Scalia's faithfulness to *Chevron* came late in his career in *City of Arlington v. FCC*.<sup>119</sup> There, writing for the Court, Justice Scalia afforded *Chevron* deference to an agency's interpretation of an ambiguity in the statute governing the scope of that agency's jurisdiction.<sup>120</sup> Justice Scalia specifically rejected the idea that judges should be involved in first answering questions about whether a statute is jurisdictional in deciding if *Chevron* applied.<sup>121</sup> If Step One involved rigorous application of the canons of construction, then there should be no problem in applying *Chevron* in this context.

But *City of Arlington* also appears to have marked the beginning of the rising tide of judges questioning *Chevron*. Chief Justice Roberts wrote a powerful dissent, expressing his concerns not only about the broad interpretation of *Chevron*, but also about the nature of an administrative state that “wields vast power and touches almost every aspect of daily life.”<sup>122</sup> He also decried a common feature of the modern administrative agency—the accumulation of legislative, executive, and judicial powers in the same hands.<sup>123</sup> As authority, Chief Justice Roberts quoted Federalist No. 47, that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.”<sup>124</sup> And as to the common refrain that *Chevron* leaves policymaking to the electorally accountable executive branch, Roberts replied—“with hundreds of federal agencies poking into every nook and cranny of daily life, [a] citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.”<sup>125</sup> Although Roberts stopped short of calling for *Chevron* to be dismantled, his dissent still made an impact. Then-Judge Neil Gorsuch cited it in his thorough call for *Chevron*'s reexamination.<sup>126</sup>

As for Justice Scalia, the once great apologist of *Chevron* seemed to cool to the doctrine in his final years. In *EPA v. EME Homer City Generation, L.P.*, Justice Scalia lamented the Court's granting *Chevron* deference to the EPA's broad reading of a statutory provision that allowed the EPA to implement a sweeping new emissions rule.<sup>127</sup> To him, the EPA's action was nothing short of a power grab, unmoored from any statutory grant of power.<sup>128</sup> He specifically cited *Brown & Williamson* in saying that the Court had gone too far in allowing the EPA to use

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<sup>118</sup> See, e.g., *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (stating that some uncertainty in a statutory scheme does not expand an agency's authority under *Chevron*); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (explaining that just because a statutory scheme was complex and “Byzantine” did not make it ambiguous).

<sup>119</sup> 569 U.S. 290 (2013).

<sup>120</sup> *Id.* at 301.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 313 (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

<sup>123</sup> *Id.* at 313.

<sup>124</sup> *Id.* at 312 (alteration in original).

<sup>125</sup> *Id.* at 315.

<sup>126</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>127</sup> 572 U.S. 489, 526 (2014) (Scalia, J., dissenting).

<sup>128</sup> *Id.*

vague statutory terms to then implement a massive new scheme without any further statutory support.<sup>129</sup> And like Chief Justice Roberts a year before, Justice Scalia lamented the administrative state's growth: "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."<sup>130</sup> While Justice Scalia never openly called for reconsidering *Chevron*, Justice Alito has said that Justice Scalia was "rethinking the whole question of *Chevron* deference" before his death, and plenty of evidence from Justice Scalia's final years supports Justice Alito's suggestion.<sup>131</sup>

Justice Scalia even more openly reconsidered *Auer* deference. Despite being the author of *Auer*, Justice Scalia did publicly express concern that *Auer* and *Seminole Rock* were in fact wrong and that he wanted the Court to revisit them. Specifically, he became concerned about the potential implications of agencies being able to both draft and then give binding interpretations of their own rules—including giving agencies reason to craft vague regulations.<sup>132</sup>

## 2. Vocal Skepticism by Prominent Court of Appeals Judges

It is notable that the leading judicial advocates for revisiting *Chevron* and *Auer* are more "conservative" judges and justices. Recent data show a basis for fears that *Chevron*'s standard is being abused or unfaithfully applied.<sup>133</sup> Several prominent judges have expressed concern about *Chevron* and particularly how there is no principled way to determine whether a provision is truly ambiguous. Some have argued that, like Justice Scalia, "conservative judges will be more likely to stop their *Chevron* analysis at step one than liberal judges because they will more often find statutory meaning clear. Indeed, this was how Justice Antonin Scalia, a longtime defender of *Chevron*'s framework, understood the *Chevron* framework to work."<sup>134</sup>

A good example of a circuit judge expressing dismay with *Chevron* is Judge Raymond Kethledge of the Sixth Circuit. In his decade on the bench, he has never found ambiguity under *Chevron*—echoing "Justice Scalia's conception of a powerful, textual *Chevron* step one that will often . . . uncover Congress's clear meaning."<sup>135</sup> Indeed, Judge Kethledge has said that a court should not resign itself to giving *Chevron* deference "before making every effort to discern for [itself] the statute's meaning"<sup>136</sup> Relatedly, Judge Kethledge worries that *Chevron* creates "a

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<sup>129</sup> *Id.* at 528.

<sup>130</sup> *Id.* at 525.

<sup>131</sup> Robin Bravender, *Alito Snubs Chevron, Obama EPA's 'Eraser'*, E&E NEWS (Nov. 17, 2016), <https://www.eenews.net/stories/1060045952>.

<sup>132</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment); see also *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) ("Our cases have not put forward a persuasive justification for *Auer* deference.").

<sup>133</sup> See Barnett et al., *supra* note 98, at 1510 ("[O]ne immediately noticeable item is that the conservative judges appear to behave less politically [in applying *Chevron*] than the liberal judges.").

<sup>134</sup> *Id.* at 1515.

<sup>135</sup> *Id.* at 1516 (footnote omitted).

<sup>136</sup> *Zurich Am. Ins. Grp. v. Duncan ex rel. Duncan*, 889 F.3d 293, 308 (6th Cir. 2018) (Kethledge, J., concurring in the judgment).

strong incentive” for an agency “to make statutory language seem more complicated than it actually is” so that the court will then find ambiguity.<sup>137</sup>

Judge Kethledge’s skepticism of *Chevron* extends beyond the concern that federal judges are not doing enough to avoid finding ambiguity. He also believes that *Chevron* is doctrinally wrong. In response to the argument that it is preferable to let the agencies handle ambiguity rather than federal judges, Judge Kethledge argued that it is just as bad to arrogate the power to effectively legislate to the executive as it is to allow judges to effectively legislate by giving them freer rein to interpret statutes.<sup>138</sup>

Judge Kethledge is far from alone. Newly appointed Judge James C. Ho of the Fifth Circuit worries that judges’ failure to faithfully and evenhandedly apply *Chevron*—hence giving agencies largely unconstrained reign in proffering statutory interpretations—leads to a violation of the separation of powers.<sup>139</sup> And skepticism of *Chevron* deference is not limited to Republican-appointed judges. Judge Kathleen O’Malley—an appointee to the Federal Circuit by President Obama—has called for limitations on *Chevron*. Specifically, invoking *King v. Burwell* and *Brown & Williamson*, she wrote, “[T]here are times when courts should not search for an ambiguity in the statute because it is clear Congress could not have intended to grant the agency authority to act in the substantive space at issue.”<sup>140</sup> Judge O’Malley also authored an opinion favoring the Supreme Court revisiting *Auer* in the *Kisor* case back when it was before the Federal Circuit.<sup>141</sup>

Indeed, several circuit judges have written on the evils of both *Chevron* and *Auer*. For example, Judge Kent Jordan of the Third Circuit powerfully expounded on the inherent problems with *Chevron* and *Auer*. Regarding *Chevron*, Judge Jordan worried that “*Chevron* not only erodes the role of the judiciary, it also diminishes the role of Congress.”<sup>142</sup> Further, while *Chevron* leads to the “aggrandizement of federal executive power at the expense of the legislature,” it also creates “perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues.”<sup>143</sup>

Turning to *Auer*, Judge Jordan decried how the doctrine gives agencies incentive to craft vague regulations which give them “wide latitude in deciding how to govern.”<sup>144</sup> Further,

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<sup>137</sup> *Tenn. Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1050 (6th Cir. 2018) (Kethledge, J., concurring in the judgment).

<sup>138</sup> Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323-24 (2017).

<sup>139</sup> See *Voices for Int’l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 781 (5th Cir. 2018) (Ho, J., concurring) (“Misuse of the *Chevron* doctrine means collapsing [the executive, legislative, and judicial] functions into a single entity. So too with *Chevron*, to be sure. But the misuse of *Chevron* in this case abrogates separation of powers without even the fig leaf of Congressional authorization.”).

<sup>140</sup> *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015).

<sup>141</sup> See *Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O’Malley, J., joined by Newman and Moore, JJ., dissenting from denial of rehearing en banc) (saying that there is little logic behind continued adherence to *Auer* and pointing out that Chief Justice Roberts and Justices Scalia, Thomas, and Alito have expressed interest in revisiting *Auer* and *Seminole Rock*).

<sup>142</sup> *Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J. concurring in the judgment).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 280.

judicial deference to agencies leads to “the permanent expansion of the administrative state” by granting agencies “vast and largely unaccountable power.”<sup>145</sup> And even more perversely, without effective judicial review, efforts to check the expansion of agency power become nearly impossible.<sup>146</sup> Specifically, the Constitution’s “requirements of bicameralism and presentment (along with the President’s veto power), which were intended as a brake on the federal government, being ‘designed to protect the liberties of the people,’ are instead, because of *Chevron*, ‘veto gates’ that make any legislative effort to curtail agency overreach a daunting task.”<sup>147</sup>

Finally, returning to the Sixth Circuit, Judge Amul Thapar recently authored a scathing rebuke of *Auer*—concluding that the precedent “deserve[s] renewed and much-needed scrutiny.”<sup>148</sup> In reference to an agency’s argument that its commentary be given deference, Judge Thapar responded, “But one does not ‘interpret’ a text by adding to it. Interpreting a menu of ‘hot dogs, hamburgers, and bratwursts’ to include pizza is nonsense.”<sup>149</sup> He then wrote:

Under *Auer*, agencies possess immense power. Rather than simply enacting rules with the force of law, agencies get to decide what those rules mean, too. But just as a pitcher cannot call his own balls and strikes, an agency cannot trespass upon the court’s province to “say what the law is.” *Auer* nevertheless invites agencies into that province, with courts standing by as agencies “say what the law is” for themselves. Not only that, but *Auer* incentivizes agencies to regulate “broadly and vaguely” and later interpret those regulations self-servingly, all at the expense of the regulated. *Auer* thus encourages agencies to change the rules of the game with the benefit of hindsight, “unhampered by notice-and-comment procedures.”<sup>150</sup>

Just weeks before submission of this paper, Judge Thapar wrote the majority opinion in a case involving *Chevron* deference. Noting *Chevron*’s ambiguity problem, Judge Thapar wrote, “[C]ourts must do their best to determine the statute’s meaning before giving up, finding ambiguity, and deferring to the agency. When courts find ambiguity where none exists, they are abdicating their judicial duty.”<sup>151</sup> He then went on to say, “This abdication by ambiguity impermissibly expands an already-questionable *Chevron* doctrine.”<sup>152</sup> As such, Judge Thapar

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<sup>145</sup> *Id.* Indeed, some judges have written about how giving too much deference under *Auer* can lead agencies to circumvent the formal rulemaking process altogether. See, e.g., *Marsh v. J. Alexander’s LLC*, 905 F.3d 610, 637-38, 642 (9th Cir. 2018) (en banc) (Ikuta, J., joined by Callahan, J., dissenting) (lamenting how the court allowed a substantive rule to masquerade as an interpretation under *Auer*—creating one of “the worst dangers of improper *Seminole Rock* and *Auer* deference”).

<sup>146</sup> *Egan*, 851 F.3d at 280.

<sup>147</sup> *Id.* (quoting RANDY R. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 212 (2016)).

<sup>148</sup> *United States v. Havis*, 907 F.3d 439, 452 (6th Cir. 2018) (Thapar, J., concurring).

<sup>149</sup> *Id.* at 450.

<sup>150</sup> *Id.* (citations omitted).

<sup>151</sup> *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018) (citing Barnett & Walker, *supra* 57, at 33-34).

<sup>152</sup> *Id.* (citing, *inter alia*, Judge Ho’s opinion in *Voices for Int’l Bus. & Educ., Inc. v. NLRB*, Chief Justice Roberts’s dissent in *City of Arlington*, Judge Gorsuch’s *Gutierrez-Brizuela* concurrence, and Judge Kavanaugh’s *Fixing Statutory Interpretation* article).

has lent his voice to the growing chorus of circuit judges to question and criticize *Chevron* and *Auer*. The question now is whether the Supreme Court will listen.

### III. Current Prospects for *Chevron* and *Auer*

A majority of sitting justices have expressed varying degrees of concern with *Chevron* and *Auer*. While this, of course, does not guarantee that the Court will overrule *Chevron* or *Auer*, the number of Justices who have taken the time to write openly about their views on deference is significant.<sup>153</sup> This section will examine the important opinions of each Justice that could play a role in deciding whether *Auer* and *Chevron* stay or go.

#### A. Justice Thomas

Like Justice Scalia, Justice Thomas was once a major proponent of *Chevron* and *Auer* deference. So strong was his commitment that he wrote the *Brand X* opinion—a case that took *Chevron* to its logical extreme. In *Brand X*, the Supreme Court faced the question of whether a court precedent that had interpreted an ambiguous statute precluded the agency from promulgating a different interpretation.<sup>154</sup> Justice Thomas, writing for the Court, explained that if the statute was ambiguous, then a straightforward application of *Chevron* requires that the agency, not a court, gets to have the last say on what the statute means.<sup>155</sup> The Court was quick to note, however, that if a court had found that the statute was unambiguous, then that decision would be binding on the agency.<sup>156</sup> But even Justice Scalia was uncomfortable with the *Brand X* holding. He saw the case as nothing more than an executive agency overruling the decision of an Article III court. He went so far as to characterize the decision as “bizarre.”<sup>157</sup> Justice Thomas also joined Justice Scalia’s majority opinion in *City of Arlington*.<sup>158</sup>

Nevertheless, from the beginning of his tenure, Justice Thomas had left hints that he was not entirely comfortable with giving excessive deference to agencies. In *Thomas Jefferson University v. Shalala*, Justice Thomas worried that agencies would purposely write vague regulations “because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”<sup>159</sup> Then, in 2015, Justice Thomas issued two notable opinions that called into question both *Chevron* and *Auer*.

Beginning with *Auer*, Justice Thomas said that because “this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns.”<sup>160</sup> He then explained that the *Seminole Rock* and *Auer* line of cases “undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that

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<sup>153</sup> See Raso & Eskridge, *supra* note 14, at 1753-54 (“That individual Justices continue to harbor their own distinctive theories of deference suggests that this is not an area where stare decisis is the norm, though it is possible that the Justices consider *Chevron* binding as a matter of stare decisis but disagree as to its precise meaning.”).

<sup>154</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

<sup>155</sup> *Id.* at 982-83.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1017 (Scalia, J., dissenting).

<sup>158</sup> See 569 U.S. 290 (2013).

<sup>159</sup> 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

<sup>160</sup> *Perez v. Mortg. Bankers Ass’n.*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).

the Framers sought to prevent.”<sup>161</sup> Regarding his constitutional concerns, Justice Thomas saw *Seminole Rock* and *Auer* as transferring the interpretive power from the judicial branch to the other branches of government.<sup>162</sup> Instead, the only way to effectuate the constitutional scheme is to allow the judiciary to exercise its interpretive authority unhampered by the workings of the other branches of government.<sup>163</sup> As to the claim that agencies are best suited to interpret their own regulations, Justice Thomas responded simply, “[J]udges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language.”<sup>164</sup> In short, Justice Thomas sees *Seminole Rock* and *Auer* as presenting serious constitutional problems and believes they should be overruled.<sup>165</sup>

As for *Chevron*, Justice Thomas also believes that the doctrine presents incurable separation-of-powers infirmities.<sup>166</sup> He has argued that *Chevron* unconstitutionally hands the interpretive power over to the executive and prevents judges from reaching legal decisions independent of the other branches of government.<sup>167</sup> Now, with the addition of Justices Gorsuch and Kavanaugh to the Court, Justice Thomas has firm allies in highlighting the potential constitutional issues with *Chevron* and *Auer*.<sup>168</sup>

### B. Chief Justice Roberts and Justice Alito

Chief Justice Roberts, of course, wrote the vehement dissent in *City of Arlington*—which seems to have ignited the current deference debate among judges. While his dissent was directed at the particularly troubling holding that agencies get *Chevron* deference for interpretations of statutes controlling the scope of their own jurisdiction, several of the Chief Justice’s concerns apply to *Chevron* and the administrative state more broadly.<sup>169</sup> The Chief Justice and Justice Alito have also lamented how judges can be unduly quick to determine that a complex statutory provision is ambiguous.<sup>170</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1220-21.

<sup>163</sup> *Id.* at 1221.

<sup>164</sup> *Id.* at 1223.

<sup>165</sup> See *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (“Any reader of this Court’s opinions should think that the doctrine is on its last gasp. Members of this Court have repeatedly called for its reconsideration in an appropriate case. And rightly so. The doctrine has metastasized and today ‘amounts to a transfer of the judge’s exercise of interpretive judgment to the agency.’” (citations omitted)).

<sup>166</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

<sup>167</sup> *Id.*

<sup>168</sup> See, e.g., *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052-53 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (arguing that the Court should reconsider *Seminole Rock* and *Auer*).

<sup>169</sup> See *supra* notes 122–25 and accompanying text.

<sup>170</sup> See, e.g., *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring in the judgment) (explaining that just because two provisions conflict does not necessarily mean that the provisions are ambiguous); see also *id.* at 79 (Alito, J., dissenting) (agreeing with the Chief Justice’s concern); cf. *E.I. du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2563-64 (2018) (opinion of Gorsuch, J., joined by Roberts, C.J., and Thomas, J., respecting denial of certiorari) (questioning whether any deference should apply to an agency interpretation that was raised for the first time by an agency in litigation); *Scenic Am., Inc. v. Dep’t of Transp.*, 138 S. Ct. 2, 2-3 (2018) (opinion of Gorsuch, J., joined by Roberts, C.J., and Alito, J.) (inviting cases regarding whether *Chevron* applies to an agency’s interpretation of a contract to which it is a party).

As for *Auer*, Chief Justice Roberts and Justice Alito have authored several concurrences in the past few years inviting its reconsideration. In *Decker v. Northwest Environmental Defense Center*, Chief Justice Roberts, joined by Justice Alito, noted the growing interest in reconsidering *Seminole Rock* and *Auer* and encouraged future cases to raise the issue.<sup>171</sup> Justice Alito, joined by Chief Justice Roberts, also expressed the concern that deference to agency interpretation of ambiguous regulations incentivizes agencies to craft vague regulations—which inevitably harms regulated parties who essentially have no way of knowing how to conform given behavior.<sup>172</sup> Justice Alito has also noted the potential constitutional issues of Congress delegating power to agencies.<sup>173</sup>

### C. Justice Breyer

A potential wild card in the debate is Justice Breyer, long a *Chevron* critic. From early on, he worried that a broad application of *Chevron* could be “counterproductive” or even “senseless.”<sup>174</sup> Justice Breyer has also made clear that while ambiguity may be “a sign” of Congress’s intent to delegate a policy matter to an agency, ambiguity is “not always a conclusive sign.”<sup>175</sup>

Nevertheless, Justice Breyer is a well-known pragmatist who is quite deferential to agencies.<sup>176</sup> In fact, given his deep respect for data and expertise that the agencies presumably deploy, Justice Breyer supports the use of *Skidmore* deference, which to him is not toothless but is more of a balancing test; he chided Justice Scalia for calling *Skidmore* an “anachronism.”<sup>177</sup> Indeed, Justice Breyer highlighted how “*Skidmore* made clear that courts may pay particular attention to the views of an expert agency where they represent ‘specialized experience,’ even if they do not constitute an exercise of delegated lawmaking authority.”<sup>178</sup> Justice Breyer then attempted to make peace with *Chevron* by engrafting it into *Skidmore*. He wrote, “*Chevron* made no relevant change. It simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency

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<sup>171</sup> 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring); *accord Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment) (agreeing that there are “substantial reasons” for revisiting *Auer* and *Seminole Rock*).

<sup>172</sup> See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012) (“Our practice of deferring to an agency’s interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’ It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.” (alterations in original) (citations and footnote omitted)).

<sup>173</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (explaining how Congress may not delegate its legislative authority).

<sup>174</sup> Miles & Sunstein, *supra* note 104, at 826 & n.11.

<sup>175</sup> *City of Arlington v. FCC*, 569 U.S. 290, 308 (2013) (Breyer, J., concurring in part and concurring in the judgment).

<sup>176</sup> Miles & Sunstein, *supra* note 104, at 826.

<sup>177</sup> *Christensen v. Harris Cty.*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting); *Barnett & Walker*, *supra* note 57, at 12-13.

<sup>178</sup> *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting) (citation omitted).

the legal authority to make those determinations.”<sup>179</sup> He concluded that “[i]f statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experience-based views of expert agencies.”<sup>180</sup>

Regardless of the label or source of deference, Justice Breyer, at least in ordinary, mine-run cases, is inclined to yield if he finds that expertise has led to a given outcome, particularly based on his reading of a statutory and regulatory scheme’s broader purpose. This includes regularly consulting “legislative and regulatory history.”<sup>181</sup> Justice Breyer may not want to overrule *Chevron* (or *Auer*, for that matter) if he fears that the Court will significantly limit courts’ ability to defer to an agency.<sup>182</sup> We will see.

#### D. Justices Ginsburg, Sotomayor, and Kagan

Unlike other members of the current Roberts Court, Justices Ginsburg, Sotomayor, and Kagan have not openly called for undoing *Chevron* and *Auer*. But at least occasional discomfort emerges from their votes, too. Justice Ginsburg, for example, has joined opinions highlighting the excesses of deference doctrines. For example, she joined Justice Thomas’s dissent in *Thomas Jefferson University v. Shalala*, which raised concern about how *Seminole Rock* deference may encourage agencies to issue vague regulations.<sup>183</sup> She also joined Justice Scalia’s *Brand X* dissent—though notably not the portion of the opinion where he called the Court’s decision “bizarre” and “probably unconstitutional.”<sup>184</sup>

But none of these opinions invited full reexamination of the doctrine.<sup>185</sup> Indeed, Justice Ginsburg’s silence on the doctrine’s underpinnings indicates that she may not be particularly concerned about its legitimacy. Further, Justice Ginsburg is quite sensitive to *stare decisis*. She is unlikely to favor upsetting a doctrine that could affect the functioning of the administrative state absent some clear principles that promote stability.

Justice Sotomayor’s record consists of writing and joining opinions applying *Chevron* or *Auer*.<sup>186</sup> And even when she has dissented in a cases involving the application of a deference

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<sup>179</sup> *Id.*, see also Barnett & Walker, *supra* note 57, at 12-13.

<sup>180</sup> *Christensen*, 529 U.S. at 597 (Breyer, J., dissenting).

<sup>181</sup> *City of Arlington v. FCC*, 569 U.S. 290, 309-10 (2013) (Breyer, J., concurring in part and concurring in the judgment).

<sup>182</sup> See *id.* at 310 (explaining that the doctrine over the past few decades “has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency”).

<sup>183</sup> 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

<sup>184</sup> *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1005, 1017 (2005) (Scalia, J., dissenting).

<sup>185</sup> See Manning, *supra* note 28, at 615 (noting that Justice Thomas’s opinion in *Thomas Jefferson University* “did not repudiate *Seminole Rock* outright, but criticized its underpinnings”).

<sup>186</sup> For example, Justice Sotomayor wrote the majority opinion in *Perez v. Mortgage Bankers Association* over the protestations of Justices Scalia, Thomas, and Alito. 135 S. Ct. 1199, 1203 (2015). It is worth noting, however, that Justice Sotomayor’s recent opinion in *Pereira v. Sessions* tactfully avoided applying *Chevron*. 138 S. Ct. 2015, 2113 (2018). This prompted a response from Justice Alito in dissent, who claimed that the “increasingly maligned” *Chevron* doctrine required accepting the government’s interpretation. *Id.* at 2121 (Alito, J., dissenting). Justice Alito then accused Justice Sotomayor’s majority opinion of “simply ignoring *Chevron*.” Whether Justice Sotomayor

doctrine, she does not question its underpinnings.<sup>187</sup> As with Justice Ginsburg, *stare decisis* and the possible upending of administrative-law doctrines are likely important concerns for Justice Sotomayor.

It is possible, however, that Justice Kagan may have a different approach. During her tenure on the Court thus far, Justice Kagan has shown indications of a meaningful commitment to textualism. As such, she may well harbor concerns about courts being too quick in deferring to agency interpretations when application of all the canons of statutory construction could do the trick.

That said, Justice Kagan also appears to value deference to complex administrative schemes, and may want a more systematic basis for grounding such deference. For example, she wrote the dissent in *Michigan v. EPA*, chiding the Court for not faithfully applying *Chevron*.<sup>188</sup> She said that the agency interpretations at issue did not arise “‘in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.’”<sup>189</sup> She then argued that the agency’s “‘experience and expertise in that arena—and courts’ lack of those attributes—demand that judicial review proceed with caution and care.’”<sup>190</sup> Thus, while it may be possible to envision Justice Kagan sharing some concerns about excessive deference to agencies, she also will want a solution that lets courts defer to agencies’ expert judgments when textual analysis does not yield clear answers.<sup>191</sup>

#### *E. Justices Gorsuch and Kavanaugh*

Although discussion of the Court revisiting *Chevron* and *Auer* has been ongoing for several years, the appointments of Justices Gorsuch and Kavanaugh—both notable skeptics—have supercharged the debate. Justice Gorsuch’s focus is on constitutional concerns—namely that *Chevron* and *Auer* raise significant separation-of-powers and non-delegation issues. During his time on the Tenth Circuit, then-Judge Gorsuch wrote several opinions laying out the argument against *Chevron* deference. These opinions received significant coverage during his confirmation hearings.

First, Judge Gorsuch criticized both *Chevron* and *Brand X* in *De Niz Robles v. Lynch*.<sup>192</sup> The government there had sought to retroactively apply a new interpretation of an ambiguous immigration-law provision.<sup>193</sup> The new interpretation conflicted with a prior Tenth Circuit precedent—which, under *Brand X*, meant that the agency’s new interpretation controlled.<sup>194</sup> But the petitioner had affirmatively relied on the prior Tenth Circuit precedent when ordering his

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avoided applying *Chevron* because she has doubts about its legitimacy and vitality or simply because she saw the doctrine as inapplicable under those circumstances remains to be seen.

<sup>187</sup> See, e.g., *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 82-86 (2014) (Sotomayor, J., dissenting).

<sup>188</sup> 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting).

<sup>189</sup> *Id.* (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)).

<sup>190</sup> *Id.*; see also *id.* at 2726 (“Far more than courts, agencies have the expertise and experience necessary to design regulatory processes suited to ‘a technical and complex arena.’” (quoting *Chevron*, 467 U.S. at 863)).

<sup>191</sup> See *Scialabba*, 573 U.S. at 57 (plurality opinion per Kagan, J.).

<sup>192</sup> 803 F.3d 1165, 1171 (10th Cir. 2013).

<sup>193</sup> *Id.* at 1168.

<sup>194</sup> *Id.*

immigration-status affairs.<sup>195</sup> And, of course, the agency’s precedent did not exist.<sup>196</sup> Yet, the agency argued that it was entitled to apply its interpretation retroactively.<sup>197</sup>

Judge Gorsuch began his majority opinion by raising concerns that *Chevron* Step Two leads to impermissible delegation of legislative powers to executive agencies.<sup>198</sup> Worst still, he explained, *Brand X* creates further confusion by giving executive agencies the judicial power.<sup>199</sup> Yet he recognized that *Chevron* and *Brand X* were controlling precedents that the court of appeals was bound to apply.<sup>200</sup>

But Judge Gorsuch was not finished. He noted that serious due-process concerns accompanied an agency’s attempt to retroactively nullify a circuit precedent upon which the petitioner had relied long before the agency’s new interpretation.<sup>201</sup> Judge Gorsuch then explained that because the agency was acting in a capacity analogous to that of a legislature in announcing its new rule, the default presumption that legislation is not retroactive should apply.<sup>202</sup> Indeed, applying that presumption made sense given that the agency was exercising its “delegated legislative policymaking authority.”<sup>203</sup> The opinion then went on to hold that the agency’s interpretation would not apply retroactively.<sup>204</sup>

What Judge Gorsuch had insinuated in *De Niz Robles* became abundantly clear in his next significant *Chevron* opinion. Specifically, in *Gutierrez-Brizuela v. Lynch*, in which he was both the author of the panel opinion and the author of a separate concurring opinion, he expounded upon his fundamental concerns with *Chevron*.<sup>205</sup> He began by writing that “*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.”<sup>206</sup> He then went on to discuss how the founders viewed the separation of powers as vital to the protection of individual liberty.<sup>207</sup>

Judge Gorsuch then took aim at *Brand X*. He discussed how “the framers sought to ensure that judicial judgments ‘may not lawfully be revised, overturned or refused faith and credit by’ the elected branches of government.”<sup>208</sup> *Brand X*, however, upsets “this deliberate design” by essentially giving executive agencies the authority to overrule precedents, draining those precedents of their authoritativeness.<sup>209</sup> Then, after pointing to an example of where the Tenth Circuit had to overrule a prior decision after an agency changed its interpretation, Judge

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1171.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1172.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* at 1178 (“[L]egislation bears presumptively prospective effect in our legal order precisely to ensure that the people may rely on the law as it is, so long as it is, including any of its associated judicial interpretations.”).

<sup>205</sup> 834 F.3d 1142, 1149 (2016) (Gorsuch, J., concurring).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1150.

<sup>209</sup> *Id.*

Gorsuch wrote, “[i]f that doesn’t qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we’ve forgotten what might.”<sup>210</sup> *Brand X* also allows for lawmakers to circumvent the deliberately difficult legislative process of bicameralism and presentment.<sup>211</sup>

Judge Gorsuch also pointed to the text of the APA, which vested the courts with the authority “to ‘interpret . . . statutory provisions’ and overturn agency action inconsistent with those interpretations.”<sup>212</sup> *Chevron*, however, effectively removes this power by giving that interpretive power not to courts but to agencies.<sup>213</sup> He also found no comfort in *Chevron*’s limiting the doctrine to when a statute is ambiguous. He wrote that the framers feared a situation where “unchecked by independent courts exercising the job of declaring the law’s meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.”<sup>214</sup>

Judge Gorsuch likewise took issue with *Chevron*’s underlying premise that courts should defer as a matter of statutory construction—namely, that Congress intended such deference to the agency when it drafted a statute with ambiguity. He quipped, “[t]rying to infer the intentions of an institution composed of 535 members is a notoriously doubtful business under the best of circumstances.”<sup>215</sup> He then pointed back to the text of the APA, which *Chevron* never even cited but which says nothing about giving the agency any kind of power to authoritatively interpret a statute.<sup>216</sup>

He next moved to non-delegation concerns, openly questioning Congress’s constitutional authority to delegate substantive-rulemaking power to an executive agency.<sup>217</sup> But he was quick to note that “Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive.”<sup>218</sup> He further conceded that Congress can constitutionally “allow the executive to resolve ‘details.’”<sup>219</sup> He found this, however, to be a far cry from what the Court allowed in *City of Arlington*, where the agency was able to define for itself the limits of its own jurisdiction.<sup>220</sup> Finally, Judge Gorsuch criticized *Chevron* Step One’s reliance on ambiguity. He complained that “questions linger still about just how rigorous *Chevron* step one is supposed to be.”<sup>221</sup>

At least one commentator has suggested that Justice Gorsuch’s goal is to resurrect a more stringent understanding of the non-delegation doctrine—which could cast much of what the current administrative state does in a far different constitutional hue, perhaps invalidating some

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1151.

<sup>212</sup> *Id.* (alteration in original) (quoting 5 U.S.C. § 706)).

<sup>213</sup> *Id.* at 1152.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1153.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1153-54.

<sup>218</sup> *Id.* at 1154.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 1154-55.

<sup>221</sup> *Id.* at 1157.

roles that are taken for granted today.<sup>222</sup> While still a member of the Tenth Circuit, then-Judge Gorsuch wrote a powerful opinion in *United States v. Nichols*.<sup>223</sup> There, he took issue with the Sex Offender Registration and Notification Act’s delegation to the Attorney General the decision of whether to require those convicted prior to the Act to comply with the Act’s requirements and how to go about doing so.<sup>224</sup> Judge Gorsuch was especially concerned with this provision. He highlighted the basic constitutional mandate that Congress may not delegate its legislative power to the executive branch.<sup>225</sup> Although the Supreme Court has shied away from enforcing the non-delegation doctrine in recent decades, Judge Gorsuch argued that courts should be more willing to take up the task of deciding whether an unconstitutional delegation has occurred.<sup>226</sup>

Justice Gorsuch has continued his attack on *Chevron*—recently suggesting that the doctrine is practically dead. In *BNSF Railway Co. v. Loos*, the Court faced a potential *Chevron* problem in dealing with a Federal Employers’ Liability Act question.<sup>227</sup> Lisa Blatt, the counsel for the petitioner, notably avoided *Chevron* as much as possible<sup>228</sup> and the Court followed suit—engaging in textual analysis and not citing *Chevron* even once.<sup>229</sup>

Justice Gorsuch, joined by Justice Thomas, dissented from the Court’s interpretation and its holding. However, he welcomed the Court’s snubbing of *Chevron*.<sup>230</sup> He also jabbed the *Chevron* doctrine, writing that “if it retains any force,” then it would allow a party “to parlay any statutory ambiguity into a colorable argument for judicial deference to the [agency’s] view, regardless of the Court’s best independent understanding of the law.”<sup>231</sup> He then congratulated the petitioner on being “well aware of the mounting criticism of *Chevron* deference” and arguing the case in a way that avoided relying on it.<sup>232</sup> In the end, Justice Gorsuch could not help but applaud a *Chevron*-free outcome—writing:

Instead of throwing up our hands and letting an interested party—the federal government’s executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is in light of its text, its context, and our precedent.<sup>233</sup>

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<sup>222</sup> Heather Elliott, *Justice Gorsuch’s Would-Be War on Chevron*, 21 GREEN BAG 2D 315, 319-21 (2018).

<sup>223</sup> 784 F.3d 666, 667-77 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

<sup>224</sup> *Id.* at 668.

<sup>225</sup> *Id.* at 670.

<sup>226</sup> *See id.* at 671 (“[T]he difficulty of the inquiry doesn’t mean it isn’t worth the effort. After all, at stake here isn’t just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution . . .”).

<sup>227</sup> No. 17-1042, 2019 WL 1005830, at \*2 (U.S. Mar. 4, 2019).

<sup>228</sup> *See* Transcript of Oral Argument at 58, *BNSF Ry. Co. v. Loos*, No. 17-1042 (U.S. Mar. 4, 2019) (bringing up *Chevron* as her time was about to expire).

<sup>229</sup> *BNSF*, 2019 WL 1005830, at \*2-\*8.

<sup>230</sup> *Id.* at 11 (“Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less.”).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

As for *Auer*, Justice Gorsuch joined Justice Thomas’s dissent from denial of certiorari in a case that invited revisiting *Auer*.<sup>234</sup> Given that vote and his strongly expressed views on *Chevron*, Justice Gorsuch may well equally (or even more strongly) disfavor *Auer*. We will find out by the end of the Term, when the Court’s decision in *Kisor* is released. Meanwhile, he will surely continue pushing to revisit *Chevron*. Justice Gorsuch’s willingness to engage in deep analysis (even writing concurring opinions to his own majority as a circuit judge) should lead us to expect studious concurring (or dissenting) opinions, depending on how broad or narrow a majority opinion is and whether it addresses constitutional issues (as opposed to prudential issues).

Justice Kavanaugh’s concerns regarding *Chevron* (and, by relation, *Auer*) appear related not just to constitutional concerns but also by the doctrine’s practical impact and workability. He believes that *Chevron* “encourages agency aggressiveness on a large scale [because under] the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.”<sup>235</sup> Meanwhile, judges suffer from the lack of an “objective or determinate way to figure out whether something is ambiguous.”<sup>236</sup>

This is not to say that Justice Kavanaugh does not share Justice Gorsuch’s concerns about *Chevron*’s overall legitimacy. Indeed, he noted how the doctrine “has no basis in the Administrative Procedure Act” and, hence, “is an atextual invention by courts.”<sup>237</sup> Further still, he exclaimed that “*Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”<sup>238</sup>

As a D.C. Circuit judge, Justice Kavanaugh frequently wrote opinions discussing how various administrative-law doctrines could be better enforced as a check against expansive administrative power.<sup>239</sup> For example, he strongly supported vibrant application of the “hard-look” doctrine.<sup>240</sup> Under this doctrine, a court will invalidate an agency’s rule when

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>241</sup>

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<sup>234</sup> See *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., with whom Gorsuch, J., joined dissenting from denial of certiorari) (inviting reconsideration of *Seminole Rock* and *Auer*).

<sup>235</sup> Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017).

<sup>236</sup> *Id.* at 1913.

<sup>237</sup> Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2150.

<sup>238</sup> *Id.*

<sup>239</sup> For a good overview of then-Judge Kavanaugh’s jurisprudence, see Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (quoting *Motor Vehicle Mfr. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In one D.C. case upholding new EPA regulations, then-Judge Kavanaugh dissented—claiming the EPA failed to consider the costs of imposing the regulations.<sup>242</sup> “In my view,” he wrote, “it is unreasonable for EPA to exclude consideration of costs in determining whether it is ‘appropriate’ to impose significant new regulations on electric utilities.”<sup>243</sup> Specifically, the court applied *Chevron* and concluded that the term “appropriate” in the statute governing when the EPA could issue the regulations at issue was ambiguous.<sup>244</sup> The EPA interpreted “appropriate” to not include a requirement that it consider costs.<sup>245</sup>

Judge Kavanaugh—later vindicated by the Supreme Court,<sup>246</sup> in an opinion by Justice Scalia—found the EPA’s argument untenable. He wrote that “under the APA, an agency must consider the relevant factors when exercising its discretion under the governing statute.”<sup>247</sup> Regardless of whether the term was ambiguous, the agency could not simply ignore the massive new burdens that its regulations might impose.<sup>248</sup> And this was not the only time that Judge Kavanaugh insisted that an agency show that it considered the impact of its new measure. He frequently invoked *State Farm*’s hard-look review to ensure that “the agency action was reasonable and reasonably explained.”<sup>249</sup>

The theme of checking agency power surfaced time-and-again throughout Judge Kavanaugh’s opinions on the D.C. Circuit.<sup>250</sup> Indeed, one of Judge Kavanaugh’s greatest contributions to the *Chevron* discussion was the role of *Brown & Williamson*’s major questions doctrine—which Judge Kavanaugh referred to as the “major rules” doctrine.<sup>251</sup> For example, when the FCC issued its controversial net-neutrality rules in 2015, the D.C. Circuit ultimately upheld the rules after applying *Chevron* analysis.<sup>252</sup> Judge Kavanaugh noted his dissent—arguing that the case was a clear example of where the major-rules doctrine should have

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<sup>242</sup> *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1258-59 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev’d sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015).

<sup>243</sup> *Id.* at 1259.

<sup>244</sup> *Id.* at 1260.

<sup>245</sup> *Id.* In fact, adding insult to injury, the EPA’s reading of “appropriate” to not include consideration of costs was a changed interpretation. *Id.* Previously, the EPA had understood the statute to require that the agency consider costs. *Id.*

<sup>246</sup> *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

<sup>247</sup> *White Stallion Energy Ctr.*, 748 F.3d at 1261 (citing *State Farm*, 463 U.S. at 42-43).

<sup>248</sup> *See id.* (“In this case, whether one calls it an impermissible interpretation of the term ‘appropriate’ at *Chevron* step one, or an unreasonable interpretation or application of the term ‘appropriate’ at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*, the key point is the same: It is entirely unreasonable for EPA to exclude consideration of costs in determining whether it is ‘appropriate’ to regulate electric utilities under the MACT program.”).

<sup>249</sup> *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015); *accord Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017); *Americans for Clean Energy v. EPA*, 864 F.3d 691, 727 (D.C. Cir. 2017); *Cytospor Therapeutics, Inc. v. FDA*, 715 F.3d 922, 926 (D.C. Cir. 2013); *Nat’l Tel. Co-op Ass’n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009); *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

<sup>250</sup> *See, e.g., PHH Corp. v. Consumer Fin. Prot. Bd.*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (“Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”).

<sup>251</sup> *See infra* notes 283–86.

<sup>252</sup> *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 703-06 (D.C. Cir. 2016).

applied.<sup>253</sup> He began by emphasizing how “Congress did not clearly authorize the FCC to issue the net neutrality rule.”<sup>254</sup> Absent clear congressional authorization, enactment of “major agency rules of this kind” was impermissible.<sup>255</sup> To Judge Kavanaugh, the major-rules exception to *Chevron* was not merely a box for courts to tick when engaging in *Chevron* review. Quite the contrary: he saw the major rules doctrine as helping to “preserve the separation of powers and operate[] as a vital check on expansive and aggressive assertions of executive authority.”<sup>256</sup> Thus, Judge Kavanaugh vigorously advocated for broader application of the major-rules doctrine as enforcing basic structural requirements that can get lost in rote application of *Chevron*.<sup>257</sup>

For *Chevron* specifically, Justice Kavanaugh also fears that “policy preferences can seep into ambiguity determinations in subconscious ways.”<sup>258</sup> Specifically, the lack of a “neutral method to evaluate whether a text is clear or ambiguous” means that courts should avoid using “ambiguity-dependent tools and canons” such as *Chevron* and *Auer*.<sup>259</sup> Justice Kavanaugh sees the ambiguity question not as a minor inconvenience in marginal cases, but as a major threat that “undermine[s] the stability of the law and the neutrality (actual and perceived) of the judiciary.”<sup>260</sup> Even if judges could find neutral ways for determining if something is ambiguous, “[i]t is all but impossible to communicate clarity versus ambiguity determinations in a reasoned and accountable way”—especially in the context of controversial cases.<sup>261</sup>

Further, recalling his experience as White House Staff Secretary to President George W. Bush, Justice Kavanaugh explained that “*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”<sup>262</sup> He went on to say:

We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope . . . . After all, an executive branch decisionmaker might theorize, “If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is accepted. And isn’t just about every statute ambiguous in some fashion or another? Let’s go for it.”<sup>263</sup>

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<sup>253</sup> *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *See id.* at 419 (“This major rules doctrine (usually called the major questions doctrine) is grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies. In short, while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules.” (emphasis in original) (citations omitted)).

<sup>258</sup> Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2139.

<sup>259</sup> *Id.* at 2140.

<sup>260</sup> *Id.* at 2143.

<sup>261</sup> *Id.* at 2142-43.

<sup>262</sup> *Id.* at 2150.

<sup>263</sup> *Id.* at 2151.

Worst still, Justice Kavanaugh pointed out that the Executive can choose “a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency’s legal interpretation is not the best, yet that interpretation carries the force of law. Amazing.”<sup>264</sup>

Thus, because Justice Kavanaugh regards ambiguity-dependent canons as “a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable among judges of different partisan backgrounds and ideological predilections,” he favors revisiting *Chevron* to devise a more accountable solution.<sup>265</sup> But since prudential concerns are the driving force behind Justice Kavanaugh’s views of *Chevron* and *Auer*, he would probably be comfortable joining a narrower opinion—particularly one that leaves in place the ability for Congress to expressly delegate technical decisions to agencies.<sup>266</sup> All of this, of course, begs the question of what could replace *Chevron* and *Auer*. The balance of this paper seeks to offer some thoughts.

#### IV. Life After *Chevron*—Possible Alternatives

In place of *Chevron*, Justice Gorsuch has advocated for de novo review of agency interpretation.<sup>267</sup> His primary concern is that courts be able to “fulfill their duty to exercise their independent judgment about what the law *is*.”<sup>268</sup> He further explains that several benefits would flow from having de novo review of agency interpretations. Specifically,

[It] would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.<sup>269</sup>

In recognition that deference to agencies is, at least in part, based on concerns that generalist judges do not enjoy the level of expertise of those in an agency, Justice Gorsuch noted that “courts could and would consult agency views and apply the agency’s interpretation.”<sup>270</sup> But ultimately, *the court* would decide whether that interpretation “accords with the best reading of a statute.”<sup>271</sup> And as for the argument that *Chevron* affords agencies the ability to easily implement policy changes, Justice Gorsuch argued “an agency’s recourse for a judicial declaration of the law’s meaning that it dislikes would be precisely the recourse the Constitution prescribes—an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment.”<sup>272</sup>

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 2143.

<sup>266</sup> *See id.* at 2153-54 (explaining that the indeterminacy of *Chevron* doctrine is the culprit in preventing a more neutral and predictable jurisprudence).

<sup>267</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (2016) (Gorsuch, J., concurring).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

De novo review—treating statutes implicating agency authority just like other statutes subject to judicial construction—has obvious advantages, but would also raise several issues. For one thing, although his point about maintaining stability in the law is well taken, *Chevron* was born from a *deregulatory* instinct.<sup>273</sup> If one concern is the expansion of the administrative state with ever increasing reams of regulations that ordinary, law-abiding citizens could never hope to understand, then locking an agency into a fixed, pro-regulatory position could hamper future efforts at deregulation.

Further, though Justice Gorsuch leaves room for courts to consider interpretations proposed by the agency, he offers no specific solution on how judges can deal with complex statutory schemes where it appears that Congress intended for agencies to exercise their expertise and discretion. One response to that problem might be that a judicial construction, in some cases, would only need to set the metes and bounds, which may be all that the judiciary could do when it discerns Congress’s clear intent to authorize bounded discretion. When that happens, an agency would presumably be within a safe harbor if it modified its regulations to stay within those parameters. That would still be de novo statutory construction.

And, of course, then-Judge Gorsuch was speaking via a single concurring opinion, which is hardly the place to address all possible questions dealing with a complicated problem in administrative law. But if the Court is going to overrule or significantly limit *Chevron*, then some guidance will be needed regarding how courts can treat agency interpretations. The remainder of this section addresses some possibilities as food for thought among the conference’s attendees.

#### A. *The Role of Congress*

**Clear statements.** Not just here, but in the law in general, clarity from Congress would solve a host of jurisprudential problems. That’s hardly a new observation, but getting Congress to undertake the difficult task (and perhaps even politically impossible task in many cases) of legislating without obvious ambiguity is elusive, to put it mildly. But one intermediate solution could be to essentially reverse how courts currently treat ambiguity under *Chevron*. That is, if the judicially-created presumption upon which *Chevron* relies (that Congress intends to delegate whenever there is ambiguity) turns out to be inadequate, perhaps the Court should flip it by presuming that Congress intends such delegation only when it expressly affirms that ambiguity in a particular context is tantamount to a delegation.<sup>274</sup> At least some of Justice Gorsuch’s non-delegation and separation-of-powers concerns would thereby be addressed.<sup>275</sup>

Clear-statement rules are not uncommon and would be no less justified here. The Court will not read statutes without a clear statement to intrude upon the traditional domain of the state

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<sup>273</sup> See *supra* notes 15–16 and accompanying text.

<sup>274</sup> See Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2154-56 (generally endorsing the idea of plain-statement rules as an alternative to ambiguity-dependent canons); see also Walker, *supra* note 38, at 1421 (“[T]he reviewing court could assess whether the collective Congress reasonably intended to delegate by ambiguity that particular issue to the agency. The court would inquire whether the ambiguity seems like a deliberate delegation by the collective Congress, or whether it seems more like the result of administrative collusion during the legislative process—or even just legislative inadvertence—that the collective Congress would not have intended to result in a delegation of interpretive authority to the agency.”).

<sup>275</sup> See *supra* notes 217–26 and accompanying text.

law (the federalism canon), to apply extraterritorially, or to intrude into the judiciary’s authority to grant habeas corpus relief, among other things.<sup>276</sup> The structural principles that justify a clear statement there are not self-evidently mightier than the concern that Americans not be ruled by bureaucracies without clear warrant. The Court could say that it presumes that Congress does not intend to approach non-delegation and separation-of-powers concerns casually, thereby requiring clarity. Ideally, a clear-statement rule would lead drafters of legislation to think more carefully about legislation implication administrative agencies more generally.<sup>277</sup> A less desirable result would be for Congress to simply include boiler-plate language authorizing gap-filling in every statute; that result would not reflect careful consideration but would amount to just another tedious formalism.

***A deregulatory presumption.*** Even if Congress responded with clearer statutes and express direction to agencies as to when they may fill gaps (rather than boilerplate authorizations), the short and median-term costs could be high. The concern that courts may thwart deregulatory policies through pro-regulatory interpretations would still pose a problem. An ancillary solution may be to have a canon that specially treats deregulatory actions by agencies deferentially—either by analogy to executive decisions not to prosecute or as a concession by an agency that it wishes to avoid creating non-delegation, federalism, separation-of-powers, or individual-liberty concerns. Like an admission against interest, an agency that attempts to lessen or retrench on its existing regulatory grip might warrant more deference, while new agency interpretations that would *expand* its regulatory grasp or impose new burdens or otherwise make non-deregulatory changes (particularly when they would disturb established expectations) could be reviewed without deference.<sup>278</sup> Although it is simplistic to suggest that every agency action could fit clearly into either of those categories, the principle may be worth developing.

***Re-regulation requirements.*** As for *Auer*, courts could also look to the agency’s governing statute to see whether an agency’s interpretation of its regulations should be viewed as authoritative. Otherwise, if the agency wishes to bring about significant changes to its own regulatory policy, courts may presume that the same level of rigor required to adopt the regulation in the first place should be required to modify the regulation. Notice-and-comment rulemaking is tedious—and eliminating the easy escape-hatch of *Auer* deference may make agencies more careful *ex ante*.

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<sup>276</sup> See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) (stating that repeal of habeas corpus jurisdiction will not be presumed absent a clear statement); *Gregory v. Ashcroft*, 501 U.S. 452, 463-64, 470 (1991) (explaining that absent a clear statement, the court will assume that a statute is not seeking to intrude on the traditional domain of the states).

<sup>277</sup> Cf. Walker, *supra* note 38, at 1425 (explaining that a “more limited *Chevron* doctrine would also likely encourage the collective Congress to more expressly indicate its intent to delegate by ambiguity”).

<sup>278</sup> See Garland, *supra* note 15, at 513-20 (discussing proposed theories for courts to “review deregulation less rigorously than they would the initial promulgation of a rule”).

## B. *The Use of Textual Canons of Statutory Interpretation*

One of the most significant points lodged against overruling *Chevron* (and *Auer* for that matter) is the fear that judges will not have the wherewithal to interpret complex regulatory schemes. This concern is surely overblown.

To start, if the criticism that judges can't deal with complex legislation is fair, then federal judges have little business engaging in *any* modern federal-statutory interpretation. Federal judges must regularly interpret everything from the federal criminal code to federal patent laws to federal securities laws, all of which are extraordinarily complex (before adding in all the state laws brought before federal courts sitting in diversity). Indeed, the fear that federal judges cannot understand complex statutory and regulatory schemes finds no premise in *Chevron* itself. After all, faithful application of *Chevron* Step One *requires* the judge to first determine—using traditional tools of statutory construction—whether a provision has a clear meaning. And it appears that judges who try to avoid finding ambiguity are not given enough credit.<sup>279</sup>

Moreover, the APA itself envisions an interpretive role for courts.<sup>280</sup> There is no obvious reason why the same canons that courts apply in construing other complex statutes cannot help judges satisfy the role the APA assigns them by eliminating inferior interpretations under *Chevron* Step One.<sup>281</sup> Justice Kavanaugh, in his review of Judge Katzmann's book, *Judging Statutes*, strongly endorsed the idea of using the traditional canons of interpretation as a remedy to *Chevron*.<sup>282</sup> In fact, Justice Kavanaugh has written extensively on possible alternatives to the current *Chevron* doctrine. With that, we can turn to his specific proposals.

## C. *Justice Kavanaugh's Solution: Maintain Deference When Policy Implementation Falls Within the Agency's Expertise, But Let Judges Tackle Questions of Interpretation*

In writings prior to his nomination to the Supreme Court, Justice Kavanaugh has already indicated where he thinks agency-deference doctrine should go. In a nutshell, he would give deference when Congress grants the agency authority to implement policies within the agency's expertise. But he would give no deference for questions of interpretation and construction.

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<sup>279</sup> See Kethledge, *supra* note 138, at 319 (“I would suggest that the persistence and willingness of judges to work hard before declaring statutes ambiguous is an important but perhaps overlooked difference between judges.”).

<sup>280</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (2016) (Gorsuch, J., concurring) (discussing the APA).

<sup>281</sup> See Kethledge, *supra* note 138, at 329-30 (“What is necessary for textualism to work is simply that the judge construe the text in a principled way. There are plenty of principles and rules to direct that process: we have definitions for every word in the language, and rules of grammar, and, perhaps most important, our own ordinary usage of the language . . . . For, in my experience at least, if one works hard enough, all the other interpretations are eventually revealed as imposters.”); see also Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2129 (explaining that “textualists tend to find language to be clear rather than ambiguous more readily than purposivists do”).

<sup>282</sup> See generally Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88.

To begin with, Justice Kavanaugh favors strong application of the major-questions doctrine per *Brown & Williamson* (which he refers to as the “major rules” doctrine).<sup>283</sup> As Justice Kavanaugh wrote:

This major rules doctrine (usually called the major questions doctrine) is grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.<sup>284</sup>

Absent some kind of “clear authorization” from the most electorally accountable branch of government (Congress), an agency does not possess the authority to address major social or economic issues.<sup>285</sup> While the Supreme Court “has not articulated a bright-line test that distinguishes major rules from ordinary rules,” there are several factors relevant to the determination, namely: “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”<sup>286</sup>

Justice Kavanaugh concedes that the test “has a bit of a ‘know it when you see it’ quality.”<sup>287</sup> But regardless, if an issue presents a major question of political or economic significance, then “Congress must clearly authorize an agency to issue [the] major rule.”<sup>288</sup> Thus, there is a chance that Justice Kavanaugh may be open to retaining *Chevron*, but with a more expanded understanding of what constitutes a “major question”—at least initially.

However, as discussed above, Justice Kavanaugh’s core concern with doctrines like *Chevron* and *Auer* is that they rely on courts finding ambiguity. Justice Kavanaugh distrusts courts’ ability to determine ambiguity based upon neutral and explicable principles.<sup>289</sup> Further, while an expanded major-questions doctrine could place limits on *Chevron*, Justice Kavanaugh still acknowledges that trying to separate out only major issues could be incoherent.<sup>290</sup> As such, he may well ultimately conclude that doing away with *Chevron* (and *Auer*) altogether is an essential step in restoring proper bounds of deference.<sup>291</sup>

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<sup>283</sup> See, e.g., *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (explaining that the “major rules doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority”).

<sup>284</sup> *Id.* at 419 (citation omitted).

<sup>285</sup> *Id.* at 422.

<sup>286</sup> *Id.* at 422-23.

<sup>287</sup> *Id.* at 423.

<sup>288</sup> *Id.* at 425.

<sup>289</sup> See Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2121 (“[C]ourts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons.”).

<sup>290</sup> See *id.* at 2152 (“[I]f *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?”).

<sup>291</sup> See *id.* at 2138 (“The simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous.”).

In place of *Chevron* (and other ambiguity-dependent canons), Justice Kavanaugh recommends the following two-step process of interpretation.<sup>292</sup>

First, courts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction. Second, once judges have arrived at the best reading of the text, they can apply—openly and honestly—any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text.<sup>293</sup>

As for how to determine the “best reading” of a provision, “[c]ourts should try to read statutes as ordinary users of the English language might read and understand them.”<sup>294</sup> He then explains that “the ‘best reading’ of a statutory text depends on (1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language.”<sup>295</sup> One important issue with using the canons—as Judge Thapar pointed out—is that the Court has not “explicitly described which canons are ‘traditional tools’ and which are not.”<sup>296</sup> While the semantic canons would apply regardless, the Court at some point would need to offer more guidance on which substantive canons so apply—so that judges do not end up using more purposivist approaches and nullifying any gains from doing away with *Chevron*.

Note that these same rules of interpretation could apply just as equally to regulations as they do to statutes (and hence obviate the need for *Auer*). All of this said, Justice Kavanaugh still recognizes that “*Chevron* makes a lot of sense in certain circumstances.”<sup>297</sup> Specifically, the doctrine “affords agencies discretion over how to exercise authority delegated to them by Congress.”<sup>298</sup> Indeed, he even concedes that it “makes a great deal of sense” for courts to “stay out” when “Congress delegates the decision to an executive branch agency that makes the policy decision.”<sup>299</sup> Indeed, *staying out* when Congress has vested policy control in an agency should not require *Chevron*; if the court’s construction of the statute is that Congress has left a wide range of choices available to the agency, that conclusion is just as honorable for a court as giving the text a fixed meaning. Indeed, if Congress clearly demarcates such a range, it would be a usurpation for a court to directly select one point within the authorized range and proclaim it to be the will of Congress. But as Justice Kavanaugh has explained, the *Chevron* doctrine has not been limited to such instances where Congress expressly gives policymaking discretion to agencies.<sup>300</sup> Instead, the doctrine applies “whenever a statute is ambiguous.”<sup>301</sup>

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<sup>292</sup> *Id.* at 2144.

<sup>293</sup> *Id.* (footnote omitted).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 2144–45.

<sup>296</sup> *Arangure v. Whitaker*, 911 F.3d 333, 339 (6th Cir. 2018).

<sup>297</sup> Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2152.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

In short, Justice Kavanaugh believes in deference to agencies—but he does not agree that the *trigger* for such deference is simply a finding of ambiguity in its most granular sense.<sup>302</sup> Deference to an agency’s expertise is appropriate when Congress has expressly given an agency discretion in implementing policy. As a solution, Justice Kavanaugh proposes the following:

To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms like “reasonable,” “appropriate,” “feasible,” or “practicable.” In those cases, courts should say that the agency may choose among reasonable options allowed by the text of the statute. In those circumstances, courts should be careful not to unduly second-guess the agency’s choice of regulation. Courts should defer to the agency, just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of *State Farm*. This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency’s statutory interpretation and simultaneously be very deferential to an agency’s statutory interpretation and simultaneously be very deferential to an agency’s policy choices within the discretion granted to it by the statute.

But in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency’s interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial manner in most cases.<sup>303</sup>

Drawing a distinction between instances where Congress has textually committed a decision to an agency’s discretion and instances that call for what is more-or-less statutory interpretation would mitigate the objection that courts are breaking with the text of the APA by declining to interpret statutes. But it does allow for Congress to direct that certain decisions be made by an agency with a clear-statement rule, *which itself* would be the part of the statute that courts would interpret.

The clear-statement rule requiring textual commitment of something to an agency’s discretion also should remove concerns that courts are precluding themselves from saying what the law is. Congress is not necessarily required to invest the courts with authority to review every administrative action, of course.<sup>304</sup> When Congress explicitly leaves something to an agency, this might be viewed as analogous to refining a federal court’s jurisdiction.

Justice Kavanaugh’s proposal also is not unfounded in the Court’s own precedents.<sup>305</sup> Again, the proposal would still leave ample room for judges to defer to expert agencies.

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<sup>302</sup> *Id.* at 2153.

<sup>303</sup> *Id.* at 2153-54 (citing *Motor Vehicle Mfr. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (other citations omitted).

<sup>304</sup> See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (“There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (“Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.”).

<sup>305</sup> See, e.g., *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. But

“Agency expertise,” wrote Judge Starr, “is especially valuable when a regulatory scheme is complex or statutory terms are broad and imprecise. Many regulatory statutes, particularly those enacted in the 1960’s and since, are highly complex.”<sup>306</sup> Further, as then-Judge Roberts explained, “[s]uch deference is particularly appropriate in the context of ‘a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’”<sup>307</sup> By still affording courts the ability to defer when Congress has textually committed to an agency the power to exercise its expert judgment, judges will not need to put on the hat of a technocrat.

## V. The More Immediate Question: What to Do with *Auer*

Much of the broader discussion has focused on *Chevron*, but *Auer* is first up at the Supreme Court. Many concerns with *Chevron*—particularly those raised by Justice Kavanaugh regarding the lack of neutral principles for finding ambiguity—apply equally to *Auer*. Likewise, Judge Thapar’s and others’ criticism that *Auer* allows agencies to seize greater power without going through the rulemaking process echoes the concerns that *Chevron* itself invites expansive (and perhaps unconstitutional) agency power.<sup>308</sup> And, of course, *Auer* is based on the same premise as *Chevron*—namely that the agency should be given deference in interpreting an ambiguous provision.

Yet *Auer* deference raises its own issue that is worth mentioning—mostly separation of powers. Recall that *Auer* instructs that an agency’s interpretation of its *own* regulation gets deference when the agency’s regulation is ambiguous. The author of the text (legislative power) then becomes its enforcer (executive power) and interpreter (judicial power). *Auer* unsurprisingly engenders concerns that all governmental authority appears concentrated in one body.<sup>309</sup> And, of course, there is the practical worry that agencies will intentionally write ambiguous regulations so that they have greater leeway in interpreting them in the future.<sup>310</sup>

This distinction between *Chevron* and *Auer* does make it possible to let *Auer* go but still retain *Chevron*.<sup>311</sup> But, as recent arguments have pointed out, *Chevron* itself comes with its own

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where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”)

<sup>306</sup> Starr, *supra* note 12, at 310.

<sup>307</sup> *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 729 (D.C. Cir. 2005) (Roberts, J.) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

<sup>308</sup> *United States v. Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring).

<sup>309</sup> See Manning, *supra* note 28, at 639 (“In short, whereas *Chevron* retains one independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place no independent interpretive check on lawmaking by an administrative agency.”).

<sup>310</sup> See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (expressing such a concern).

<sup>311</sup> See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency’s interpretation of the statute it is charged with implementing. But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to *itself* the implementation of that rule, and thus the initial determination of the rule’s meaning.”).

separation-of-powers concerns. Indeed, strong points have been made regarding how *Chevron* allows Congress to essentially give away its law-making authority to the executive branch—especially considering the very lax modern understanding of non-delegation doctrine.<sup>312</sup> As such, if worries about the pooling of power into one set of hands form the basis for discarding *Auer* and *Seminole Rock*, it would be surprising if the same concerns are not then leveled against *Chevron* itself. One can imagine a strong concurrence from Justice Gorsuch or Justice Thomas in *Kisor* making the point that the effects of *Chevron* in allowing not only legislative, but also judicial, functions to be concentrated in executive agencies warrants reconsidering *Chevron*.

In the meantime, the principal briefs in *Kisor* have been filed—providing a preview for what a decision may ultimately entail.<sup>313</sup> Notably, the respondent—the U.S. Government—does not defend *Auer* deference as the courts know it, and many of its arguments overlap with its ostensible adversary’s.

Many of *Kisor*’s arguments as petitioner are quite familiar, echoing various concerns about excessive deference that this paper has explored. *Kisor* notes how the APA was enacted after the Court decided *Seminole Rock*, meaning that the APA’s stringent requirements should override *Seminole Rock*’s generous deference to agencies.<sup>314</sup> Indeed, *Seminole Rock* and *Auer* allow agencies to circumvent the APA’s substantive and procedural safeguards designed “to protect the public from irregular agency lawmaking.”<sup>315</sup> *Auer* deference is also inconsistent with the Court’s broader understanding that interpretive rules are meant only “to advise the public.”<sup>316</sup> But, *Kisor* continues, *Auer* anomalously gives agency interpretations of its regulations the force of law.<sup>317</sup> Further, he emphasizes how *Auer* fosters unpredictability by allowing agencies to create vague regulations malleable to the agency but unclear to the regulated public,<sup>318</sup> which also engenders separation-of-powers concerns.<sup>319</sup> The brief further explains how *Auer* cannot be justified like *Chevron* because *Chevron*-deference is only given to interpretations that survived the notice-and-comment or other authoritative processes.<sup>320</sup> No such layer of protection exists for *Auer*—the agency can simply issue a new interpretation of its regulation that becomes binding.<sup>321</sup> Finally, *Kisor*’s brief contends that because *Seminole Rock* and *Auer* are purely judicial creations lacking a basis in statutory or constitutional text, *stare decisis* has less force.<sup>322</sup> Further, no private-reliance interests exist for *Auer*—indeed, the doctrine creates instability in the

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<sup>312</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (2016) (Gorsuch, J., concurring) (highlighting how current *Chevron* doctrine allows for a concentration of both legislative and judicial powers within the executive branch—thwarting the framers’ design); Kavanaugh, *Fixing Statutory Interpretation*, *supra* note 88, at 2150 (explaining how *Chevron* shifts power from the legislative to the executive branch); see also *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (“When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”).

<sup>313</sup> For full disclosure, the authors of this paper have filed amicus briefs in support of the petitioner in *Kisor*.

<sup>314</sup> Brief for Petitioner at 26, *Kisor v. Wilkie*, No. 18-15 (U.S. Jan. 24, 2019).

<sup>315</sup> *Id.* at 30.

<sup>316</sup> *Id.* at 32-33 (citation omitted).

<sup>317</sup> *Id.* at 33.

<sup>318</sup> *Id.* at 36-40.

<sup>319</sup> *Id.* at 43-45.

<sup>320</sup> *Id.* at 45-46.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 47-50.

law by allowing agencies to change the substantive meaning of regulations without rulemaking protections.<sup>323</sup>

The government’s position regarding *Auer* is essentially this: mend it, don’t end it. One reading the brief without knowing which party wrote it might think that it was the party *opposing* *Auer* deference, not the one supposedly defending it. From the get-go, the government concedes that *Auer* and *Seminole Rock*—as currently applied—cause significant practical problems and are inconsistent with the APA.<sup>324</sup> The government agrees with petitioner that *Auer* deference undermines APA safeguards and elides the difference between legislative and interpretive rules.<sup>325</sup> The government goes so far as to recognize that “courts have not always carefully examined whether there is genuine regulatory ambiguity in the first place.”<sup>326</sup> In other words, the government concedes that a doctrine used by and benefiting its *own clients* is unduly expansive.

But rather than gut *Auer* altogether, the government suggests placing safeguards in the doctrine to alleviate its worst attributes. First, its reach should be massively curtailed. Analogizing to the restrictions that *Mead Corp.* imposed on *Chevron* doctrine, the government says that *Auer* should not even apply unless “certain threshold requirements” are satisfied.<sup>327</sup> To begin with, the government’s version of “Step One” emphasizes the need for courts to first “apply *all* ‘the ordinary tools’ of statutory and regulatory construction”—including substantive canons—before finding a regulation ambiguous.<sup>328</sup> And the government defines “ambiguous” as “‘yield[ing] more than one reasonable interpretation’” after the court’s careful consideration.<sup>329</sup> Further, for Step Two, the government stresses how “an agency’s interpretation must be *reasonable*—*i.e.*, it must be one of the reasonable readings to which the regulation is susceptible even after applying the traditional tools of construction.”<sup>330</sup>

But the government doesn’t stop there. It goes on to propose that *even if* a regulation is found ambiguous, deference is warranted only when an interpretation

1. is “not inconsistent” with prior interpretations and provides fair notice to regulated parties;
2. “is sufficiently grounded in the agency’s expertise,” rather than be merely a proposed reading of text that has little to do with that special area, and

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<sup>323</sup> *Id.* at 51-52.

<sup>324</sup> Brief for Respondent at 12, 15-16, *Kisor v. Wilkie*, No. 18-15 (U.S. Feb. 25, 2019).

<sup>325</sup> *Id.* at 22-24.

<sup>326</sup> *Id.* at 27.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 28 (emphasis added).

<sup>329</sup> *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)); *see also id.* at 29 (“A rigorous application of the tools of construction would obviate any need for *Seminole Rock* deference in many cases. Courts should instead strive where possible to give effect directly to an agency’s legislative rule—the agency action that, under the APA, carries the force and effect of law.”).

<sup>330</sup> *Id.* (emphasis in original).

3. represents *the agency's* considered views—not simply the views of “low-level employees.”<sup>331</sup>

If an interpretation fails to meet these requirements, only *Skidmore* deference is appropriate, according to the government.<sup>332</sup> Regarding inconsistency, the government says that courts should deny *Auer* deference if “the agency adopts a novel interpretation that disrupts settled expectations”—hopefully alleviating concerns about fair notice.<sup>333</sup> And if agencies wish to change their interpretation and have it get binding deference, then they can go through a notice-and-comment process.<sup>334</sup>

But, unlike petitioner, the government stops short of calling for *Auer's* total demise. It says that Congress could alter *Auer* at any time—but thus far has chosen not to do so.<sup>335</sup> And it disagrees with petitioner that no reliance interests exist. Eliminating *Auer* deference could upend schemes around which regulated parties have arranged their affairs, given that challenges now would not require courts to essentially allow the agency to resolve the question.<sup>336</sup> Concomitantly, decisions that are fundamentally policy-oriented could end up in the laps of hundreds federal judges (generating potentially massive conflict and confusion) rather than staying with politically accountable branches.<sup>337</sup> In areas where the conditions described above are met, the government concludes, it is better to have a “properly circumscribed” test that employs “traditional tools of legal interpretation” while still leaving true and purposeful ambiguity to policy makers.<sup>338</sup> The government also worries that eliminating *Auer* will jeopardize uniform application of regulations and agencies’ ability to apply scientific and technical expertise.<sup>339</sup> Finally, the government says that its version of *Auer* will provide regulated parties with greater “certainty and predictability” than complete de novo judicial review.<sup>340</sup>

The government also tries to shield *Chevron*. Specifically, it argues that the premises giving rise to *Chevron* do not apply to *Auer* because in the *Auer* context, Congress has not implicitly delegated a decision to an agency.<sup>341</sup> Thus, the government wants *Chevron* and *Auer* to be distinguished. Whether the government ultimately succeeds in convincing the Court that *Chevron* should stay even if *Auer* goes is a question that will have to wait for a future Term.

Although *Kisor* raises only the question of whether *Auer* and *Seminole Rock* should be overruled, another case presents a *Chevron* question. Specifically, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, asks whether the Hobbs Act requires giving *Chevron* deference to the FCC’s interpretation of the Telephone Consumer Protection Act.<sup>342</sup> The

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<sup>331</sup> *Id.* at 27.

<sup>332</sup> *Id.* at 12, 28.

<sup>333</sup> *Id.* at 31.

<sup>334</sup> *Id.* at 33.

<sup>335</sup> *Id.* at 35.

<sup>336</sup> *Id.* at 37-38.

<sup>337</sup> *Id.* at 39-40.

<sup>338</sup> *Id.* at 40.

<sup>339</sup> *Id.* at 40-43.

<sup>340</sup> *Id.* at 43.

<sup>341</sup> *Id.* at 19-20.

<sup>342</sup> *See* No. 17-1705, 2018 WL 3127423, at \*1 (U.S. Nov. 13, 2018) (mem.).

petitioner, however, is arguing that the court of appeals precluded the district court from undertaking *Chevron* analysis.<sup>343</sup> Hence, the petitioner has not asked for *Chevron* to be reconsidered.<sup>344</sup> The petition for certiorari was only recently granted and only the petitioner’s opening brief has been filed—which curiously barely mentions *Chevron*.<sup>345</sup> Even though this case does not squarely put the question of reconsidering *Chevron* before the Court, the case is still worth watching. At the very least, it could garner separate opinions addressing the *Chevron* issue.

But if *Auer* and *Seminole Rock* are overruled, the question then becomes what replaces the doctrine. There several alternatives. First, courts might afford no deference at all to agency interpretation of regulations. This option might lead agencies to draft clearer regulations at the outset, for fear that courts will misunderstand and misapply given regulations, or at least prevent their casual expansion. Of course, while this might have the salutary consequence of providing greater predictability, some agencies might instead choose to create policy by adjudication—which is then retroactive.<sup>346</sup>

Another option is to retain *Auer* for more formalized regulations, such as those issued through notice-and-comment rulemaking and those signed by the head of an agency.<sup>347</sup> However, this approach would fail to address the underlying concerns about *Auer*—namely, that the doctrine violates separation-of-powers principles and encourages agencies to write vague regulations. Further still, this option would invite more unpredictability by essentially introducing the *Mead* problem and *Chevron* Step Zero into the *Auer* doctrine.

The Court could also announce that a lesser form of deference will apply to agency interpretations (like *Skidmore* deference—the power to persuade). This would allow courts to weigh the persuasiveness of the agency’s explanation and leave room to defer to the agency’s expertise in complex matters. It could also help address concerns that courts are abdicating their judicial review. But it may just end up leaving the status quo in place. At the least, the Court would have to provide greater guidance about when deference is appropriate—otherwise judges’ ideological preferences could end up determining when they find something persuasive.<sup>348</sup>

Finally, the Court could also look to historical practice and the text of the APA in deciding how courts should handle agency interpretations of their own regulations.<sup>349</sup> One could see this approach being favored by Justices Thomas and Gorsuch (and perhaps Justice Kavanaugh, given his writings), as it would “instruct courts to review legal questions using

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<sup>343</sup> Petition for Writ of Certiorari at 2-3, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. June 21, 2018).

<sup>344</sup> *See id.* at 13-20.

<sup>345</sup> *See generally* Brief for Petitioner, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. Jan. 8, 2019).

<sup>346</sup> Shane A. Pennington & Evan A. Young, *The End of the Dance? The Chevron Two-Step and New Directions for Administrative Law* 7 (2017).

<sup>347</sup> *Id.*

<sup>348</sup> *Cf. Arangure v. Whitaker*, 911 F.3d 333, 339 (6th Cir. 2018) (Thapar, J.) (discussing how the Court has not yet explained which canons of interpretation are “traditional tool” of interpretation).

<sup>349</sup> Pennington & Young, *supra* note 346, at 8; *see also* Bamzai, *supra* note 9, at 997-1000 (explaining how *Chevron*-type deference is inconsistent with historical practice).

independent judgment and the canons of construction.”<sup>350</sup> Justice Scalia proposed this as a means of replacing *Auer*. He wrote:

I would therefore restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.<sup>351</sup>

### Conclusion

All that can be said with certainty right now is that we should know more by the end of this Term. Perhaps *Auer*’s hour has come. If so, it will then be interesting to see how much damage the Court’s uprooting or limiting *Auer* does to *Chevron*. Ultimately, of course, any argument for reconsidering *Chevron* and *Auer* must overcome stare decisis considerations.<sup>352</sup> This is never an easy task. However, as this paper has endeavored to show, scholars and judges have gone to great lengths to urge replacement of these precedents for reasons transcending dubious constitutional provenance. If these doctrines do not predictably constrain judges, who can too easily find a provision ambiguous (or not), then *neither* the courts *nor* the agencies are well cabined. Further, Justice Kavanaugh has provided compelling reasons to doubt whether any ambiguity-dependent canon—let alone *Chevron* and *Auer*—can be applied based on neutral and articulable principles.

As Dean Manning so aptly said, “if our written Constitution is to remain relevant, then judges must try, where possible, to shape the modern administrative state to accommodate the carefully chosen structural commitments of our Constitution.”<sup>353</sup> *Kisor* will give the Court an opportunity either to begin a massive reconsideration of fundamental tenets of administrative law—or, perhaps, to tell us that all the speculation has been in vain.

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<sup>350</sup> Bamzai, *supra* note 9, at 977.

<sup>351</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment).

<sup>352</sup> *But see* Razo & Eskridge, *supra* note 14, at 1751-54 (explaining how justices tend to have a weaker conception of stare decisis for deference canons like *Chevron*).

<sup>353</sup> Manning, *supra* note 28, at 637 (footnote omitted).