

**DEFERENCE IS DEAD (LONG LIVE *CHEVRON*)***Nathan Richardson\**

## ABSTRACT

*Chevron v. NRDC has stood for more than 35 years as the central case on judicial review of administrative agencies' interpretations of statutes. Its contours have long been debated, but more recently it has come under increasing scrutiny, with some—including two sitting Supreme Court Justices—calling for the case to be overturned. Others praise Chevron, calling deference necessary or even inevitable. All seem to agree the doctrine is powerful and important.*

*This standard account is wrong, however. Chevron is not the influential doctrine it once was and has not been for a long time. It has been eroded from the outside as a series of exclusions have narrowed its scope and has been hollowed out from the inside as Justices have become ever more willing to find clear meaning in statutes, thereby denying deference to agencies. In recent years, agencies have won only a handful of statutory interpretation cases, and none in more than four years. Only once since 2015 has deference been outcome-determinative. At the Supreme Court level—though not, for now, in the circuit courts—deference is dead. The once-crystal Chevron has turned to mud. As a result, however, it is less likely to be formally overturned than widely believed—critics of deference and of administrative power on the Court would gain little. Instead, Chevron's future is likely to be one of further decline, at least in the short term. This has implications for major policy areas like climate change, health care, and immigration where regulatory policy is necessary and challenges are likely to reach the Court.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	442
II.	CHEVRON'S CRYSTALLINE FOUNDATION .....	446
III.	CHEVRON TURNS TO MUD .....	453
	A. <i>External Erosion</i> .....	454
	B. <i>Internal Erosion</i> .....	459
	C. <i>The Internal/External Distinction Blurs</i> .....	470
	D. <i>Empirical Analysis of Chevron</i> .....	473
IV.	CHEVRON TODAY .....	475
	A. <i>The Foundations Crumble (2013–15)</i> .....	475
	1. <i>City of Arlington v. FCC</i> .....	475
	2. <i>Utility Air Regulatory Group ("UARG") v. EPA</i> .....	477
	3. <i>King v. Burwell</i> .....	478
	4. <i>Michigan v. EPA</i> .....	483
	B. <i>The Death of Deference (2016–20)</i> .....	486
	C. <i>Chevron Under Attack</i> .....	495
	1. The Old Guard.....	495
	2. Justice Gorsuch .....	497
	3. Justice Kavanaugh.....	499
	4. Outside Voices .....	502
	D. <i>Effects of Chevron's Decline at Agencies</i> .....	504
	E. <i>Why?</i> .....	510
	1. Anti-Administrativism.....	510
	2. Textualism.....	512
	3. Inherent Instability.....	514
V.	CHEVRON'S FUTURE .....	516
	A. <i>Rejection?</i> .....	516
	B. <i>Continued Decline</i> .....	518
	C. <i>Holding the Line</i> .....	520
	D. <i>The Longer Term</i> .....	523
VI.	CONCLUSION.....	524

## I. INTRODUCTION

Administrative law is a delicate balance of power between Congress, agencies, and the courts. Congress is ultimately in charge—the statutes it enacts are agencies' sole source of authority.<sup>1</sup> But Congress acts only

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rarely and, when it does, leaves substantial gaps. The tasks of identifying the scope of those gaps and defining the powers agencies have to fill them, or not, are left to the courts and the agencies themselves.<sup>2</sup> In the modern era, the central case defining this balance of interpretive power between agencies and courts has of course been *Chevron v. NRDC*, decided by the Supreme Court in 1984.<sup>3</sup> *Chevron* has been so influential for so long because it crystallized a central question in administrative law—when courts would defer to agency interpretations of statutes, replacing fuzzy, multifactor standards with rule-like clarity, at least in a broad swath of cases.<sup>4</sup> *Chevron*'s reputation for influence is nearly unsurpassed in the administrative law canon; Cass Sunstein elevated *Chevron* to the highest of pedestals, calling it a “counter-*Marbury*, for the administrative state.”<sup>5</sup>

But at the Supreme Court level, *Chevron* now lacks the power and predictability it claims to have—and may once have had—though it probably never had the influence its reputation suggests. This decline in *Chevron*'s influence dates back to at least the 1990s but has accelerated: over the past five terms, agencies have won only three of fifteen statutory interpretation cases, and in only one of those three did *Chevron* matter, meaning the Court deferred to the agency's interpretation.<sup>6</sup> Moreover, *Chevron* appears under threat. Prominent judges and academics, including two sitting Supreme Court Justices, have called for its

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have been impossible to complete. Thanks also to Kent Barnett, Tejas N. Narechania, William Yeatman, and many others for their comments and suggestions, large and small.

1. See Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 9 (2011) (“*Skidmore* and *Armour* established early on in the administrative era that Congress plays the critical role of providing clear statutory meaning when it wishes to do so, and binds both courts and agencies in that situation.”).

2. *Id.* at 19. Or, perhaps more precisely, these tasks are the province of interest groups, bureaucrats, and other political actors acting within, exerting influence from outside, and litigating against agencies.

3. 467 U.S. 837 (1984).

4. See Ronald J. Krotoszynski, *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 742 (2002); see also *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (“[T]he Court now resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference . . . whereby ‘[t]he fair measure of deference to an agency administering its own statute . . . var[ies] with circumstances,’ . . . The Court has largely replaced *Chevron*, in other words, 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.”).

5. Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2074–75 (1990).

6. See data and discussion *infra* Section IV.B.

reconsideration and possible rejection.<sup>7</sup> Whether it will survive, and for how long, is an open question.

As Michael Herz concluded almost five years ago, “[a]t this point, it takeschutzpah to write about *Chevron*.”<sup>8</sup> Nevertheless, since then debate over *Chevron*, and predictions of its demise, seem to have increased in volume. But perhaps there is room to say a bit more. I am not the first to note *Chevron*’s decline. Among academics, Linda Jellum in 2007,<sup>9</sup> Michael Herz in 2015,<sup>10</sup> and Jonathan Adler in 2016,<sup>11</sup> among others, have noted aspects of the decline of meaningful *Chevron* deference at the Court. There are contrary views: Nicholas Bednar and Kristin Hickman in 2017,<sup>12</sup> and Adrian Vermeule in a 2016 book,<sup>13</sup> have argued that deference retains vitality or is even inevitable. Christopher Walker and Kent Barnett have documented that *Chevron* retains influence in the lower courts, at least for now;<sup>14</sup> the claims made here are exclusively about the doctrine’s present and future at the Supreme Court level, though they may trickle down to lower courts over time.

This Article makes three new contributions to this literature. First, it catalogs the role of *Chevron* at the Court in recent years; this evidence, detailed in Part IV, lends support to the thesis that deference has declined precipitously. Second, it adopts a model for understanding *Chevron*’s rise and fall: Carol Rose’s metaphor of legal “crystals” and “mud,” which predicts a cyclical pattern, from consolidation and simplification to complexity and ambiguity.<sup>15</sup> This model suggests *Chevron*’s decline was probably inevitable. Finally, Part V makes and justifies a prediction that despite its weakness, *Chevron* is unlikely to be overturned, and suggests some plausible futures for the doctrine.

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7. See discussion *infra* Section IV.C.

8. Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1867 (2015).

9. See generally Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007).

10. See generally Herz, *supra* note 8.

11. See generally Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983 (2016).

12. See generally Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1392 (2017).

13. See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 168–69 (2016).

14. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 1 (2017).

15. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

At the Supreme Court level, *Chevron's* ability to provide certainty has been on the wane for more than two decades. To be sure, *Chevron* remains a near-necessary citation in administrative law cases, retains a central position in administrative law curricula, and persists as one of the most well-known and cited cases in American law. But at the Supreme Court level, *Chevron* today applies to an ever-shrinking range of cases, has little impact on the outcome of cases to which it still applies, and is of little use as a predictive tool for future disputes. In short, *Chevron's* crystal has turned to mud. Agencies before the Supreme Court in recent years appear to receive little or no interpretive deference, whatever *Chevron* says. In my view it is fair to say that deference is dead at the Supreme Court, though it is worth noting that lower courts and agencies do not seem to have followed, at least not yet.<sup>16</sup>

This erosion of *Chevron's* rule-like character has been at times explicit and at times implicit. First, the Supreme Court has established a series of explicit carve-outs from *Chevron's* scope. Agency interpretations of criminal law, interpretations of statutes empowering multiple agencies, and so-called "major questions," among other classes of cases, have been excluded from *Chevron* deference. Second, the Court has at times given little more than lip service to *Chevron's* deference requirement, implicitly eroding its scope and reliability. These trends have been present for a long time, perhaps all the way back to *Chevron* itself. But they have accelerated in recent cases. Taken together, they mean agencies are entitled to deference in a shrinking pool of cases, with fuzzy boundaries, and that deference is weaker and more uncertain, even when the Court purports to give it. In short, not only has the Court's interpretive deference to agencies declined over time, but also—and possibly more importantly—the predictability and reliability of that deference has declined as well.

But these developments do not mean *Chevron* is likely to be overruled. That cannot be ruled out, but erosion of *Chevron's* force and clarity—its muddying—make it *less* likely, not more. The reasons why are explored below, but they boil down to a simple idea: Why go to the effort of overruling a case that is not very important anymore? The Court has already shown *Chevron* is rarely an obstacle and, when it is, that its scope can be shrunk, or its mandate weakened so as to render it toothless. *Chevron* deference will continue to be cited when judges find it helpful or convenient to do so, but its ability to decide cases is rapidly diminishing, if it has not disappeared already. Perhaps one day *Chevron* will be

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16. See Barnett & Walker, *supra* note 14, at 1.

replaced with a new deference rule, but for now the pressure appears to be in the opposite direction—toward more doctrinal uncertainty, not less.<sup>17</sup>

This is a positive claim, not a normative one. In the interest of full disclosure, my view is that in the short term, *Chevron's* decline will lead to greater judicial involvement in policy matters, and I am not optimistic that will lead to better results. In the longer term, whether muddying of deference doctrine is good depends on how and when it recrystallizes again, a topic I speculate about at the end of this Article. But I hope here only to persuade that my positive claim is true—that *Chevron* is far less meaningful than it is widely understood to be but is nevertheless likely to survive—so that a normative debate over that claim and what should follow can be had.

## II. *CHEVRON'S* CRYSTALLINE FOUNDATION

Though *Chevron* is likely familiar to most readers, it is worth briefly reviewing what it does. Federal administrative agencies are empowered by Congress to do a wide variety of things: environmental regulation, immigration enforcement, provision of benefits . . . the list is nearly endless. The statutes by which Congress empowers agencies to do these things are complex, and not everyone may agree about what they allow or require agencies to do or refrain from doing; gaps are inevitable. To do their work, agencies must try to fill these gaps. If their actions or inactions are challenged in court, judges must then decide if the agency's interpretation of the statute is correct. *Chevron* is the most important in a series of Supreme Court cases over at least seventy-five years dealing with how much weight judges should give to the agency's statutory interpretation.

*Chevron* did at least two things. Its first and probably most well-known effect was to shift power from courts to agencies by creating a space within which judges were required to defer to agency interpretations of statutes.<sup>18</sup> Only if those interpretations contradicted discernible and clear congressional intent, *Chevron* Step One, or exceeded the bounds of reasonableness in Step Two, would judges be permitted to replace the agency's interpretation with their own.<sup>19</sup>

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17. Like any predictions about the Court, these depend on its ideological balance remaining stable; if there are major personnel changes on the Court, all bets are off.

18. See Sunstein, *supra* note 5, at 2074–75.

19. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511–12.

Chevron's second innovation was to crystallize the law of deference to agency interpretations, at least in part. Before *Chevron*, agencies were treated more or less like any party before the court and given an opportunity, but no more than that, to convince the judges of the wisdom of their position.<sup>20</sup> *Chevron* changed that—where before there were standards, now there was a rule: defer to agency interpretations, at least within some range of cases.<sup>21</sup> These two changes wrought by *Chevron* are inextricably intertwined; to the extent that *Chevron* shifted power from courts to agencies, it was by giving agencies more certainty that their interpretations would be upheld.

*Chevron* quickly became recognized as a major doctrinal shift in administrative law.<sup>22</sup> But in a broader sense, it was nothing new. Across all areas of law, there is evolution from rules to standards and back or, as Carol Rose described it in a seminal Article on the pattern in property law contexts, from crystals to mud and back.<sup>23</sup> Rose's framework is useful not just because it is earthily evocative, but because it is far more precise than the perhaps overexposed rules/standards dichotomy.<sup>24</sup>

To take one of Rose's illustrations, the crystal *caveat emptor* rule has been muddied by modern doctrines requiring disclosure of defects by sellers and imposing an implied warranty of habitability on landlords.<sup>25</sup> But private parties have responded by sometimes including waivers of these duties in contracts, reimposing the crystalline rule.<sup>26</sup> Then, courts or legislatures may respond by making certain duties nonwaivable, and the pattern continues.

Both crystal rules and muddy standards have advantages, which become more apparent the more the legal pendulum swings in the opposite direction.<sup>27</sup> Crystals make for settled expectations, allowing

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20. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211 (2006) (“[T]he *Skidmore* decision suggested that courts would merely consult such agency interpretations, considering whether they were long-standing, consistent, and well-reasoned.”).

21. See Scalia, *supra* note 19, at 511 (“*Chevron* . . . announced the principle that the courts *will accept* an agency’s reasonable interpretation of the ambiguous terms of a statute that the agency administers.”) (emphasis added).

22. See *id.* at 512; see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986).

23. See Rose, *supra* note 15, at 595 (drawing on the work of historian P.S. Atiyah to suggest that law evolves from mud to crystal and back, cyclically).

24. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 380 (1985) (suggesting that “much of legal discourse—including the very fanciest law-talk—might be nothing more than the unilluminating invocation of ‘canned’ pro and con arguments about rules and standards”) (alteration in original).

25. Rose, *supra* note 15, at 581.

26. *Id.* at 582–83.

27. See *id.* at 590–93.

long-term planning and predictable outcomes.<sup>28</sup> Muddy standards allow for case-by-case determinations, taking account of unique circumstances. They are less vulnerable to exploitation by bad actors who technically comply with rules and are able to deal with unanticipated contradictions or superseding concerns.<sup>29</sup> The appeal of both leads to oscillation.<sup>30</sup> Make the rules too crystallized, and outlier cases will make muddying the waters with exceptions very tempting. Then, as the rules are overlaid with those exceptions and epicycles, decision costs go up and predictability declines, making the case for “rationalization”—the re-imposition of rules—though the new rules may be quite different from the old.<sup>31</sup> This description suggests that the move from crystals to mud and back is endogenous, but external factors might come into play as well.<sup>32</sup> For example, pressure to change might come from perception that some actors are taking advantage of current law, or that it does not adequately protect groups or interests who lacked political power in the past.<sup>33</sup>

*Chevron* fits this mud-to-crystal pattern well, even if it did not go all the way. The *Skidmore* standard that prevailed before 1984 required judges to consider a wide—and non-exclusive—set of factors when deciding whether to defer to agency interpretations of law, including the consistency of the agency’s position, the agency’s level of expertise, and the interpretation’s “power to persuade.”<sup>34</sup> It would be hard to sketch a looser standard, and, in practice, *Skidmore* deference was probably little different from de novo review, with agencies cast as “little more than expert witnesses.”<sup>35</sup> Each case, and each agency interpretation of a statute, would be evaluated by judges on its own merits. There were no hard rules, only loose standards.

In contrast, *Chevron* demanded deference to agency interpretations from judges, at least in the range of cases where congressional intent was

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28. *See id.* at 591–92.

29. *See id.* at 592.

30. *Id.* at 593.

31. *Id.* at 590–93.

32. *Id.* at 595.

33. This could prompt change in either direction. If current law is rule-like and the apparent threat is from actors that technically comply but violate the spirit of the law or other important norms, then a move toward mud would allow decisionmakers to catch bad behavior. On the other hand, if actors are perceived to be taking advantage of uncertain standards to decide cases arbitrarily, or in line with their preferences, then a more crystalline law could prevent that.

34. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

35. *See Jellum, supra* note 9, at 738.

clear. Perhaps unintentionally,<sup>36</sup> it does—or at least *did*—something quite radical: after *Chevron*, judges were now required to accept some agency interpretations they felt were wrong, or at least inferior.<sup>37</sup> As Justice Kavanaugh has put it, “when the Executive Branch chooses 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>38</sup>

*Chevron* did not go as far as it might have. A fully crystalline solution to the question of interpretive authority would be to simply say that agencies always win. But of course, that would make courts impotent in many administrative law cases, violating both *Marbury*<sup>39</sup> and Article III.<sup>40</sup>

Instead, *Chevron* takes a more constrained approach: judges first decide if statutory ambiguity exists. If not, i.e., if “Congress has directly spoken,” there is no deference.<sup>41</sup> If ambiguity does exist, then judges are directed to defer to the agency interpretation, at least within reason.<sup>42</sup> *Skidmore*’s multifactor inquiry is collapsed to a single question whose outcome, in theory, determines the case. If there is no ambiguity, the agency’s expertise, power to persuade, and the other factors are irrelevant, and the agency loses.<sup>43</sup> If there is ambiguity, those factors are either similarly irrelevant, or nearly so, and the agency almost always

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36. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014) (noting that the parties, attorneys, and Justices, including its author Justice Stevens, did not view *Chevron* as a landmark case or doctrinal change when it was decided).

37. See Breyer, *supra* note 22, at 379.

38. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

39. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

40. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

41. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). As *Chevron* cases illustrate, this inquiry is far more complex than it appears. See Jellum, *supra* note 9, at 727. Is the question whether the *text* or Congress’s *intent* is clear? *Id.* What tools can be brought to bear to resolve any apparent ambiguity?

42. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598–99 (2009). This “reasonableness” standard in *Chevron*’s “second step” probably collapses into traditional arbitrary and capricious review. *Id.*

43. *Id.* at 599.

wins.<sup>44</sup> Such clarity and brevity are hallmark legal crystallization, even if they do not go all the way.

To be sure, *Chevron* was never fully crystalline. It never dictated the outcome of all cases. Its innovation—deference—only applies when a court finds statutory ambiguity. Even when it does apply, it only shifts decision-making authority to another body, the agency, rather than dictating a substantive result. And even then, it only shifts that authority within some range of reasonableness—though, again, Step Two is so deferential at the Supreme Court level as to be nearly irrelevant.<sup>45</sup>

That said, *Chevron* never had a golden age of clarity; in characterizing it as a crystallization I do not mean to imply that it did. It took the Court years to figure out what it meant,<sup>46</sup> and by that time it was already being constrained and reshaped, as the next section details. It is plausible, therefore, to call *Chevron* a failed attempt at crystallization. Linda Jellum does so, arguing that “the opinions of the late 1980s and 1990s show a court divided and confused by *Chevron*. . . . There is no consistency, just a muddy battlefield.”<sup>47</sup> If this view is correct, then *Chevron* did little: *Skidmore* deference was a muddy mess, *Chevron* was too, and that remains the case today.

In my view, this goes too far, or was at least premature. Jellum’s characterization is largely driven by a doctrinal fight *within Chevron* that she observes and documents between textualist and “intentionalist” views on what interpretive tools can be used to determine whether statutory ambiguity exists.<sup>48</sup> This dispute is important for understanding *Chevron* deference, and I agree that the rise of textualism plays an important role in *Chevron*’s decline over the long term.<sup>49</sup> But the 1980s—

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44. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 319 (8th ed. 2017) (“In practice, it is rare for a court to set aside an agency interpretation in step two. By most counts, the Supreme Court has done so only twice.”); see also VERMEULE, *supra* note 13, at 158 (“At [the Supreme Court] level, agencies almost never lose [arbitrariness challenges],” within which Vermeule includes *Chevron* Step Two cases. Since 1982, he finds, “the Court has passed on the merits of arbitrariness challenges sixty-four times. Of those, agencies have lost . . . only five times—a remarkable win rate of 92 percent.”).

45. See VERMEULE, *supra* note 13, at 158.

46. As noted above, Justice Stevens claims not to have intended a revolutionary doctrinal change when he wrote the majority opinion in *Chevron*. See Merrill, *supra* note 36, at 275. Linda Jellum describes the process by which the Court came to grips with *Chevron*’s import. See Jellum, *supra* note 9, at 743–53. Articles by Justices Scalia and Breyer not long after *Chevron* was decided were particularly influential. See generally Scalia, *supra* note 19; Breyer, *supra* note 22.

47. Jellum, *supra* note 9, at 760.

48. See *id.* at 753–60.

49. See *infra* discussion Section IV.E.2.

90s disputes she discusses do not affect the basic crystallization that *Chevron* achieved; and even if they did, it was temporary—as Jellum describes, the textualists won.<sup>50</sup> Jellum’s characterization of early *Chevron* as “muddy” is also driven by the court’s 1994 decision in *MCI Telecommunications v. AT&T*,<sup>51</sup> for reasons detailed in the next section, I agree that this case substantially undercut *Chevron* by narrowing its scope.

The inconsistent application and internal conflict that mark the Court’s early *Chevron* cases do not change the fact that it was a significant step toward crystallization, relative to what preceded it. Jellum does not appear to disagree; she notes that “[p]rior to *Chevron*, not every agency opinion was entitled to deference. But *Chevron* established an all-or-nothing default rule.”<sup>52</sup> This is easier to see if one steps back from the wider fight over textualism at the time, within which *Chevron* cases were an inevitable battlefield. Justice Scalia was nominated to the Court in 1986 and quickly became an ardent *Chevron* supporter.<sup>53</sup> He was soon followed by five other new Justices over the next eight years, radically changing the makeup of the Court.<sup>54</sup> For this new Court, *Chevron* was the bedrock case in its domain, agency interpretation of statutes.<sup>55</sup> The law, or at least the Court, was ready for crystallization. Over time, *Chevron* became “foundational, even . . . quasi-constitutional[,] . . . the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”<sup>56</sup>

It appears to have changed outcomes, too. Agencies won cases more often under *Chevron* than under the preceding *Skidmore* regime, to a small but still significant degree.<sup>57</sup> Probably more importantly, agencies

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50. Jellum, *supra* note 9, at 761.

51. *Id.* at 759–61.

52. *Id.* at 743.

53. See Scalia, *supra* note 19, at 521 (“I tend to think, however, that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict—though that is true enough—but because it more accurately reflects the reality of government, and thus more adequately serves its needs.”) (alteration in original); Jellum, *supra* note 9, at 748.

54. Jellum, *supra* note 9, at 753.

55. See *id.* at 748–60.

56. Sunstein, *supra* note 20, at 188.

57. See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099–1100 (2008) (finding a 76.2 percent win rate for agencies in Supreme Court cases through 2006 under *Chevron* deference, versus a 73.5 percent win rate under *Skidmore* and an overall win rate of 68.3 percent). See *infra* Section III.D (discussing this and other empirical analyses of *Chevron*).

could also now have real confidence judges would uphold their interpretations, at least within some range. Review of agency decisions became more predictable, allowing agencies to experiment more with new regulatory approaches.<sup>58</sup> With the confidence that litigation outcomes are more predictable, agencies can better know—or, more precisely, themselves better define—the limits of their authority.<sup>59</sup> In short, *Chevron* significantly empowered the executive branch at the judiciary's expense.<sup>60</sup> As Justice Kavanaugh put it, while criticizing *Chevron*:

In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. . . . From my more than five years of experience at the White House, I can confidently say 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>61</sup>

It is of course possible to put the same argument in positive terms: *Chevron* could free agencies from unreasonable judicial interference, allowing them to use their superior subject-matter knowledge to better fulfill congressional intent and address important problems.

For good or ill, within a few years, a core question in administrative law—interpretive deference to agencies—had been crystallized, shifting power seemingly permanently toward agencies and away from courts.

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58. See Sunstein, *supra* note 20, at 190 (“*Chevron* has signaled a substantial increase in agency discretion to make policy through statutory interpretation. For this reason, *Chevron* might well be seen not only as a kind of counter-*Marbury*, but even more fundamentally as the administrative state’s very own *McCulloch v. Maryland*, permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions.”). This shadow effect of *Chevron* is, I suspect, far greater than the marginal change in case outcomes, though it is probably impossible to measure.

59. In fact, assuming that the level of agency tolerance for risk is stable over time, a perhaps naive view is that *Chevron* should not change the rate of agency victories/losses in interpretive cases at all, at least in the long term. Instead, agencies should react by increasing the aggressiveness of their interpretations until their post-*Chevron* success rate is the same as the pre-*Chevron* rate. However, this assumes that the variation in results before and after *Chevron* is the same. In fact, if *Chevron* did crystallize the law, giving more consistent results, that variation should, almost by definition, decrease. Increased certainty about outcomes should then allow agencies to be even more aggressive in their interpretations, essentially reallocating some tolerated losses from bad luck to calculated risks.

60. See Sunstein, *supra* note 20, at 190; see also Jellum, *supra* note 9, at 728–29, 736–37.

61. Kavanaugh, *supra* note 388, at 2150.

## III. CHEVRON TURNS TO MUD

Nearly as rapidly, however, *Chevron's* crystal started to erode. Within a few years after *Chevron* was decided, the Supreme Court began to add exceptions to its reach, and additional exceptions have been added over time. Students and practitioners must now master a complex list of carve-outs, with litigants predictably arguing as much about whether a case falls into one of the exceptions as they do about *Chevron's* core inquiry about statutory clarity.

Over the same period, the Supreme Court has by fits and starts reduced the degree of deference shown in those cases that remain within *Chevron's* scope—Justices seem increasingly willing to find that a statute is clear, i.e. that Congress has spoken to the issue, and that therefore agency interpretations can be rejected at *Chevron's* Step One. And on a small number of recent occasions agencies have also lost cases at *Chevron's* Step 2; that is, Justices have determined that although statutory ambiguity existed, the agency's interpretive resolution of that ambiguity was unreasonable, though as noted above, this has been extremely rare under *Chevron*.

In short, *Chevron* has been eroded from the outside by reducing its scope and from the inside by reducing the degree of deference courts give in practice, even if the doctrine does not ostensibly change or narrow. What was once a clear and simple doctrinal rule has become ever more complex over time.<sup>62</sup> Because much of *Chevron's* value comes from its crystalline clarity, this increase in complexity has seriously diminished the doctrine's significance.

While a comprehensive account of the evolution of *Chevron* in practice is well beyond the scope of this Article, a review of the most important shifts is perhaps necessary. *Chevron* itself contains no obvious limiting principles—its two-step inquiry applies whenever “a court reviews an agency's construction of the statute which it administers.”<sup>63</sup> This is *Chevron-as-crystal*, or as close as it gets. Courts must defer to reasonable agency interpretations of statutes. As Carol Rose's theory predicts, however, simple crystalline principles come under pressure from real-world edge cases. For *Chevron*, this has happened fairly quickly.

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62. See Dan Farber, *The Chevron Doctrine: Is It Fading? Could That Help Restrain Trump?*, LEGALPLANET (July 2, 2018), <https://legal-planet.org/2018/07/02/straws-in-the-wind-warning-signs-for-chevron/> (detailing complexity added to *Chevron* over time).

63. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

A. *External Erosion*

Initially, the erosion was external—classes of cases were taken out of *Chevron*'s domain because of perceived tension between deference and other values, problems of practical implementation, and other limitations. For example, *Chevron* deference was deemed as early as 1990 not to apply to agency interpretations of criminal statutes; interpretations of criminal statutes are reviewed de novo.<sup>64</sup> Deference in the criminal context would conflict with the rule of lenity and interfere with courts' longstanding central role in the administration of criminal law.<sup>65</sup> More broadly, the danger of concentration of power in criminal adjudication is well understood—the proverbial “judge, jury, and executioner.” Withholding deference in the criminal context is not widely controversial; even strong defenders of deference to agencies rarely suggest it should be extended to prosecutors,<sup>66</sup> or that carving criminal statutes out of *Chevron*'s domain is a serious threat to the wider rule. I suspect that had someone asked Justice Stevens or the rest of the majority in *Chevron*, immediately after it was handed down, whether they meant it to apply to criminal statutes, they would have answered “no, of course not.”

Other explicit constraints on *Chevron*'s domain or, as Peter Strauss has called it, *Chevron*'s space,<sup>67</sup> have followed. An incomplete list includes interpretations articulated for the first time during litigation,<sup>68</sup> interpretations of statutes administered by multiple agencies, including

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64. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (“The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”); see also *United States v. Apel*, 571 U.S. 359, 369 (2014) (“[W]e have never held that the Government’s reading of a criminal statute is entitled to any deference.”).

65. See *Abramski v. United States*, 573 U.S. 169, 191 (2014) (“[C]riminal laws are for courts, not for the Government, to construe.”); see also Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 916–17 (2007) (“[T]o a court thinking in lenity terms, an ambiguous statute ultimately can only have one meaning: the more lenient one.”).

66. But see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996) (arguing that the common-law-like delegation of interpretive authority to courts in criminal law should instead be given to the Department of Justice).

67. Peter L. Strauss, *“Deference” is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight.”* 112 COLUM. L. REV. 1143, 1145 (2012).

68. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”).

the Administrative Procedure Act (“APA”) itself,<sup>69</sup> statutes for which Congress has specifically provided for de novo review,<sup>70</sup> and interpretations regarding the scope of judicial review.<sup>71</sup> Like the exclusion of interpretations of criminal statutes, these exceptions can be easily defended and seem relatively modest, though the frequency of litigation and large number of cross-agency statutes means both exceptions may be quite significant in practice.<sup>72</sup> The Court’s refusal to defer to interpretations of multi-agency statutes is an outgrowth of *Chevron* itself, which actually *does* contain a limitation on its own scope: it applies only to an agency’s interpretations of statutes “which it administers.”<sup>73</sup> Multi-agency statutes, by definition, are not administered by any single agency, and therefore cannot fall within *Chevron*’s domain. The practical problems that would come from deference in this context are fairly obvious. Would the Court have to uphold inconsistent or even contrary interpretations of a statute by two or more agencies? Each of these exclusions seems sensible, perhaps even obvious.<sup>74</sup> But nevertheless, they shrink *Chevron*’s domain, eroding the scope of its crystalline clarity. Mud creeps in.

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69. See, e.g., *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (denying deference to an Office of Workers’ Compensation Programs interpretation of the APA on the grounds that it “is not a statute that the [agency] is charged with administering”).

70. See 5 U.S.C. § 552(a)(4)(B) (requiring de novo review of Freedom of Information Act claims); see also John C. Brinkerhoff Jr. & Daniel B. Listwa, *Deference Conservation—FOIA’s Lessons for a Chevron-less World*, 71 STAN. L. REV. ONLINE 146, 147 (2018), <https://www.stanfordlawreview.org/online/deference-conservation-foias-lessons-for-a-chevron-less-world/>.

71. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (“[A] role for the Department of Labor in administering the statute . . . does not empower the Secretary to regulate the scope of the judicial power vested by the statute.”) (citation omitted).

72. See, e.g., discussion *infra* Section IV.A.3 (treating at length *King v. Burwell*, 576 U.S. 473 (2015), in which the multi-agency aspect of a recently enacted statute became particularly relevant). See also Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 12:05 PM), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html) (describing the historical frequency of APA litigation).

73. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

74. Some other categorical exclusions are harder to explain. For example, until 2011, it was unclear whether *Chevron* applied in tax cases. See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 53–57 (2011) (holding that *Chevron*, rather than the multifactor *National Muffler* standard, applied in tax cases). *Mayo* is a rare counterexample to the pattern of narrowing of *Chevron*’s scope discussed in this section, though it may just be the Court resolving unclear precedent rather than a meaningful expansion of the doctrine.

This process of external erosion of *Chevron* reached its peak in 2000–01, with the Court’s decisions in *Christensen v. Harris County*<sup>75</sup> and, in particular, *United States v. Mead Corp.*<sup>76</sup> In *Mead*, the Court refused to defer to a Customs Service classification of imported day planners, one of 10,000 to 15,000 such interpretations each year.<sup>77</sup> Despite the fact that such classifications are, in fact, statutory interpretations of the tariff schedule, the Court ruled that such ministerial interpretations, lacking “the force of law,” are not entitled to deference.<sup>78</sup> While it is difficult to parse what the majority meant by reference to “force of law”—after all, the Customs Service determination *did* subject the importer to higher tariffs—the opinion does place significant emphasis on the fact that tariff categorization is a quick, nearly process-free interpretive decision by the agency.<sup>79</sup> *Christensen* similarly rejected deference for agency interpretations in an opinion letter.<sup>80</sup> The *Mead* majority suggests that *Chevron*’s domain is really for agency interpretations that come out of meaningful deliberative processes, like formal adjudication and notice-and-comment rulemaking, though the Court does not go so far as to say that *only* interpretations in these proceedings will get deference.<sup>81</sup>

*Mead*’s constriction of *Chevron*’s scope can be readily defended—agencies making small-bore ministerial decisions, even when they are nominally interpretations of statutes, are not engaging in the kind of deep technical analysis that gives them an expertise advantage over courts, and as the court finds in *Mead*, Congress arguably did not intend to delegate broad interpretive powers when it granted agencies the authority to make small decisions.<sup>82</sup> On the other hand, it is not obvious

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75. 529 U.S. 576 (2000).

76. 533 U.S. 218 (2001).

77. *Id.* at 233.

78. *Id.* at 221.

79. *Id.* at 231–33 (“[The Customs Service’s rulings] present a case far removed not only from the notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.”).

80. 529 U.S. at 587.

81. *See Mead*, 533 U.S. at 229 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”). *But see id.* at 231 (“The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.”).

82. *See id.* at 231–33 (“The authorization for classification rulings, and Customs’s practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.”).

why making large numbers of small decisions requires less expertise than big, considered, and contentious rulemakings. And the effects of such decisions may be large, as the number of customs classifications indicates—the delegation of power is a big one. Turning crystal to mud in *Mead* is defensible, but not as obviously so as in earlier constraints on *Chevron*.

Moreover, the Court in *Mead* explicitly opted for mud over crystal, reviving the moribund *Skidmore* deference regime, rather than opting for de novo review as in the criminal context.<sup>83</sup> As discussed above, *Skidmore* grants an amorphous and highly context-sensitive degree of deference to agency interpretations. It is as muddy as standards get.

Justice Scalia objected to the *Mead* majority's contraction of *Chevron*'s domain and in particular to the revival of *Skidmore* deference in a trademark fiery dissent.<sup>84</sup> For Justice Scalia, *Mead* is “an avulsive change in judicial review of federal administrative action” that has “replaced the *Chevron* doctrine” and “we will be sorting out the consequences . . . for years to come.”<sup>85</sup> Resurrecting *Skidmore* “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>86</sup> In other words, Justice Scalia accused the Court of replacing *Chevron* crystal with anachronistic *Skidmore* mud.<sup>87</sup> As he points out, this is doubly true: *Mead* introduces ambiguity both about *Chevron*'s scope and about the degree of deference available when a case falls outside that scope.<sup>88</sup> In his view, this is pernicious. Perhaps, Justice Scalia argues,

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times[, b]ut in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities . . . that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictably, and endless litigation.<sup>89</sup>

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83. See *id.* at 234 (“To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form . . .”).

84. *Id.* at 239 (Scalia, J., dissenting).

85. *Id.*

86. *Id.* at 241 (alteration in original).

87. *Id.* at 250.

88. See *id.* at 239.

89. *Id.* at 250.

Justice Scalia closes with a prediction that *Mead*'s "consequences will be enormous, and almost uniformly bad."<sup>90</sup> Nor was Justice Scalia alone in his criticism: scholars and other commentators have called *Mead* and the Court's attempts to apply it "incoherent" or a "mess."<sup>91</sup>

Justice Scalia's predictions in his *Mead* dissent in retrospect seem somewhat overblown. He was undoubtedly correct that *Mead* made the deference inquiry more complex for courts and litigants, adding what Cass Sunstein has called "Step Zero" to that inquiry.<sup>92</sup> Step Zero is a land mine students and brief writers now have to navigate, to their great frustration. Nevertheless, agencies can easily avoid *Mead* and retain access to *Chevron* deference by using APA procedures—notice-and-comment or formal adjudication. Though *Mead* revealed the *Skidmore* abyss, it can still be bridged. Even if an agency does not use such procedures or lacks the authority to do so, it may still get deference, as the Court first suggested in *Mead* itself and has reiterated since.<sup>93</sup> If anything, *Mead* clarified the issue somewhat by making the level of procedure an important marker, if not a decisive one.

*Mead* has also lacked the reach in practice that Justice Scalia and other critics predicted it would have. That is due in part, however, to disagreement within the Court about the interaction between *Chevron*, *Mead*, and *Skidmore*.<sup>94</sup> It is also due to further decisions that have been interpreted to substantially limit *Mead*'s reach—most notably *Barnhart v. Walton*, decided soon after *Mead*.<sup>95</sup> In an opinion by Justice Breyer, the Court in *Barnhart* suggested that even statutory interpretations in informal guidance documents could be entitled to *Chevron* deference, depending on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of

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90. *Id.* at 261.

91. Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 528 & n.14 (2014) (quoting Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *GEO. WASH. L. REV.* 347, 347 (2003)); *id.* at 528 & n.15 ("examining court of appeals decisions applying *Mead* and concluding that Justice Scalia 'actually understated the effect of *Mead*'") (quoting Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *VAND. L. REV.* 1443, 1444 (2005)).

92. See Sunstein, *supra* note 20, at 191.

93. *Mead*, 533 U.S. at 231 (majority opinion); see also *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due.") (citation omitted).

94. Hickman, *supra* note 91, at 530.

95. See 535 U.S. at 222.

time.<sup>96</sup> But these factors sound much more like *Skidmore*'s multifactor test than *Chevron*'s ostensibly bright-line rule regarding access to deference.

The edges of *Chevron*'s scope are therefore muddy, but *Mead* did not make them so alone—courts had struggled for years with whether small-bore agency determinations of various types were entitled to deference.<sup>97</sup> It often remains unclear when *Mead*—and therefore *Chevron*, *Skidmore*, or something in between—applies. If *Mead* is less important than Justice Scalia predicted and feared, that is partly because it is even *less* clear when it applies than he thought. Moreover, it can be applied opportunistically, taking agency interpretations in or out of *Chevron*'s domain as needed.<sup>98</sup>

*Mead* is the culmination of more than fifteen years of Supreme Court decisions restricting *Chevron*'s scope, eroding its power from the outside. In each case, *Chevron*'s broad, albeit never bright-line, deference rule yielded to some practical consideration. Deference to interpretations in criminal cases, of multi-agency statutes, in mere agency litigating positions, and in small-potatoes guidance documents would interfere with other important values like the rule of lenity, be unworkable in practice, or perhaps give too much unfettered power to agencies. Or to look at it from the other side, none of these areas, one gets the sense the Court is saying, is *really* what *Chevron* was about, for good or at least defensible reasons. So is crystal ground to mud.

### B. Internal Erosion

A second, albeit to some extent overlapping, phase of *Chevron*'s erosion undercut the deference doctrine from the inside. The Court has repeatedly purported to apply *Chevron* while denying meaningful deference. The roots of this internal erosion may go back to *Chevron*'s earliest days,<sup>99</sup> but most clearly emerged in a series of cases in the early 2000s. The doctrinal meaning of each of these cases is of course contestable, but taken together they have substantially reduced the scope of *Chevron* in practice. Initially, this occurred by narrowing Step One—

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96. *Id.*

97. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 850–51 & nn.88–92 (2001).

98. See, e.g., Amy J. Wildermuth, *What Twombly and Mead Have in Common*, 102 NW. U. L. REV. COLLOQUY 276, 277–78 (2008) (claiming *Mead* is susceptible to “results-oriented manipulation”).

99. See Jellum, *supra* note 9, at 748–60 (documenting evolving understandings of Step One in the 1980s and 1990s).

that is, through increasing willingness to find that Congress had “clearly spoken” in a statute, thus leaving no ambiguity for an agency to interpret. More recently, at least one case suggests deference has narrowed at Step Two as well.

This *sub rosa* erosion of *Chevron* is more corrosive than external, explicit narrowing of scope because it not only reduces the doctrine’s power to decide cases, but also creates ambiguity and sows doubt. At the risk of pushing the crystals and mud metaphor too far, external erosion grinds down crystalline rules, while internal erosion softens or dissolves them whole.

To be sure, the losing party, dissenting judges, and outside observers who disagree with the outcome of a case will often accuse the majority of incorrectly applying relevant doctrine or applying it in form but not in good faith. In *Chevron* cases, this typically comes as an accusation that the majority has found ambiguity—and therefore, under *Chevron*, deferred to the agency interpretation—where a harder look, applying the traditional tools of statutory interpretation, would have uncovered a clear meaning.<sup>100</sup> Or, conversely, that the majority too readily found a clear meaning when deeper inquiry would have revealed ambiguity.<sup>101</sup> The presence of such dissents and critiques is not, alone, enough to prove that *Chevron* is ungrounded, indeterminate, or even eroding. Disagreement over how a rule or doctrine should be applied is possible no matter how crystalline the doctrine—though one of the advantages of crystalline rules are that such disagreements are, in theory, rarer. Nevertheless, each push on the boundaries of a doctrine creates precedent for further such moves, and repeated or egregious violence done to those boundaries can render them meaningless. In my view, the Court has done such violence to the boundaries of *Chevron*’s Step One in at least one such case, probably two, and possibly more.

The clearest case of internal erosion is *FDA v. Brown & Williamson Tobacco Corp.*, decided by the Court in 2000, a year before *Mead*.<sup>102</sup> The Food and Drug Administration (“FDA”) had issued rulemakings regulating tobacco products, asserting jurisdiction based on its interpretation of its own primary governing statute, the Food, Drug, and

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100. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–15 (1995) (Scalia, J., dissenting) (arguing that the majority failed to discern a clear textual meaning of “harm” in the Endangered Species Act).

101. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 558 (2007) (Scalia, J., dissenting) (“[I]n the face of textual ambiguity, the Court’s application of *Chevron* deference . . . is nowhere to be found.”).

102. 529 U.S. 120 (2000).

Cosmetic Act (“FDCA”).<sup>103</sup> The FDCA gave the FDA authority to regulate “drugs” and “devices . . . intended to affect the structure or any function of the body.”<sup>104</sup> In the FDA’s view, nicotine was a “drug” and cigarettes were “devices” within the FDCA’s definitions due to their well-established effects on the body’s structure and function.<sup>105</sup> Tobacco firms sued the agency, claiming that it lacked authority to regulate their products.<sup>106</sup>

The case comes down to a relatively simple question of statutory interpretation—are tobacco products drugs or devices within the FDCA’s definitions? If so, the FDA has authority to, in fact must, regulate them.<sup>107</sup> If not, the agency does not have that authority. This is a clear-cut question of statutory interpretation that does not fall into one of the exclusions from *Chevron*’s domain. Deference should therefore apply: unless Congress has clearly spoken—Step One—or the agency’s interpretation is unreasonable—Step Two—the agency interpretation prevails.<sup>108</sup>

Statutory interpretation is often hard. But this looks like it should be an easy case. No one seriously contests that nicotine and tobacco products affect the structure and function of the body and are intended to do so. That is the point of smoking. Nevertheless, the Court rejected the FDA’s interpretation in a five-to-four holding.<sup>109</sup> Not only did the court reject the FDA’s assertion that its interpretation reflected the plain meaning of the statute, but the Court in fact reached the opposite conclusion: Congress’s clear intent in the FDCA, it ruled, was to *deny* the FDA regulatory authority over tobacco.<sup>110</sup> So much for deference. Indeed, at first blush the outcome seems like anti-deference; where the statute is, or at least seems, clearly in favor of the agency’s position, as it does in *Brown & Williamson*, no deference is necessary. *Chevron* did not change that. But like I said, statutory interpretation is hard. Maybe you do not think the FDCA is as clear as I do. But even if so, the agency should still prevail because, under *Chevron*, the Court should defer in such ambiguous cases.

The Court, of course, did not overrule *Chevron* in *Brown & Williamson*. So, what is going on? One possibility is simply motivated

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103. *Id.* at 125.

104. *Id.* at 126.

105. *Id.* at 127.

106. *Id.* at 129.

107. *Id.* at 135.

108. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

109. *Brown & Williamson*, 529 U.S. at 161.

110. *Id.* at 160–61.

reasoning by the Justices in the majority: uncomfortable with a major expansion in federal regulatory power, they were unwilling or unable to do what *Chevron* commands—to defer to reasonable agency interpretations of ambiguous statutes with which they personally disagree.<sup>111</sup> Of course, even if the Justices' policy preferences were the driving force behind the result in *Brown & Williamson*, the majority cannot just say that in the opinion—legal reasons to reach the result have to be given. And if one is inclined to interpret the majority opinion more charitably, those reasons might be convincing. In either case they set precedent, shaping how statutory interpretation cases under *Chevron* are decided afterwards.

The stated reasoning for the result in *Brown & Williamson* is that extrinsic evidence, beyond the statute itself, shows that Congress did not intend to grant the FDA authority to regulate tobacco—or, more precisely, interpretive authority to determine whether it had that substantive authority.<sup>112</sup> *Chevron* instructs courts to divine congressional intent via the “traditional tools of statutory construction”:<sup>113</sup> text, but also context, canons of interpretation, and the like.<sup>114</sup> The majority in *Brown & Williamson* expands the list of tools to include evidence of intent from other, later statutes.<sup>115</sup> Under the FDCA, products regulated by the FDA must be “safe,” but the Court concluded that “safe” tobacco was an oxymoron and that the FDA would be forced eventually to ban cigarettes.<sup>116</sup> This, the Court found, was inconsistent with other statutes related to tobacco passed by Congress after the FDCA, such as laws requiring warning labels or banning some tobacco advertising.<sup>117</sup> These later statutes, under this interpretation, worked an implicit partial repeal of the FDCA,<sup>118</sup> despite the fact that such implicit repeal is usually disfavored.<sup>119</sup> The Court also pointed to the “economic and political significance” of the agency’s regulatory action as a reason to conclude Congress did not intend to grant regulatory or interpretive authority, a point the Court would later clarify as an independent exception to

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111. See Breyer, *supra* note 22, at 379 (“[N]either a strict view of *Chevron*, nor any other strictly defined verbal review formula requiring deference to an agency’s interpretation of law can prove successful in the long run . . . [because] such a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain.”).

112. See *Brown & Williamson*, 529 U.S. at 160–61.

113. *Chevron*, 467 U.S. at 843 n.9.

114. See *id.* at 863–64.

115. *Brown & Williams*, 529 U.S. at 143.

116. *Id.* at 130.

117. *Id.* at 137.

118. See *id.* at 181 (Breyer, J., dissenting).

119. *Branch v. Smith*, 538 U.S. 254, 273 (2003).

*Chevron*,<sup>120</sup> and to the inconsistency of the FDA's claim of authority with its past practice of refusing to regulate tobacco.<sup>121</sup>

The FDA, according to the majority, had misread the FDCA in its broader context—the ostensibly clear definitions of “drug” and “device” in the statute had to be read in light of other congressional action.<sup>122</sup> Moreover, in the majority's reasoning, the tension between textual and extra-textual—indeed, statutory and extra-statutory—evidence did not just create ambiguity which, under *Chevron*, the agency would have had the opportunity to fill.<sup>123</sup> Instead, it fully overcame the text of the statute, making the intent of Congress to deny FDA authority over tobacco unambiguous.<sup>124</sup>

In simplest *Chevron* terms, the agency thought it did not need deference at all, but the Court said the agency lost at Step One. It is impossible to know without probing the minds of the Justices in the majority which of these readings of *Brown & Williamson* is correct: motivated reasoning or broadening of Step One to include implied repeal. I suspect some of both. But for our purposes here it is not necessary to choose—both have corrosive effects on *Chevron*'s predictability and power.

As noted above, Step One is the key to whether *Chevron* is crystal or mud. If *Chevron* had instructed courts to always and everywhere defer to agency interpretation, subsequent cases would be easy to understand and to predict. But, as noted, that would be incompatible with *Marbury* and probably unconstitutional. The opposite rule—de novo review of agency interpretations—would also be crystalline with respect to the deference rule, affording none, but not with respect to case outcomes: the reviewing court might agree or disagree with the agency's statutory interpretation. *Chevron*'s Step One principle—that judges defer when statutes are ambiguous<sup>125</sup>—is a compromise approach. The initial meta-inquiry about ambiguity is de novo, entirely within the hands of judges. But once complete, the pendulum swings toward substantial deference. An escape hatch remains in Step Two: judges may reject “unreasonable” or “impermissible” agency interpretations, but until recently judges have rarely if ever done so.<sup>126</sup> Therefore if Step One is broad, if lots of statutes are ambiguous, *Chevron* deference has great power. And if the

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120. See discussion *infra* Section III.C.

121. *Brown & Williamson*, 529 U.S. at 147.

122. *Id.* at 132–33.

123. *Id.* at 132, 159–61.

124. See *id.* at 160–61.

125. See Scalia, *supra* note 19, at 511.

126. See BREYER ET AL., *supra* note 44, at 319.

boundaries of Step One are reasonably clear, such that courts take a consistent approach to determining whether there is ambiguity, *Chevron* deference is predictable.

The Court's approach to Step One in *Brown & Williamson* undercut both of these values. If one reads *Brown & Williamson* as entirely results-oriented, the damage to *Chevron* is relatively clear. If judges have broad or unlimited freedom to decide what statutory provisions are ambiguous and which are not, according to their policy preferences and unmoored to any principle, then the deference available at Step Two should they find ambiguity is, if not meaningless, at least secondary. Substantial power would be reallocated from agencies to judges. Step One discretion would swallow *Chevron*.

But even if one does not read *Brown & Williamson* as an exercise of naked results-oriented judging, its expansion of the traditional tools of statutory interpretation has similar effects. The broader the list of factors and sources of evidence that judges may marshal to determine whether ambiguity exists, the greater their discretion and the less deferential *Chevron* becomes. Statutory text, context, purpose, interpretive canons, and for some Justices legislative history were already acknowledged as sources for divining the clarity of congressional intent.<sup>127</sup> Debate among Justices over which factors should be considered, and which should determine the outcome in any case, was of course common.<sup>128</sup> But to the then-existing list of factors *Brown & Williamson* added implied repeal by subsequent statutes, the "economic and political" significance of the regulatory action and the degree to which an agency interpretation breaks with past practice.<sup>129</sup> In doing so, *Brown & Williamson* expanded the Step One inquiry from one grounded at least largely in the statute toward a wide-ranging multifactor analysis, one that sounds much more like *Skidmore* mud than *Chevron* crystal. There is no way to reasonably predict which factors a reviewing Court will choose to consider, to emphasize, and to minimize. Opportunities for results-oriented judging increase—there is little difference between a test with many factors and a test with none at all. *Brown & Williamson* alone may not have made *Chevron* Step One completely indeterminate at the Court, but no other case took a bigger step in that direction.

Moreover, the Court in *Brown & Williamson* announced no change in *Chevron*'s scope, unlike with the external erosions discussed above.

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127. See Jellum, *supra* note 9, at 728.

128. See, e.g., Jellum, *supra* note 9, 727–30 (describing textualist-intentionalist divide within *Chevron* Step One).

129. *Brown & Williamson*, 529 U.S. at 147.

*Brown & Williamson* was ostensibly a pure Step One case, decided within the four corners of *Chevron*. This has potentially greater effect on *Chevron* as a doctrine because the precedents it sets—the additions it makes to the Step One toolbox—are not limited to any discernible class of cases. Implied repeal, economic and political significance, and change in longstanding agency interpretation are, after *Brown & Williamson*, factors that every court may, possibly must, consider in deference cases.

Justice Scalia, who would be a year later so scathing in his critique of *Mead*'s muddying of *Chevron*, was in the *Brown & Williamson* majority and appears to have had little or no objection to the Court's approach.<sup>130</sup> This should perhaps not be surprising, as Justice Scalia always took a broad view of the Court's toolkit for determining whether statutory language is ambiguous.<sup>131</sup> In an oft-quoted defense of *Chevron* in 1989, he argued that:

[T]he “traditional tools of statutory construction” include not merely text and legislative history but also, quite specifically, the consideration of policy consequences. . . . Policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron*—the step that determines, before deferring to agency judgment, whether the law is indeed ambiguous. Only when the court concludes that the policy furthered by *neither* textually possible interpretation will be clearly “better”—in the sense of achieving what Congress apparently wished to achieve—will it, pursuant to *Chevron*, yield to the agency's choice. But the reason it yields is assuredly *not* that [the court] has no constitutional competence to consider and evaluate policy.<sup>132</sup>

If judges' policy preferences are a fair basis for deciding whether a statute is ambiguous, the factors added by *Brown & Williamson* are small potatoes. Perhaps Justice Scalia does not really believe judicial policy preferences should control Step One outcomes; later in the same Article he praises *Chevron*'s predictability:

Chevron is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the

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130. *Id.* at 124.

131. *See* Scalia, *supra* note 19, at 515.

132. *Id.* (alteration in original).

bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.<sup>133</sup>

Reconciling these two views is difficult, however. If judges' policy views are relevant at Step One, it is unclear how Congress can rely on agency policy preferences to control outcomes under *Chevron*. "[W]ithin the bounds of permissible interpretation" in the second quotation is doing a lot of work. This indeterminacy casts Justice Scalia's *Mead* dissent in a new light. His version of *Chevron* is not and never was the bright-line rule he claims is threatened by *Mead's* revival of *Skidmore*. Justice Scalia's *Chevron*, if that is what was applied in *Brown & Williamson*, shifts much less power from judges to agencies and has much less predictable outcomes than the standard account of *Chevron* or his own claims suggest. The broad view of Step One Justice Scalia articulates in his 1989 essay seems inconsistent with the *Brown & Williamson* Court's approach insofar as Justice Scalia and the rest of the majority there include the agency's reversal of a longstanding position in the factors they consider relevant. Justice Scalia pointed to *Chevron's* abandonment of *Skidmore's* inclusion of agency stability of position as one of the later case's chief virtues, preventing judicial ossification of regulatory law.<sup>134</sup>

Perhaps it is unfair to single out Justice Scalia. The four other Justices in the *Brown & Williamson* majority were equally willing to expand the scope of Step One. Although the four dissenting Justices argued forcefully that the Court should have deferred to the FDA's interpretation, they did not call for a narrower approach to Step One, other than by rejecting the majority's reading of later congressional enactments.<sup>135</sup> And many of the same Justices dissenting in *Brown & Williamson* have been accused of motivated reasoning at *Chevron* Step One in other cases.<sup>136</sup> My claim here is not to suggest that Justice Scalia is unique in holding a broad view of Step One that sharply limits *Chevron's* power and predictability; I suspect that when the chips are down it is quite difficult for any judge to do what *Chevron* asks and set aside their preferences in favor of the agency's. Justice Scalia's honest inclusion of judicial policy preferences within the Step One toolkit is

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133. *Id.* at 517.

134. *Id.*

135. *Brown & Williamson*, 529 U.S. at 181–82 (Breyer, J., dissenting).

136. *See, e.g.,* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 715 (1995) (Scalia, J., dissenting) (arguing that the majority failed to discern a clear textual meaning of "harm" in the Endangered Species Act based on a misreading of the statute's purpose).

therefore worthy of some praise, even if it undercuts the virtues he attributes to *Chevron* in the same Article. It is harder to square these views and his vote in *Brown & Williamson* with the rule-like *Chevron* he describes in his *Mead* dissent, however.

*Brown & Williamson* was not unique in its broad view of the Court's Step One tools, nor was its influence limited to the Justices who signed onto its majority opinion—a broad Step One would not be a factional project. In *Massachusetts v. EPA*, decided a few years later, all four Justices who would have deferred to the FDA's statutory interpretation of the FDCA refused to defer to the EPA's interpretation of the Clean Air Act that greenhouse gases that contribute to climate change were not "air pollutants" subject to regulation under the law.<sup>137</sup> Only Justice Kennedy was in the majority in both cases.<sup>138</sup> The cases differ in many important respects.

*Massachusetts*, like *Brown & Williamson*, is marked by an aggressive approach to Step One and a resulting refusal to defer to the agency's view. *Brown & Williamson* paid little heed to statutory text, appealing to extra-textual factors, some of them found in Step One toolbox for the first time. In contrast, the *Massachusetts* court focused almost solely on one textual provision of the statute, the definition of "air pollutant."<sup>139</sup> This required rejecting all of the agency's claims for a broader reading, including evidence from later congressional enactments that, in the agency's view, indicated Congress did not intend to delegate authority to regulate greenhouse gases.<sup>140</sup> This forced the majority to distinguish *Brown & Williamson*, doing so with a vague pronouncement that regulatory authority over tobacco "clashed with . . . 'common sense' intuition," while lack of authority over greenhouse gases did not.<sup>141</sup>

Justice Scalia in dissent argued that the majority even got its textual analysis wrong, ignoring part of the relevant definition and missing ambiguity that should have gotten the agency to Step Two.<sup>142</sup> Cass Sunstein, no critic of the administrative state in general or of climate regulation, has criticized the *Massachusetts* court for too quickly

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137. See *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007); *Brown & Williamson*, 529 U.S. at 163–64 (Breyer, J., dissenting).

138. *Massachusetts*, 549 U.S. at 503; *Brown & Williamson*, 529 U.S. at 124.

139. *Massachusetts*, 549 U.S. at 528–29.

140. *Id.* at 529–30.

141. *Id.* at 531.

142. *Id.* at 558 (Scalia, J., dissenting).

resolving the Step One ambiguity inquiry and therefore showing insufficient deference to the agency's interpretation.<sup>143</sup>

The Court's approaches to *Chevron* Step One in *Brown & Williamson* and *Massachusetts* are therefore superficially quite different—*Massachusetts* is all about text; *Brown & Williamson* is all about, well, everything else. Such contrast probably should not be surprising, given that the Justices in dissent and majority are almost exactly reversed.<sup>144</sup> But a closer look is revealing—the Justices' methodological approaches in the two cases are against type. Noted textualist Justice Scalia, joined by Justice Thomas, spends a great deal of time in both cases appealing to context, purpose, and broad legislative intent. At the same time, the more liberal Justices are quite willing to pound the text. This gives away the game. It is difficult to read the results in the two cases as determined by anything other than the policy preferences of a majority of the court, with mere lip service given to the statutory ambiguity inquiry in *Chevron*. Even if one is not willing to go that far, the extreme range of judicial flexibility in *Chevron* Step One still makes access to the deference in Step Two extremely unpredictable, and therefore substantially reduces *Chevron*'s power and influence. In short, *Brown & Williamson* shows that judges can dig through the Step One toolbox until they find the evidence they need, while *Massachusetts* shows judges can grab one tool and more or less ignore the others. If that reading is correct, almost anything is possible at Step One.

It is possible that expansion of the boundaries of Step One, eroding *Chevron* from the inside, was inevitable. Just as it is difficult in individual cases for judges to follow *Chevron*'s deference command, it is difficult for courts to hold the line on a principled doctrine in the face of edge cases and other pressures; this is Carol Rose's insight.<sup>145</sup> Crystal looks eternal but cannot hold for long, much less forever. Michael Herz describes *Chevron* as a "self-regulatory regime[]" that relies "on entities

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143. Cass R. Sunstein, *Changing Climate Change, 2009–2016*, 42 HARV. ENV'T L. REV. 231, 242–43 (2018).

144. Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 3 SUP. CT. REV. 111, 143 (2007). Seven of the Justices on the Court when *Brown & Williamson* was decided remained on the Court in 2007 when *Massachusetts* was decided, and the two changes in personnel did not affect the Court's ideological balance. *See id.* at 128. Justice Kennedy voted in the majority in both cases. *Id.* at 143. Justices Breyer, Stevens, Ginsburg, and Souter dissented in *Brown & Williamson* but were in the majority in *Massachusetts*. *Id.* Justices Scalia and Thomas were in the majority in *Brown & Williamson* but dissented in *Massachusetts*. *Id.* Justices O'Connor and Rehnquist were also in the majority in *Brown & Williamson*, but were replaced by Justice Alito and Chief Justice Roberts, who dissented in *Massachusetts*. *Id.*

145. *See supra* Section II.

[here, judges] to oversee themselves.”<sup>146</sup> Such regimes are extremely hard to maintain. As he puts it in the *Chevron* context, “[o]nly in the rarest of self-protective settings will courts create and stand by a super-strong hands-off principle. *Chevron* has never, in practice, amounted to an abdication of the judicial role, if only because judges are not going voluntarily to disarm.”<sup>147</sup>

A narrow view on the traditional tools available at Step One no doubt makes *Chevron* cases more predictable, but as the deep disagreement over textual meaning in *Massachusetts* illustrates, not by much. Even a small toolkit gives judges broad freedom. For example, the Court applies traditional canons of statutory construction, part of the traditional tools at Step One, denying deference if they allow plain meaning to be discerned.<sup>148</sup> As Karl Llewellyn famously argued, these canons are in reality indeterminate; they do not compel a consistent reading of statutes.<sup>149</sup> Judges may pick and choose among them to reach a preferred result. This complexity, unpredictability, and, well, muddiness gets worse as more interpretive tools are added to the Step One inquiry, as the Court did in *Brown & Williamson*, shifting power back to judges. Even if one reads *Brown & Williamson* as consistent with past *Chevron* Step One practice, all that proves is that the inquiry was always extremely broad—judges were never really, in Herz’s terms, self-regulating at all.<sup>150</sup>

Not all scholars read the evolution of Step One and, by extension, *Chevron*’s power and influence the same way. Linda Jellum argues that rather than expanding in scope, Step One has *narrowed*; where once it looked to intent as well as text, the Court over time has come to focus almost exclusively on “a search for mere textual clarity.”<sup>151</sup> In Jellum’s view, this narrowing explains the Court’s reduced reliance on *Chevron*,

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146. Herz, *supra* note 8, at 1873.

147. *Id.* at 1871; *see also* Breyer, *supra* note 22, at 379 (noting psychological difficulty of meaningful and persistent deference doctrines).

148. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“[T]he *Chevron* Court explained that deference is not due unless a ‘court, employing traditional tools of statutory construction,’ is left with an unresolved ambiguity. . . . Where, as here, the canons supply an answer, ‘*Chevron* leaves the stage.’”) (citations omitted). *But see* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 66 (2008) (noting tension between use of “normative” canons of construction and *Chevron*’s allocation of interpretive authority to agencies, leading to circuit splits on how canons should be applied in *Chevron* cases).

149. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395, 401 (1950).

150. *See* Herz, *supra* note 8, at 1873.

151. *See* Jellum, *supra* note 9, at 761, 770.

effectively narrowing its scope.<sup>152</sup> Thus, *Chevron* has entered “[s]enescence” because “[t]extualism [r]eigns.”<sup>153</sup> As described above, I do not agree that the Court has narrowed Step One over time; quite the opposite. But Professor Jellum and I are otherwise not far apart. We agree that the Court often “p[ays] lip service” to Step One ambiguity analysis in *Chevron* cases.<sup>154</sup> For Jellum, this is evidence that Step One has become less relevant, with the Court “almost impatient” to get to deeper review at Step Two.<sup>155</sup> Instead, I think that Step One has been expanded so much that Step Two is only very rarely relevant.

Under this view, *Brown & Williamson* is unusual not because of its expansive view of the tools available for determining ambiguity at Step One, but its willingness to discuss that range openly. In other cases, the Court similarly reaches its preferred result in Step One but feels no need to discuss how in any depth. Perhaps the *Brown & Williamson* Court was forced to show the full arsenal of Step One only because the statutory language was so clearly in the agency’s favor. *Brown & Williamson* is emphatically *not* a textualist holding. In any case, Professor Jellum and I certainly agree that *Chevron* has declined in significance, though perhaps for somewhat different reasons.

### C. *The Internal/External Distinction Blurs*

*Chevron*’s decline has been continuous and, perhaps, inexorable. But for a time, the Court was at least willing to make explicit its constraints on deference. By the late 1990s, however, implicit, internal erosion of *Chevron* became the norm.<sup>156</sup> In my view, *Brown & Williamson* was the pivotal case in this trend, pulling back the curtain enough to reveal *Chevron*’s empty core.

The best evidence that *Brown & Williamson* was a major departure from previous *Chevron* practice is that the Court has since excised the case from the main line of *Chevron* jurisprudence by creating a new, explicit limitation on *Chevron*’s scope—the so-called major questions doctrine.<sup>157</sup> Under the doctrine, certain “extraordinary cases” involving interpretive questions that have major political, economic, or social

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152. *Id.* at 761.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.*

157. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 358 (2016).

implications are taken out of the *Chevron* framework.<sup>158</sup> In other words, the major questions doctrine is, along with *Mead*, part of “Step Zero” of the *Chevron* process.<sup>159</sup> The reference to “extraordinary cases” comes from language in *Brown & Williamson*, and in later cases.<sup>160</sup> *Brown & Williamson* and another case decided a year before, *MCI Telecommunications Corp. v. AT&T*, have been treated as the first major questions doctrine cases.<sup>161</sup> *Brown & Williamson* did not announce any doctrinal change, however, and in fact explicitly cited the basis for its holding within Step One.<sup>162</sup> Neither did *MCI* purport to change *Chevron* doctrine; the basis for the holding there is somewhat cryptic, but it can be read as either a *Brown & Williamson*-style expansive Step One case or a rare agency loss at Step Two.<sup>163</sup> Despite these dubious roots, the major questions doctrine has since reappeared from time to time in subsequent Court decisions and dissents<sup>164</sup> before being explicitly enshrined in *Chevron* doctrine in 2015’s *King v. Burwell*.<sup>165</sup>

The major questions doctrine has been heavily criticized as an erosion of *Chevron* and a judicial power-grab.<sup>166</sup> As I have argued in a previous Article, there is an alternative interpretation—the major questions doctrine at least cabins the erosion of *Chevron* in *Brown & Williamson*, *MCI*, and their progeny to a narrow class of “major” cases.<sup>167</sup> Without it, judges unwilling to follow *Chevron*’s self-restraint requirements in such cases are forced to wedge their arguments into the preexisting *Chevron* framework, typically, as in *Brown & Williamson*, by finding that the statute unambiguously dictates the reading they prefer.<sup>168</sup> Doing so muddies Step One doctrine, creating precedent for further mischief.<sup>169</sup> A formal major questions doctrine confines that

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158. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). See generally Richardson, *supra* note 157.

159. See Sunstein, *supra* note 20, at 213, 236.

160. Richardson, *supra* note 157, at 371–72.

161. *Id.* at 364–66, 371 (discussing the foundational role of *MCI* and *Brown & Williamson* in the major question doctrine).

162. See discussion *supra* Section III.B.

163. *Id.* at 364–65.

164. *Id.* at 360–78.

165. 576 U.S. 473, 485–86 (2015). See discussion *infra* Section IV.A.3.

166. See Richardson, *supra* note 158, at 390–409 (discussing critiques of the major questions doctrine at length).

167. See generally *id.*

168. *Id.* at 412, 422.

169. *Id.* at 422.

mischief to a small sandbox of cases, possibly restricted to the Supreme Court.<sup>170</sup>

Of course, that only works if the class of major cases is relatively small, and if its boundaries can be at least roughly determined in advance.<sup>171</sup> So far, the list of Supreme Court cases explicitly citing the doctrine is small, though there does seem to be a recent increase.<sup>172</sup> But, just as with *Mead*'s "force of law" requirement, the boundaries of the major questions doctrine have never been clear. What makes a case major? It appears to be some combination of economic significance, political controversy, and a significant shift in the agency's asserted regulatory authority, though the cases never list factors explicitly.<sup>173</sup> It is therefore hard to say how effective the major questions doctrine has been in constraining erosion of *Chevron*, much less in predicting how effective it will be in the future.

The Court has also linked the major questions doctrine to a parallel quasi-clear statement rule for significant grants of regulatory authority to agencies. As Justice Scalia has repeatedly articulated the principle, Congress does not "hide elephants in mouseholes"—in other words, courts will be unwilling to resolve statutory ambiguities in favor of agencies if doing so would substantially increase their authority.<sup>174</sup> It is unclear where in the *Chevron* framework this principle does its work. Some of the cases suggest it is an additional factor in the major questions doctrine analysis—where statutory support is in some sense thin, and the implications large, *Chevron* will not apply at all.<sup>175</sup> Or the principle may operate within Step One, setting a higher bar for ambiguity where the agency's resolution of the claimed ambiguity would substantially increase its authority.<sup>176</sup> Either interpretation reduces *Chevron*'s power and predictability, however. "Elephants in mouseholes" is a simple principle in application—it increases the degree of statutory ambiguity required for agencies to access *Chevron* deference.

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170. *See id.* at 360, 428–29.

171. *See id.* at 426–27.

172. *See id.* at 376–79.

173. *Id.* at 381–85.

174. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

175. *See Richardson*, *supra* note 157, at 371–76.

176. *Id.*

Making sense of the effect of these doctrines and principles on *Chevron* is difficult, but the apparent effect is to create two additional hurdles for agencies seeking deference. Step One requires there to be some statutory ambiguity. But if the agency's interpretation of that alleged ambiguity substantially increases agency authority, deference may still not be available under the elephants in mouseholes doctrine. Instead, a clear statement from Congress—i.e., *lack of ambiguity*—is required. And even statutory text strongly in favor of the agency's reading can be overcome if the economic or political significance is sufficient to make it an extraordinary case, which the major questions doctrine takes out of the *Chevron* framework entirely. It is, of course, courts that decide when and whether these three hurdles have been overcome. All have unclear margins but lie in wait to disarm *Chevron* whenever called upon.

#### D. Empirical Analysis of Chevron

By the mid-2000s, *Chevron* had matured, with over two decades of refinement of its analytic process and definition of its scope. As the preceding discussion illustrates, that evolution had been inexorably in the direction of a narrower, weaker *Chevron*, but nevertheless *Chevron* had become generally understood as the defining case on agency interpretations of statutes. Justice Scalia's dissent in *Mead*, excoriating the majority for unearthing a by then ancient and discarded *Skidmore* deference,<sup>177</sup> is perhaps the best evidence of *Chevron*'s official supremacy.

How powerful and predictive, or how crystalline, was *Chevron* at that point? In 2008, William Eskridge and Lauren Baer published a comprehensive and highly influential analysis of agency statutory interpretation cases at the Supreme Court.<sup>178</sup> Their dataset included roughly 1,000 post-*Chevron* cases decided between 1983 and 2005—so, including *MCI* and *Brown & Williamson* but not *Massachusetts*.<sup>179</sup> On the one hand, they found that the Court rarely applied *Chevron*, doing so in only 28.5 percent of the cases they identify as within *Chevron*'s scope

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177. *United States v. Mead Corp.*, 533 U.S. 218, 239–40 (2001) (Scalia, J., dissenting).

178. Eskridge & Baer, *supra* note 57; see also Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT'L REV. L. & ECON. 81, 81 (2019) (characterizing Eskridge & Baer's Article as "one of the most highly cited legal empirical articles ever published").

179. Eskridge & Baer, *supra* note 57, at 1094. *MCI* was decided in 1994 and *Brown & Williamson* was decided in 2000. *MCI Telecomms. Corp. v. AT&T Com.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *Massachusetts* was decided in 2007, however. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

as defined by *Mead*.<sup>180</sup> This led Eskridge and Baer to conclude that “[b]ased upon our data . . . there has not been a *Chevron* ‘revolution’ at the Supreme Court level.”<sup>181</sup> When applied, however, *Chevron* did appear to meaningfully increase agencies’ rate of success: 76.2 percent under *Chevron* relative to 68.3 percent in all cases.<sup>182</sup> Another empirical study by Cass Sunstein and Thomas Miles found a slightly lower agency success rate of 67 percent over cases between 1989 and 2005.<sup>183</sup> The differences between the two studies’ findings may be due to methodological differences, or they may indicate that the Court became less deferential in *Chevron* cases after 1990.<sup>184</sup> Overall, these two analyses support the view that *Chevron* was powerful, affecting case outcomes, and possibly increasing the predictability of those outcomes, though perhaps not by as much as its reputation would suggest.<sup>185</sup>

More recent scholarship has cast some doubt on elements of Eskridge and Baer’s analysis. Natalie Salmanowitz and Holger Spamann’s 2018 research, relying on parties’ briefs in a subset of the same cases analyzed by Eskridge & Baer, found that the Court actually applied *Chevron* in a much greater percentage of applicable cases, at around 80 percent.<sup>186</sup> If this revised estimate is correct, then *Chevron* looks even more far-reaching, at least through 2006.<sup>187</sup>

However, both the Salmanowitz/Spamann 80 percent and Eskridge/Baer 28.5 percent estimates are somewhat misleading in this regard, as they constrain the denominator to *Chevron* as circumscribed by *Mead*—in other words they take some or all of the doctrinal erosion of *Chevron* for granted in defining its ambit.<sup>188</sup> Eskridge and Baer’s 8.4 percent estimate, the number of cases applying *Chevron* relative to their entire dataset of agency statutory interpretation cases, is the only figure that does not do this.<sup>189</sup> As of 2006, therefore, the case for *Chevron*’s power and influence at the Court was mixed. The trend since has been clearer.

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180. *Id.* at 1124–25.

181. *Id.* at 1090.

182. *Id.* at 1099–1100.

183. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825, 849 (2006).

184. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83–84 (2011).

185. *But see id.* at 83–85 (concluding from these two and other empirical studies that the choice of deference doctrines does not matter much for case outcomes).

186. See Salmanowitz & Spamann, *supra* note 178, at 81, 89.

187. *See id.* at 83.

188. *See id.* at 82–83.

189. Eskridge & Baer, *supra* note 57, at 1125.

## IV. CHEVRON TODAY

A. *The Foundations Crumble (2013–15)*

*Chevron's* decline has accelerated in recent years. Four cases from 2013–15 are particularly important: *City of Arlington v. FCC*,<sup>190</sup> *Utility Air Regulatory Group v. EPA*,<sup>191</sup> *King v. Burwell*,<sup>192</sup> and *Michigan v. EPA*.<sup>193</sup> They are explored below, followed by an overview of cases in the last four Court terms, during which *Chevron* has only once determined a case's outcome.

1. *City of Arlington v. FCC*

*City of Arlington v. FCC*, decided in 2013, is noteworthy as a near-miss erosion of *Chevron's* power and predictability.<sup>194</sup> In the case, the Court considered whether “jurisdictional” agency statutory interpretations were entitled to *Chevron* deference.<sup>195</sup> In a six to three opinion authored by Justice Scalia, the Court said yes,<sup>196</sup> over dissent from Chief Justice Roberts.<sup>197</sup> This was not because agency control over the boundaries of their own authority was not troubling to Justice Scalia—foxes guarding henhouses is the prevailing metaphor.<sup>198</sup> Instead, he and the other Justices in the majority rejected a jurisdictional limitation on *Chevron* because it would be impossible to administer in practice.<sup>199</sup> In Justice Scalia's view, it is impossible to draw a line between jurisdictional and non-jurisdictional questions.<sup>200</sup> Interpreting regulatory statutes almost always means deciding whether some class of behavior comes within the regulatory ambit of an agency.<sup>201</sup> In other words, *everything* is jurisdictional. “The effect would be to transfer any number of interpretive decisions . . . from the agencies that administer the statutes to federal courts.”<sup>202</sup>

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190. 569 U.S. 290 (2013).

191. 573 U.S. 302 (2014).

192. 576 U.S. 473 (2015).

193. 576 U.S. 743 (2015).

194. 569 U.S. 290 (2013).

195. *Id.* at 293, 307.

196. *Id.* at 292, 307.

197. *Id.* at 312 (Roberts, C.J., dissenting).

198. *See id.* at 305–07.

199. *Id.* at 304–05.

200. *Id.*

201. *Id.* at 297.

202. *Id.* at 304.

As Professor Herz has observed, “[f]or Justice Scalia, this was a case about whether *Chevron* lived or died. . . . On this account, *City of Arlington* is the case that saved *Chevron*.”<sup>203</sup> Carve out jurisdictional questions, and *Chevron* loses its heart, or at least its power to affect outcomes by allocating interpretive authority.<sup>204</sup> But had *City of Arlington* come out the other way it would have added another explicit exception to *Chevron* to the already-long list. What makes a jurisdictional exclusion fatal to *Chevron* but not the other exclusions and erosions? Perhaps it is too big an exclusion or too malleable; this seems to be Justice Scalia’s view.<sup>205</sup> Maybe that is right, but some of the already-established limitations on *Chevron*’s scope seem larger, fuzzier, or both, most notably the major questions doctrine. And the steady growth in the court’s tool kit and power in Step One has similar effects to those Justice Scalia fears from a jurisdictional exclusion. Courts and litigants can pick and choose arguments, and the effect is to “transfer any number of interpretive decisions” from agencies to the courts.<sup>206</sup> What Justice Scalia feared in *City of Arlington* had already come to pass years before, as he warned in *Mead* or was happy to permit in *Brown & Williamson*.<sup>207</sup>

Even the rejection of a jurisdictional exclusion in *City of Arlington* may not matter much in the long run. Herz compares Justice Scalia’s opinion and Chief Justice Roberts’ dissent to ships passing in the night, having much in common.<sup>208</sup> He further argues that courts applying the case do in practice exclude some “jurisdictional” component of the interpretive inquiry from *Chevron* deference, making it effectively part of “Step Zero.”<sup>209</sup> If this view is correct, *City of Arlington* was not so much a failed attempt to constrain *Chevron* as it was a failed attempt to elevate a common practice into established doctrine. The damage Herz argues this would do to *Chevron* was already happening. If Justice Scalia “saved” *Chevron*, it was by keeping its erosion from becoming obvious.

Even if one does view *City of Arlington* as a near miss, its rejection of a further categorical exclusion did not augur a turn in *Chevron*’s fortunes, or even much of a pause in its decline. Assault continued over the next two Court terms.

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203. Herz, *supra* note 8, at 1900.

204. *City of Arlington*, 569 U.S. at 304 (“Make no mistake—the ultimate target here is *Chevron* itself.”).

205. *See id.* at 304–05.

206. *Id.* at 304.

207. *See supra* Sections III.A–B.

208. Herz, *supra* note 8, at 1904–05.

209. *Id.* at 1905–06.

## 2. *Utility Air Regulatory Group UARG v. EPA* (“UARG”)

The first illustration came in *UARG*, decided in the next term.<sup>210</sup> It concerned interpretation of a Clean Air Act provision setting emissions thresholds above which a review and permitting process is required.<sup>211</sup> If rigidly applied, a large number of very small emissions sources would become subject to EPA regulation—something neither they nor, crucially, the EPA itself wanted.<sup>212</sup> EPA argued that the numerical thresholds in the statute were an unambiguous directive that it could only avoid because applying them would lead to “absurd results.”<sup>213</sup> The Court agreed that the statute was unambiguous, but *in the opposite direction*; Congress could not have intended for the thresholds to apply to all pollutants, based on a searching review of similar terms used throughout the statute.<sup>214</sup> In this case, at least, the ambiguity question in Step One swallowed the range of deference entirely.<sup>215</sup> Not just the outcome, but the arguments in the case would have been no different if it were decided under *Skidmore*’s multifactor standard, or even just *de novo*. *UARG* was about the best reading of a statutory provision that, if strictly applied, would lead to costly and probably unintended results. The Court listened to the agency’s reading but was unwilling to cede any real interpretive authority.

*UARG* is an excellent illustration of how little middle ground is left in *Chevron* cases in which deference might operate. The agency said the statute meant X. The Court said it unambiguously meant Y. *UARG* is not unique. The scope of Step One has been expanding, at least since *Brown & Williamson*. It is now common for both sides of an interpretive dispute to claim that their reading of the statute is the only correct or plausible reading and that they should therefore win at *Chevron*’s Step One.<sup>216</sup> The

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210. 573 U.S. 302 (2014).

211. *Id.* at 307–09.

212. *Id.* at 310, 312.

213. *See id.* at 344 (Alito, J., dissenting); *see also* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31516–18 (June 3, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) (defending refusal to apply Prevention of Significant Deterioration regulations to small sources as “administrative necessity” that avoids “absurd results”).

214. *Util. Air Regul. Grp.*, 573 U.S. at 315–20.

215. *Id.* at 315–21. The EPA therefore “lost” the case in the formal sense, but because it had not really wanted to regulate most of the emissions sources in question anyway, it ended up with more or less the policy result and regulatory authority it wanted. The EPA’s entire litigation position was, more or less, “stop me before I regulate again.”

216. It is perhaps unsurprising that parties would so claim; they and their advocates are likely to see their preferred result as the only plausible reading of a statute. But it is more surprising when Justices do the same. *UARG* and *Massachusetts* are examples, but

ubiquity of claims of clarity means that cases are really decided at Step One, before *Chevron's* deference is available at all.

Sometimes statutes are clear, of course, but when crystals become mud, the devil can cite scripture for his purpose. Big, complex statutes like the Clean Air Act, under which many interpretive cases are decided, seem particularly vulnerable: it is usually possible to find something in the statute, somewhere, that supports a given reading, then selectively cite evidence to support a claim that the reading is clear. The contrast with *Massachusetts* is telling: both cases interpreted very similar language, “any air pollutant,” in the same statute, yet concluded that language *clearly* had different meanings.<sup>217</sup> If it is possible to do that *without admitting that the language is ambiguous*, then the door to deference at Step Two is effectively closed. Internal erosion of *Chevron* is complete.

### 3. *King v. Burwell*

External erosion of *Chevron* continued as well. The Court considered a particularly high-profile case of agency statutory interpretation in 2015 in *King v. Burwell*.<sup>218</sup> Litigants challenged the federal government’s implementation of health insurance markets, claiming the Affordable Care Act (“ACA” or “Obamacare”) only authorized subsidies to those buying insurance on state-run exchanges.<sup>219</sup> The Internal Revenue Service (“IRS”) interpreted the statute to allow subsidies for users of both federal and state exchanges.<sup>220</sup> This seemingly technical matter had major implications; if subsidies were made unavailable to citizens in the group of states refusing to run their own exchanges, a significant part of the Obamacare health insurance market could collapse.<sup>221</sup> Obamacare’s high political profile added to the case’s salience.

Nevertheless, the case was a very straightforward matter of statutory interpretation. Should the text of the statute, authorizing subsidies for users of exchanges “established by the State,” be construed

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sometimes Justices of different opinions assert such in the same case. *See supra* text accompanying notes; *see, e.g.*, *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1475, 1477, 1483 (2020) (majority opinion and Alito, J., dissenting) (demonstrating that both Justice Breyer’s majority opinion and Justice Alito’s dissent would resolve the interpretive question at Step One, but with opposite results).

217. *Util. Air Regul. Grp.*, 573 U.S. at 316–21; *see also Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007).

218. 576 U.S. 473 (2015).

219. *Id.* at 483.

220. *Id.*

221. *Id.* at 492–94.

narrowly, or should other evidence of congressional intent—context, history, other enactments or lack thereof, etc.—be interpreted to allow subsidies for users of federal exchanges?<sup>222</sup> The relevant agency adopted the latter, broader reading.<sup>223</sup> Although in a six-to-three opinion by Chief Justice Roberts the Court agreed, upholding the legality of the subsidies,<sup>224</sup> it explicitly afforded no deference to the agency's position.<sup>225</sup> *Chevron* would seem to have required deference, at least unless the meaning of the statute was clear; in its decision below, the Fourth Circuit applied *Chevron* and deferred to the IRS's interpretation.<sup>226</sup>

One option available to the Court was of course to find that the text of the statute foreclosed the IRS's interpretation, thereby denying deference at *Chevron* Step One; Justice Scalia's dissent would have done so.<sup>227</sup> Another option would have been to rule that Congress unambiguously intended the subsidies to be available to users of federal exchanges, i.e., that the statute was clear in the other direction. If so, then *Chevron* deference would be irrelevant. Of course, such a reading of the statute would be in a great deal of tension with the text of the relevant provision, making it difficult to conclude with a straight face that the statute is not ambiguous.<sup>228</sup> On the other hand, that did not stop the Court in *Brown & Williamson*.

Instead, Chief Justice Roberts rejected both of these options and admitted that the statute was ambiguous, considering text, context, purpose, and other factors.<sup>229</sup> Having concluded that Congress had not clearly spoken under the traditional *Chevron* framework, the Court should have deferred to the agency. But under the modern, constrained *Chevron*, Chief Justice Roberts concluded that no deference was available, for three reasons—two previously announced, and one new. First, Chief Justice Roberts applied the elephants in mouseholes clear statement rule, citing *URG*:

The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of

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222. *Id.* at 484–85, 492–93.

223. *Id.* at 483–84.

224. *Id.* at 491–94.

225. *Id.* at 486.

226. *Id.* at 484.

227. *Id.* at 499 (Scalia, J., dissenting) (“You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it.”); see also *id.* at 510 (“If that is all it takes to make something ambiguous, everything is ambiguous.”).

228. See *id.* at 485–86.

229. *Id.* at 485–92.

health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.<sup>230</sup>

Second, the opinion classed the case as “extraordinary,” again citing *Brown & Williamson*, explicitly applying the major questions doctrine to take the case out of *Chevron*’s domain.<sup>231</sup>

While not new, both of these doctrines limiting *Chevron* were given their clearest endorsement to date in *King*. Some had argued the major questions doctrine was dormant or even dead before *King* was decided.<sup>232</sup> Moreover, recall that *Brown & Williamson* did not explicitly create a new doctrine; it was ostensibly a Step One case.<sup>233</sup> Unless one views the elephants in mouseholes doctrine as indistinguishable from the major questions doctrine,<sup>234</sup> *King* was the first Supreme Court case to explicitly state that “extraordinary cases” were outside *Chevron*’s domain.<sup>235</sup> Law professors had debated the major questions doctrine at length,<sup>236</sup> but it had yet to be formally acknowledged by the Court. Therefore, even without announcing new doctrine, *King* reduced *Chevron*’s reach by solidifying—dare I say, crystallizing—constraints the Court had already put on deference.

At the same time, *King* was a missed opportunity to add some clarity to the major questions doctrine. The actual interpretive question at issue in the case was relatively minor, in that it involved a single, short sentence appearing once in the statute, though *UARG* was far more complex in this regard, and no broad expansion of IRS authority.<sup>237</sup> But of course its implications were great; as the opinion discusses, without

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230. *Id.* at 485–86 (quoting *Brown & Williamson*).

231. *Id.* at 485.

232. See, e.g., Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (Or why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 594–95 (2008) (“In *Massachusetts v. EPA* . . . the Court dealt a fatal blow to a fledgling, though controversial, doctrine: the ‘major questions’ exception to *Chevron* deference.”).

233. See discussion *supra* Section III.B.

234. See Richardson, *supra* note 158, at 372.

235. See *id.* at 358.

236. See, e.g., Moncrieff, *supra* note 232, at 645; Sunstein, *supra* note 20, at 236.

237. See *King v. Burwell*, 576 U.S. 473, 486, (2015); see also *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 308–10, 316–18 (2014). Of course, the ACA itself was a broad regulatory expansion, and to the extent a small IRS role in subsidies held up the entire statute, that expansion was at issue in the case, albeit indirectly. See *King*, 576 U.S. at 486.

tax subsidies the federal exchanges might fail, and a substantial portion of the policy changes wrought by the ACA with them.<sup>238</sup> This suggests that the ultimate effects of a statutory interpretation move are what makes a question “major,” however incremental that interpretive move is on its own terms. This is in some tension with *Brown & Williamson* and the elephants in mouseholes principle, which seem to be driven by the size of the agency’s claimed increase in authority, such as the FDA’s claim of authority to regulate tobacco in *Brown & Williamson* or the EPA’s claim of authority over small greenhouse gas emitters in *UARG*. How much does context matter for determining whether a question is major? How big of a role does political controversy play? Was *King* a major questions case because it made headlines? Given its high political profile and the economic significance of the healthcare industry, perhaps *King* was a clear major questions case. Or perhaps it just barely crossed the major questions bar. The Court did not say.

The third and final reason Chief Justice Roberts refused to defer was on the grounds that the IRS lacked the relevant expertise: “It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort,” he concluded.<sup>239</sup> This deference-denying rationale was new; the Court had not to my knowledge previously denied deference based on an assessment of the agency’s expertise. Chief Justice Roberts cited a 2006 case, *Gonzales v. Oregon*,<sup>240</sup> but that case is at most a weak precedent. To the extent *Gonzales* relied on the level of agency expertise, it was to determine which agency should receive deference in the context of a statute that bifurcates authority among multiple agencies, not whether an agency or the Court should decide an interpretive question.<sup>241</sup>

This new “stay-in-your-lane” limitation on *Chevron* creates another hurdle agencies must cross before deference will be made available: they

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238. *King*, 576 U.S. at 492–94.

239. *Id.* at 486 (emphasis omitted).

240. *Id.* at 496 (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

241. 546 U.S. at 265–70. The statute at issue in *Gonzales* divided authority for determining whether drugs may be sold between the Secretary of Health and Human Services and the Attorney General, the former charged with resolving medical and scientific questions, and the latter legal ones. *See id.* at 248–55. Because the case concerned an “interpretive rule” issued unilaterally by the Attorney General, the Court concluded that whether the interpretation at issue was medical or legal was relevant—if it was medical, not legal, the Attorney General lacked the authority to issue it. *Id.* at 265–70. Expertise is of course relevant in that inquiry, but the inquiry is important only because of the bifurcated structure of the statute. *See id.* The ACA also allocated authority to multiple agencies, but the specific authority at issue in *King*, that of tax subsidies for users of exchanges, was exclusively delegated to the IRS. *See King*, 576 U.S. at 483, 485–86.

must convince the court that they have the technical chops in the relevant area. This could easily become a requirement little different from *Skidmore*'s "power to persuade" factor—indeed *Gonzales* specifically cites this *Skidmore* requirement after denying deference.<sup>242</sup>

Returning to *King v. Burwell*, Chief Justice Roberts's conclusion that the IRS lacks the relevant expertise is not at all convincing and illustrates the degree to which the stay-in-your-lane doctrinal addition further constrains *Chevron*. Chief Justice Roberts insinuates that the IRS has drifted away from its area of expertise—tax—into an area—health care—where its views carry no weight.<sup>243</sup> It is true that the tax subsidies in question are part of health care policy, but they are still tax subsidies. The IRS may or may not know much about how to craft health care policy, i.e. how to set up the exchanges, but it does have expertise on *taxes*. Given how much of U.S. federal policy is implemented through the tax code, denying deference to the IRS whenever a tax measure has implications beyond revenue, as *King* appears to do, effects a major reduction in *Chevron*'s scope. Congress has not carefully restricted authority it delegates to agencies to narrow lanes of expertise.

Also, the stay-in-your-lane exception appears to be separate from the preexisting exclusion from *Chevron* of statutes administered by multiple agencies. The Court in *King* or *Gonzales* could have easily applied this exclusion to deny deference, but neither court did so, nor did either explain why. In both cases, Congress bifurcated authority between multiple agencies for good reason; in the ACA, it makes a lot of sense to delegate health policy decisions to HHS and implementation of tax changes to the IRS. Modern, complex statutes frequently divide authority in similar ways, or different statutes may compel agencies to regulate in overlapping areas.<sup>244</sup> This undercuts the Court's assertion that the IRS lacked relevant expertise. Even if the "multiple agencies" exception is withering, or only applies to truly general statutes like the APA, then the newly articulated stay-in-your-lane expertise exclusion is an even more powerful replacement.

*King* is important not only as an illustration of modern application of *Chevron*'s myriad exceptions, but in that it substantially strengthens

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242. *Gonzales*, 546 U.S. at 268–69 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

243. *King*, 576 U.S. at 485–86.

244. See, e.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324-01 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536–538) (example of joint rulemaking between EPA and National Highway Traffic Safety Administration, part of the Department of Transportation, setting federal fuel economy and emissions standards).

those exceptions. In applying both the major questions and stay-in-your-lane/expertise exceptions, the *King* majority unearths principles from earlier cases—*Brown & Williamson* and *Gonzales*, respectively—that were not decisive in those cases and crystallizes them into rules readily applicable in future cases. It is entirely possible that, without *King*, the major questions doctrine would have withered away, or at most remained a dormant curiosity, cited and discussed by far more law review Articles than cases. Now, any agency litigating in the Supreme Court must consider whether it will be denied deference because the case is too important.<sup>245</sup> In this way, *King* bootstraps *Brown & Williamson* and *Gonzales*, shielding it from accusations that it is creating new rules and elevating dicta to doctrine in the process.

#### 4. *Michigan v. EPA*

In *Michigan v. EPA*, decided only a few days after *King*, the Court again rejected an agency's statutory interpretation.<sup>246</sup> However, unlike in *King*, the Court *granted* deference but still rejected the agency's interpretation as unreasonable, despite that deference.<sup>247</sup> In other words, the EPA suffered the ignominy of an almost unheard-of loss at *Chevron* Step Two.<sup>248</sup> The case involved a detailed Clean Air Act issue that is too complex to describe in depth here. But the short version is that the EPA was required to evaluate whether regulating certain emissions from coal power plants was "appropriate and necessary."<sup>249</sup> The agency did so, but without reference to cost, interpreting "appropriate and necessary" to require evaluation only of environmental and technical criteria.<sup>250</sup>

The Court, in an opinion by Justice Scalia, rejected this reading of the statute.<sup>251</sup> Justice Scalia admitted that the "appropriate and necessary" language was ambiguous in that it did not clearly direct EPA to consider cost,<sup>252</sup> but ruled that interpreting as EPA did, ignoring cost entirely at this threshold stage, was beyond "the bounds of reasonable

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245. See Richardson, *supra* note 157, at 424–25 (discussing implications of the major questions doctrine for the Clean Power Plan, an Obama-era attempt to regulate greenhouse gas emissions from power plants).

246. 576 U.S. 743, 759–60 (2015).

247. *Id.* at 751, 759 (characterizing EPA's reading of the statute as "unreasonable").

248. Kent H. Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444–45 (2018).

249. *Michigan*, 576 U.S. at 747–49.

250. See *id.* at 749–50.

251. *Id.* at 760.

252. *Id.* at 752 ("[T]his term leaves agencies with flexibility.").

interpretation.”<sup>253</sup> This was not because, in the majority’s view, the EPA’s interpretation was incompatible with the text—as Justice Scalia concedes, “[t]here are undoubtedly settings in which the phrase ‘appropriate and necessary’ does not encompass cost.”<sup>254</sup> Nevertheless, context dictated a reading that the text alone did not; as the Court held, “[r]ead naturally in the present context, the phrase ‘appropriate and necessary’ requires at least some attention to cost.”<sup>255</sup>

One possible interpretation of *Michigan* is that it signals further erosion of *Chevron* deference. It could signal increased willingness on the Court to overrule agency interpretations of admittedly ambiguous provisions. If such Step Two losses for agencies were to become common, then it would become clear that *Chevron*’s core is empty. Previous erosions have limited access to deference by explicitly restricting *Chevron*’s scope, or by implicitly expanding judges’ ability to deny deference at Step One.<sup>256</sup> Expanding Step Two would cut to *Chevron*’s heart—Step Two is where the deference magic happens. Past expansion of grounds for denying deference at Step One provides a ready model for erosion of Step Two—scattered case outcomes may gradually crystallize into categories of interpretations that the court deems presumptively or *per se* unreasonable.

It is possible that in retrospect *Michigan* will be the first step along this path. It is, in my view, a strong assertion of broad judicial authority at *Chevron* Step Two. In other words, I do not view the agency’s interpretation as particularly unusual, much less unreasonable. As the dissent in *Michigan* puts it:

Judges may interfere only if the Agency’s way of ordering its regulatory process is unreasonable—i.e., something Congress would never have allowed. The question here, as in our seminal case directing courts to defer to agency interpretations of their own statutes [*Chevron*], arises “not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.” . . . EPA’s experience and expertise . . . — and courts’ lack of those attributes—demand that judicial review proceed with caution and care. The majority actually phrases this principle well, though honors it only in the breach: Within wide bounds, it is “up to the Agency to decide . . . how to account for

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253. *Id.* at 751 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014)).

254. *Id.* at 752.

255. *Id.*

256. *See* discussion *supra* Part III.

cost.” . . . That judges might have made different regulatory choices—might have considered costs in different ways at different times—will not suffice to overturn EPA’s action where Congress, as here, chose not to speak directly to those matters, but to leave them to the Agency to decide.<sup>257</sup>

If the majority had announced a general rule that agency interpretations of ambiguous provisions not requiring consideration of costs are presumptively unreasonable, it would be a substantial constraint on *Chevron* deference. *Not* announcing such a rule but implying that similar interpretations will not receive deference does even more damage to *Chevron*’s predictability for agencies.

But reasonable people may disagree about whether an interpretation is reasonable, and disagreement about whether *Chevron* dictates a particular case’s outcome is not good evidence, alone, that deference is being weakened. The Court in *Michigan* announces no new doctrinal rule, merely an application of Step Two’s reasonableness constraint, something present since *Chevron* was decided. Judges have always had the right to reject at least some agency interpretations of ambiguous statutes. *Chevron* is, after all, a deference doctrine, not an abdication doctrine. *Michigan* is unusual because the power to reject agency interpretations at Step Two has been used so rarely, not because that power is new.

Refusal to defer at Step Two may not even, in reality, be quite so unusual. A common view, perhaps the consensus view, among academics is that Step Two is indistinguishable from *State Farm*-style arbitrary and capricious review under the APA.<sup>258</sup> This, too, is a deferential standard, but agencies do lose these cases from time to time.<sup>259</sup> So perhaps *Michigan* is not so radical. Time will tell whether it is an outlier or the harbinger of erosion of deference at Step Two. At a minimum it is a shot across the bow of agencies.

At the same time, Justice Thomas thought Justice Scalia’s opinion did not go far enough. In concurrence, he explicitly called for *Chevron* to be reconsidered on separation of powers grounds.<sup>260</sup> This would become a recurring pattern for Justice Thomas in *Chevron* cases over the next few years.

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257. *Id.* at 771 (Kagan, J., dissenting) (citations omitted).

258. See Stephenson & Vermeule, *supra* note 42, at 603–04.

259. See VERMEULE, *supra* note 13, at 158 (finding a 92% win rate for agencies in arbitrariness challenges at the Supreme Court).

260. *Michigan*, 576 U.S. at 760–62 (Thomas, J., concurring).

*B. The Death of Deference (2016–20)*

*Michigan*, *UARG*, and *City of Arlington* are not unique. In the years since they were decided, the Court has continued to show little or no appetite for meaningful deference to agencies. At the same time, open criticism of *Chevron* has risen to the surface. The result has been a total collapse of deference to agency statutory interpretations at the Supreme Court level. Three patterns in *Chevron*'s treatment at the Court over the 2015–16 through 2019–20 terms illustrate the decline in deference.

First, the Court cites *Chevron* much less than it used to. This decline appears to be a long-term trend. Thomas Merrill found in 1992 that the Court considered whether to defer to an agency in about ten to twenty statutory interpretation cases per year.<sup>261</sup> Linda Jellum found that by 2006 this had declined; she identified three citations to *Chevron* in majority opinions in the 2005–06 term, only one in the 2004–05 term, and four in the 2003–04 term.<sup>262</sup> Because Merrill counted any case with discussion of deference, even by dissenting or concurring Justices,<sup>263</sup> this is not an apples-to-apples comparison. Merrill does, however, separately record a rate of about four to five Supreme Court cases per term in which the Court not only cited but applied *Chevron*, setting a lower bound on the possible number of annual citations.<sup>264</sup> Jellum's rate of around three citations per term in the 2000s remains about the same today—*Chevron* was cited in majority opinions fifteen times since the 2015–16 term, an average of exactly three times per term, and never more than five times.<sup>265</sup> To some extent this decline is surely due to a parallel decline in the number of cases the Court decides, something Jellum notes in 2006 as well.<sup>266</sup> In fact, the continuing decline in Court opinions since 2006<sup>267</sup> without a corresponding decline in *Chevron* citations could be taken to

261. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–81 & tbl.1. (1992) (counting all cases handling deference questions in Column A).

262. See Jellum, *supra* note 9, at 772–73.

263. See Merrill, *supra* note 261, at 981 n.51.

264. *Id.* at 81 & tbl.1 (showing the different count in Column C).

265. See *infra* Table 1 and accompanying citations. Note that this count does not include *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which extensively cites *Chevron* but is instead an application of the related *Auer/Seminole Rock* deference standard for agency interpretations of their own regulations.

266. Jellum, *supra* note 9, at 773.

267. See Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), <https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war/> (describing long-term decline in the number of cases the Court decides).

suggest that *Chevron* has risen slightly in significance since then, though with just a few citations per year such small differences are unlikely to mean much.

Second, the decline in citations to *Chevron* should not be taken to indicate a simple decline in the number of agency statutory interpretation cases. In recent cases, the Court has sometimes failed to mention *Chevron* at all, despite an agency interpretation of a statute being at issue.<sup>268</sup> The number of such cases is hard to determine precisely, and whether it has declined depends on what one takes to be the best measure of the past rate, whether the 28.5 percent found by Eskridge & Baer, or the roughly 80 percent found by Salmanowitz and Spamann.<sup>269</sup> Scholars have noted a particular trend on the Court of failing or refusing to cite *Chevron* in immigration cases.<sup>270</sup> No immigration exception to *Chevron* has been formally announced and the Court does still cite it in some immigration cases,<sup>271</sup> but some scholars have suggested it can now be added to the categories of explicit exceptions already established.<sup>272</sup> As Michael Kagan describes the Court's approach in a 2019 case:

The statutory interpretation problem was [a] close enough question that it divided the Supreme Court 5-4. The Solicitor General spent three pages in his opening brief arguing for *Chevron* deference, and then another three pages on it in his reply. The Respondents argued strongly that *Chevron* should not apply. *Chevron* seemed important to everyone involved. Except

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268. See, e.g., *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893 (2019); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

269. See discussion *supra* Section III.D.

270. See generally Michael Kagan, *Chevron's Liberty Exception*, 104 IOWA L. REV. 491 (2019).

271. See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (declining to reach a *Chevron* analysis).

272. See Amy L. Moore, *Slouching Towards Oblivion: Divergent Implementation and Potential Exodus of Chevron Analysis in the Supreme Court's Interpretation of Immigration Law*, 87 UMKC L. REV. 549, 588–89, 596 (2019) (arguing the Court's refusal to cite *Chevron* in immigration contexts is due in part to overlap with the criminal law exclusion). See generally Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (2021) (arguing the exception is appropriate).

for the nine who mattered most. They acted like *Chevron* doesn't exist.<sup>273</sup>

The Court's recent decision, sans *Chevron* citation, in *Little Sisters of the Poor v. Pennsylvania*<sup>274</sup> is of particular note. There, the Court considered longstanding and controversial agency interpretations of the ACA, but the majority opinion makes no mention of *Chevron* specifically or the weight of the agency's views more generally.<sup>275</sup> This is perhaps no surprise given that its author is long-time *Chevron* critic Justice Thomas,<sup>276</sup> but in other contexts discussed below<sup>277</sup>, he has noted his objections to *Chevron* in dissent or in a concurrence in the judgment. The burden of retaining votes for a majority opinion likely meant such an attack was off the table in *Little Sisters*. Justice Thomas's solution was simply to ignore *Chevron*. This omission did not escape Justice Kagan's attention; in her concurrence in the judgment, she argues "*Chevron* deference was built for cases like these."<sup>278</sup>

Third and finally, when the court *has* cited *Chevron* in recent years, it has not helped agencies much, if at all. The Court has considered an agency's interpretation of a statute and cited *Chevron* in the majority opinion in fifteen cases decided since *Michigan* and *King* in 2015.<sup>279</sup> In only one of those fifteen, *Cuozzo Speed Technologies v. Lee*, did the Court defer to the agency's interpretation.<sup>280</sup> In two other cases, the Court agreed with the agency's interpretation but held that deference was irrelevant because the statute's meaning was clear—in other words, the agency won but *Chevron* was irrelevant to the outcome.<sup>281</sup>

In the remaining twelve cases, the Court rejected agency interpretations and denied *Chevron* deference, either because a majority of Justices thought that the statute was clearly contrary to the agency's interpretation at Step One, or because some exception to *Chevron* took it out of the doctrine's scope.<sup>282</sup> Three out of fifteen cases is not a good success rate for agencies; in fact no agency has won a *Chevron* case in

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273. Michael Kagan, *Chevron Goes Missing in an Immigration Case. Again.*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 19, 2019), <https://www.yalejreg.com/nc/chevron-goes-missing-in-an-immigration-case-again/> (citations omitted).

274. 140 S. Ct. 2367 (2020).

275. *See id.* at 2372–74, 2380–81.

276. *Id.* at 2371.

277. *See infra* Section IV.C.1.

278. *Id.* at 2397 (Kagan, J., concurring).

279. *See infra* Table 1.

280. 136 S. Ct. 2131, 2142 (2016).

281. *See infra* Table 1.

282. *See infra* Table 1; *see also infra* Part III.

more than three years since *Coventry Health Care of Missouri v. Nevils* was decided in April 2017.<sup>283</sup> Moreover, controlling the outcome of one out of fifteen cases is slim pickings for a doctrine that is alleged to be, and once was, so important. A sample size of fifteen may be too small to draw firm conclusions about what rate to expect in the future. But it is not a good sign for *Chevron*. When examined in more detail, these cases all illustrate how far *Chevron* deference has declined.

**Table 1**

Case	Citation	Author	Votes <sup>284</sup>	Agency win?	Defer?
<i>FERC v. Electric Power Supply Ass'n</i>	136 S. Ct. 760 (1/25/2016)	Kagan	6-2	Yes	No
<i>Kingdomware Technologies, Inc. v. United States</i>	136 S. Ct. 1969 (6/16/2016)	Thomas	9-0	No	No
<i>Cuozzo Speed Technologies, LLC v. Lee</i>	136 S. Ct. 2131 (6/20/2016)	Breyer	9-0	Yes	Yes
<i>Encino Motorcars, LLC v. Navarro</i>	136 S. Ct. 2117 (6/20/2016)	Kennedy	7-2	No	No
<i>Coventry Health Care of Missouri, Inc. v. Nevils</i>	137 S. Ct. 1190 (4/18/2017)	Ginsburg	8-0	Yes	No
<i>Esquivel-Quintana v. Sessions</i>	137 S. Ct. 1562 (5/30/2017)	Thomas	8-0	No	No
<i>Digital Realty Trust, Inc. v. Somers</i>	138 S. Ct. 767 (2/21/2018)	Ginsburg	9-0	No	No

283. See *infra* Table 1.

284. These vote tallies do not separately count concurrences, which in some cases do not adopt the majority's reasoning with regard to *Chevron*. See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

Case	Citation	Author	Votes <sup>284</sup>	Agency win?	Defer?
<i>SAS Institute, Inc. v. Iancu</i>	138 S. Ct. 1348 (4/24/2018)	Gorsuch	5-4	No	No
<i>Epic Systems Corp. v. Lewis</i>	138 S. Ct. 1612 (5/21/2018)	Gorsuch	5-4	No	No
<i>Wisconsin Central Ltd. v. United States</i>	138 S. Ct. 2067 (6/21/2018)	Gorsuch	5-4	No	No
<i>Pereira v. Sessions</i>	138 S. Ct. 2105 (6/21/2018)	Sotomayor	8-1	No	No
<i>Sturgeon v. Frost</i>	139 S. Ct. 1066 (3/26/2019)	Kagan	9-0	No	No
<i>Smith v. Berryhill</i>	139 S. Ct. 1765 (5/28/2019)	Sotomayor	9-0	No	No
<i>PDR Network v. Carlton &amp; Harris Chiropractic, Inc.</i>	139 S. Ct. 2051 (6/20/2019)	Breyer	9-0	No	No
<i>County of Maui v. Hawaii Wildlife Fund</i>	140 S. Ct. 1462 (4/23/2020)	Breyer	6-3	No	No

Even in the cases in which the agency prevailed, *Chevron* deference seems to have played little role. In *Cuozzo*—the only case in which the majority explicitly granted deference—the agency prevailed nine to zero.<sup>285</sup> Nevertheless, Justice Breyer’s conclusion in the majority opinion that deference was due prompted a blistering concurrence, if that is not a contradiction in terms, from Justice Thomas. Thomas openly questioned whether *Chevron* should remain good law, noting that, in his view, the outcome was dictated by the clear meaning of the statute, not

285. *Id.* at 2142; *see supra* Table 1.

deference.<sup>286</sup> The Court would almost certainly have reached the same result with or without deference.

In the other two cases in which the agency prevailed, *Coventry Health Care v. Nevils* and *FERC v. Electric Power Supply Ass'n*, Justice Ginsburg and Justice Kagan respectively were careful to make clear that *Chevron* deference played no role in the outcome.<sup>287</sup> This suggests that applying *Chevron* deference is toxic on the Court and risks losing votes for an opinion. *Chevron* deference is supposed to increase the chances of an agency prevailing by compelling a marginal Justice to accept an agency position they view as reasonable but wrong, or at least second-best.<sup>288</sup> *Chevron* today does the opposite, repelling some of the Justices and possibly *reducing* the chances of agency success.

In the remaining twelve cases in which agency interpretations were rejected by the Court, *Chevron* deference was denied on a variety of grounds. The most common was simple rejection of the agency interpretation as contrary to clear congressional intent at Step One, focused almost entirely on the statutory text; the Court decided seven<sup>289</sup>

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286. *Cuozzo*, 136 S. Ct. at 2148 (Thomas, J., concurring) (“[T]oday’s decision does not rest on *Chevron*’s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law. In an appropriate case, this Court should reconsider that fiction of *Chevron* and its progeny.” (citing *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring))).

287. *See Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) (“Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches.”); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 773 n.5 (2016) (“Because we think FERC’s authority clear, we need not address the Government’s alternative contention that FERC’s interpretation of the statute is entitled to deference under *Chevron*.”).

288. *See Breyer, supra* note 22, at 379.

289. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) (“[W]e do not defer to the agency when the statute is unambiguous.”); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (“[T]he statute, read in context, unambiguously forecloses the Board’s interpretation.”); *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (“Because ‘Congress has directly spoken to the precise question at issue,’ we do not accord deference to the contrary view advanced by the SEC.” (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984))); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“[A]fter applying traditional tools of interpretation here, we are left with no uncertainty that could warrant deference.”); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (“[I]n light of all the textual and structural clues before us, we think it’s clear enough that the term ‘money’ excludes ‘stock,’ leaving no ambiguity for the agency to fill.”); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (“[T]he Court need not resort to *Chevron* deference . . . for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.”); *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 n.3 (2019) (“Because we see, for the reasons given below, no ambiguity as to Section 103(c)’s meaning, we cannot give deference to the Park Service’s contrary construction.”).

or perhaps eight<sup>290</sup> of these cases at Step One. Other grounds for denying deference included application of the stay-in-your-lane principle,<sup>291</sup> *Mead*'s "force of law" requirement,<sup>292</sup> and the exclusion for interpretations affecting the scope of judicial review.<sup>293</sup> Another rejected *Chevron* deference due to the agency's procedural error.<sup>294</sup> These opinions withholding deference were authored by seven different Justices: Sotomayor, Kagan, Breyer, Gorsuch, Ginsburg, Thomas, and Kennedy.<sup>295</sup> No Justice wrote more majority opinions than Justice Gorsuch's three.<sup>296</sup> This suggests a broad consensus in favor of a robust, nearly all-encompassing, and predominantly textualist Step One, though again the sample size warrants caution.

One case established what appears to be a new *Chevron* exception, denying deference to an independent agency's interpretation of a statute because the Solicitor General ("S.G.") in an amicus brief offered a contrary interpretation.<sup>297</sup> This has implications for Presidential

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290. The most recent *Chevron* case, *County of Maui v. Hawaii Wildlife Fund*, applies *Chevron* somewhat cryptically; it is unclear if the agency loses at Step One or Step Two. 140 S. Ct. 1462 (2020). Justice Breyer's majority opinion notes that no party has asked for *Chevron* deference before finding nevertheless that the EPA's reading "is neither persuasive nor reasonable," terms that appear in *Chevron*'s Step Two. *Id.* at 1474. But the opinion's subsequent statutory analysis supporting this interpretation is indistinguishable from typical Step One analysis. *Id.* at 1475 ("EPA's oblique argument . . . cannot overcome the statute's structure, its purposes, or the text of the provisions that actually govern."). Some have read *County of Maui* to adopt a "*Chevron* waiver" doctrine under which deference is not given if an agency fails to ask for it. See Kristin E. Hickman, County of Maui & Chevron Waiver—Let's Not Get Carried Away, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 27, 2020), <https://www.yalejreg.com/nc/county-of-maui-chevron-waiver-lets-not-get-carried-away/>.

291. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) ("[O]n no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.").

292. See *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055–56 (2019) (holding that a lower court was not bound by an agency interpretive rule that had not undergone notice and comment but refusing to reach whether such an agency interpretation should be given *Chevron* deference); see also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

293. See *Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019) ("The scope of judicial review, meanwhile, is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.").

294. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("*Chevron* deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.") (quoting *Mead*, 533 U.S. at 227).

295. See *supra* Table 1.

296. See *supra* Table 1.

297. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("[H]ere the Executive seems of two minds, for we have received competing briefs from the Board and from the

authority over independent agencies; apparently the President or DOJ leadership may deny an agency access to *Chevron* deference to their interpretations of statutes by taking an alternative position in briefs. This contrasts with the Court's longstanding position that agency litigating positions do not get deference because they lack the force of law or have inadequate procedural underpinnings.<sup>298</sup> Apparently, the procedural requirements for denying deference are much lower than those for obtaining it.

In short, the Court has shown almost no inclination in recent years to defer to agency statutory interpretations. *Chevron's* two-step inquiry to some extent remains the *lingua franca* of agency statutory interpretation cases, but not always; the Court regularly fails to cite it at all. Even when it does, deference is rarely if ever actually available. No agency has won a case at the Supreme Court in which the majority cited *Chevron* in nearly four years.<sup>299</sup> Agencies won zero of ten cases over that period.<sup>300</sup> As noted above, in the context of *Massachusetts*, *UARG*, and *Brown & Williamson*, the modern understanding of Step One at the Court is broad enough to allow most any result.<sup>301</sup> That makes the deference available at Step Two almost impossible for agencies to access.

Majority opinions in recent years have mostly dispensed with *Chevron* quickly, resolving cases at Step One such that deference never comes into play.<sup>302</sup> This should perhaps come as no surprise given the expansion of Step One, but the open antipathy by a faction of the Court to *Chevron* makes appeal to deference doctrines at least less useful for attracting votes, and possibly counterproductive. This is particularly ironic because *Chevron's* ability to drive case outcomes was its ability to attract or compel votes in favor of the agency's interpretation by Justices who disagreed with that interpretation. If *Chevron* meant anything, it was that some Justices would vote to uphold the agency interpretation under deference who would not have done so under a *de novo* standard, or perhaps under *Skidmore*.<sup>303</sup>

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United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.”)

298. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

299. See *supra* Table 1.

300. See *supra* Table 1.

301. See *supra* Section IV.A.2.

302. See *supra* notes 289–90 and accompanying text.

303. Some scholars have characterized *Chevron* in this sense as a voting rule, requiring a supermajority to overrule agency interpretations. See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 709 (2007).

Now, citing *Chevron* appears to have the opposite effect, driving away votes; only supermajorities are able to uphold agency interpretations while explicitly granting deference. Narrow agency wins, it seems, have to fall within an explicit *Chevron* exclusion or be framed as Step One cases, in which the agency reading is unambiguously correct. Two or three Justices seem unwilling to join an opinion deferring to an agency under *Chevron* even if they agree with the result.<sup>304</sup> A good portion of the time the Court does not cite *Chevron* in agency statutory interpretation cases at all. Even when there are sufficient votes to support the agency's position, the Court seems reluctant to admit that deference plays any role in the result. Increasingly, it seems, it does not.

In short, there appears to be little if any scope for *Chevron* deference at the Supreme Court level. *Chevron* lives, but deference is dead.

It is important to reiterate that this analysis is restricted to the Supreme Court. *Chevron*'s erosion appears to be much more severe and rapid there than in the lower federal courts. Recent work by Kent Barnett and Christopher Walker indicates that *Chevron* still has substantial influence on case outcomes in the circuit courts.<sup>305</sup> As they observe, there are big differences between "*Chevron* Supreme" and "*Chevron* Regular."<sup>306</sup> One might therefore conclude that the decline of deference at the Supreme Court is not that important. Five cases or so per term is not very much. That may be true, but the cases that reach the Court are the highest-profile and most significant. Major public policy issues like health care, climate change, and immigration involve agency action for which, at the margin, statutory interpretation questions abound. Also, I am skeptical that a different "*Chevron* Regular" and "*Chevron* Supreme" can persist forever. Now-Justice Kavanaugh, whose criticisms of *Chevron* are detailed below, readily observed while still on the D.C. Circuit that "the Supreme Court itself has been reining in *Chevron* in the last few years."<sup>307</sup> Now-Justice Gorsuch more or less begged the Court to revisit

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304. See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

305. See generally Barnett & Walker, *supra* note 14.

306. *Id.* at 1, 6.

307. Kavanaugh, *supra* note 388, at 2150–51; see *infra* Section IV.C.3.

*Chevron* while on the Tenth Circuit.<sup>308</sup> A survey of appellate judges in 2018 also suggests significant skepticism about *Chevron*.<sup>309</sup>

### C. *Chevron Under Attack*

#### 1. The Old Guard

At the same time as the Court has consistently denied deference to agencies at the Supreme Court, open criticism of *Chevron* has become en vogue among some Justices. Concurring in *Michigan*, Justice Thomas criticized *Chevron* as inconsistent with *Marbury* and Article III, stopping just short of calling for it to be overturned: “[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”<sup>310</sup> Since *Michigan*, Thomas has continued to call for *Chevron* to be reconsidered at every opportunity,<sup>311</sup> most recently recommending not only *Chevron* but his own opinion in *Brand X*, extending deference to agency interpretations that contradict early judicial interpretations, to be rejected.<sup>312</sup>

Justice Kennedy’s concurring opinion in *Pereira v. Sessions*, published a week before his retirement, was written explicitly “to note [his] concern with the way in which the Court’s opinion in [*Chevron*] has come to be understood and applied.”<sup>313</sup> For Justice Kennedy:

The type of reflexive deference exhibited in some of these cases is troubling. . . . Given the concerns raised by some Members of this

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308. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*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. Maybe the time has come to face the behemoth.”).

309. See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1348 (2018) (“Although every judge we interviewed told us that he or she was bound by *Chevron*—and all but one of the judges did apply that rule in opinions—most of the judges we interviewed do not favor the *Chevron* rule.”).

310. *Michigan v. EPA*, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring).

311. See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

312. See *Baldwin v. United States*, 140 S. Ct. 690, 690–91 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

313. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (citation omitted).

Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.<sup>314</sup>

Justice Kennedy's concurrence is somewhat puzzling, or at least the venue he chose for it is. In *Pereira*, the majority in an opinion by Justice Sotomayor *denied* deference on Step One grounds<sup>315</sup>—hardly the “reflexive deference” that Justice Kennedy criticizes. If *Chevron* deference was ever “reflexive,” it certainly was not by 2017 when *Pereira* was decided. Justice Alito's dissent in the same case makes for a more effective *Chevron* critique. He would have upheld the agency's interpretation and criticizes the majority for failing to defer.<sup>316</sup> This move may be rhetorically effective, trolling the liberal Justices that have historically been more willing to defer, but should not be taken as evidence that Justice Alito really values *Chevron* deference; in the same dissent he calls it “once celebrated, and now increasingly maligned precedent.”<sup>317</sup> Occasionally, Justice Alito joins in the *Chevron*-bashing, though he has not called for it to be rejected.

Critique of *Chevron* is not entirely restricted to the Court's conservative/Republican-appointed Justices. Justice Breyer has long advocated a narrow reading of *Chevron*, dating back to his 1986 Article.<sup>318</sup> More recently, he argued in dissent in *SAS Institute for Chevron* to be treated as a mere “a rule of thumb” guided in part by the degree to which the interpreting agency has brought to bear its unique expertise, rather than a “rigid, black-letter rule of law.”<sup>319</sup> The three other liberal/Democratic-appointed Justices joined the dissent.<sup>320</sup>

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314. *Id.* at 2120–21 (citations omitted).

315. *Id.* at 2113 (majority opinion).

316. *Id.* at 2121 (Alito, J., dissenting).

317. *Id.*

318. See Breyer, *supra* note 22, at 373 (“To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as ‘always defer to the agency when the statute is silent,’ would be seriously overbroad, counterproductive and sometimes senseless.”).

319. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting).

320. *Id.* at 1360. For a list of current and former Justices, indicating their respective appointing presidents, see *Current Members*, SUPREME COURT U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 23, 2021).

*Chevron's* cousin, deference to agency interpretations of their own regulation under *Auer v. Robbins*<sup>321</sup> and *Bowles v. Seminole Rock & Sand Co.*,<sup>322</sup> has come under particularly strong criticism. Most notable is Justice Scalia's concurrence in *Perez v. Mortgage Bankers Association*, in which he called for *Auer* to be overturned.<sup>323</sup> In critiquing *Auer*, however, Justice Scalia suggested that his longstanding support for *Chevron* has perhaps waned as well.<sup>324</sup> Justice Scalia was troubled by agencies' issuance of "interpretive rules" that in effect create new law and by courts' willingness to defer to agencies when these rules are litigated.<sup>325</sup> For Justice Scalia, *Auer* deference is the source of much of the trouble, but for him "[t]he problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."<sup>326</sup> Justice Scalia seems to be whistling past *Chevron's* graveyard. Justice Alito has publicly claimed that Justice Scalia had begun to question the wisdom of *Chevron* before his death in 2016.<sup>327</sup>

## 2. Justice Gorsuch

Though of course we will never know how Justice Scalia's views on *Chevron* would have evolved, the Justice who replaced him has made his skepticism clear. Justice Kennedy's concurrence in *Pereira* cites Chief Justice Roberts's dissent in *City of Arlington* and Justice Thomas's concurrence in *Michigan* as examples of "concerns raised by some Members of this Court" about *Chevron*; it also cites then-Tenth Circuit Judge Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*.<sup>328</sup> In that case, the Tenth Circuit, in an opinion by Judge Gorsuch, ruled in favor of the agency's interpretation of a statute, applying *Chevron*

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321. 519 U.S. 452, 461–63 (1997).

322. 325 U.S. 410, 413–14, 417–18 (1945).

323. See 575 U.S. 92, 112 (2015) (Scalia, J., concurring).

324. *Id.* at 109–10 (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the 'reviewing court . . . interpret . . . statutory provisions,' we have held that *agencies* may authoritatively resolve ambiguities in statutes.") (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984)).

325. *Id.* at 110–11.

326. *Id.* at 111.

327. Adam White, *More on Justice Scalia's Doubts About Chevron*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 17, 2016), <https://www.yalejreg.com/nc/more-on-justice-scalias-doubts-about-chevron/> ("Before his death, Nino was also rethinking the whole question of Chevron deference.")

328. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

deference.<sup>329</sup> Judge Gorsuch also wrote a concurrence to his own opinion to criticize that deference, calling alleged tension between *Chevron* and the Constitution “an elephant in the room” and suggesting that “[m]aybe the time has come to face the behemoth.”<sup>330</sup> The concurrence is a sweeping and detailed philippic against *Chevron*; in particular it uses the various exceptions to *Chevron*, such as the exclusion of criminal statutes and *Mead*, lack of clarity about the tools available at Step One, and other inconsistencies to critique the foundational assumptions of implied delegation and agency expertise that undergird deference.<sup>331</sup> Not everyone is a fan, however: Asher Steinberg calls the *Gutierrez-Brizuela* concurrence “the most half-baked critique of *Chevron* one is likely to encounter outside of a law school classroom.”<sup>332</sup>

In any case, most of the concurrence reads like a Supreme Court opinion winding up to overrule *Chevron*. But, of course, all then-Judge Gorsuch can do at the end is send a plea to the Court, asking it to do what he cannot. As he plaintively puts it, “[w]e managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things.”<sup>333</sup>

Of course, now-Justice Gorsuch will play a role in any decision on whether to overturn *Chevron*. His concurrence in *Gutierrez-Brizuela* establishes him as a clear vote to do so and, since joining the court, he has joined Justice Thomas as one of *Chevron*’s most consistent critics. In *Epic Systems Corp. v. Lewis*, Justice Gorsuch, writing for the majority, applies *Chevron*, but not before noting that “[n]o party . . . has asked us to reconsider *Chevron* deference.”<sup>334</sup> This is hard to interpret as anything other than an invitation to litigants to challenge *Chevron* directly in the future. In *SAS Institute v. Iancu*, Justice Gorsuch again punts invitingly, “whether *Chevron* should remain is a question we may leave for another day.”<sup>335</sup> In *BNSF Railway Co. v. Loos*, Justice Gorsuch, in a dissenting opinion joined by Justice Thomas, refers to “mounting criticism of

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329. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148–49 (10th Cir. 2016).

330. *Id.* at 1149 (Gorsuch, J., concurring). Justice Gorsuch evidently loves big metaphors for *Chevron*, also calling it a “colossus.” *Id.* at 1151.

331. *Id.* at 1149–58.

332. See Asher Steinberg, *Judge Gorsuch and Chevron Doctrine Part III: The Gutierrez-Brizuela Concurring Opinion*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 29, 2017), <http://yalejreg.com/nc/judge-gorsuch-and-chevron-doctrine-part-ii-the-gutierrez-brizuela-concurring-opinion-by-asher-steinberg/>.

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

334. 138 S. Ct. 1612, 1629–32 (2018).

335. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

*Chevron* deference” and notes with satisfaction the litigants’ reluctance, and majority opinion’s refusal, to rely on it.<sup>336</sup> And most recently in *PDR Network v. Carlton & Harris Chiropractic*, Justice Gorsuch joins Justice Thomas in a concurrence in the judgment that questions the constitutionality of *Chevron*, alleging it is possibly inconsistent with the Vesting Clause in Article III.<sup>337</sup> Justices Thomas and Gorsuch now seem to take shots at *Chevron* almost every time the opportunity to do so arises.<sup>338</sup>

### 3. Justice Kavanaugh

What about the newest Justice? Justice Brett Kavanaugh’s views on *Chevron* are more nuanced than Justice Gorsuch’s, though broadly still skeptical. In his previous position on the D.C. Circuit, Justice Kavanaugh participated in a large number of administrative law cases; in fact, the majority of his written opinions at that level reviewed agency decisions.<sup>339</sup> In those cases, Justice Kavanaugh’s treatment of agencies did not stand out among his peers as particularly skeptical or deferential; he voted in favor of agency interpretations roughly 75 percent of the time, in twenty-five of thirty-three cases.<sup>340</sup> This is slightly more deferential than all judges in their 71 percent<sup>341</sup> and substantially more deferential than the Supreme Court at the time he joined.<sup>342</sup> Of course, Justice Kavanaugh was constrained by Supreme Court doctrine, including *Chevron*, while on the D.C. Circuit, so this pattern does not necessarily reflect how he views that doctrine. But on the other hand, there is no *Gutierrez-Brizuela*, anti-*Chevron* opinion in Justice Kavanaugh’s D.C. Circuit record, despite many opportunities.

Justice Kavanaugh’s most extensive comments on *Chevron* come not from an opinion, but from a 2016 book review in the *Harvard Law*

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336. 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting).

337. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring).

338. *But see* *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (dismissing agency position at Step One in a majority opinion by Justice Gorsuch featuring a straightforward, albeit cursory, application of *Chevron*).

339. See Adam Feldman, *The Next Nominee to the Supreme Court*, EMPIRICAL SCOTUS (Dec. 7, 2017), <https://empiricalscotus.com/2017/12/07/the-next-nominee/>.

340. See Kent Barnett et al., *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, REGUL. REV. (Sept. 3, 2018), <https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/>.

341. *Id.*

342. See *supra* Table 1.

*Review*.<sup>343</sup> In it, Justice Kavanaugh criticized *Chevron*, among other interpretive canons and doctrines, as distractions from the core judicial task of textualist statutory interpretation.<sup>344</sup> *Chevron*, he argued, is an “atextual invention by courts” that shifts too much power to agencies.<sup>345</sup> Nevertheless, he argued, “*Chevron* makes a lot of sense in certain circumstances.”<sup>346</sup> *Chevron* should not be rejected entirely, he argued, but rather should be limited to “cases involving statutes using broad and open-ended terms” rather than “a specific statutory term or phrase,” though he offers little guidance for telling the difference.<sup>347</sup>

Some scholars claim Justice Kavanaugh’s record shows he has “embraced a strong version” of the major questions doctrine.<sup>348</sup> In *United States Telecom Association v. FCC*, Justice Kavanaugh argued in dissent from a denial of rehearing en banc that the FCC lacked clear authorization from Congress to issue rules on net neutrality and that deference was not due for this “major rule.”<sup>349</sup> Dan Deacon argues this “major rules” variant is no mere restatement of the existing major questions doctrine, but rather an expansion and “weaponiz[ation]” of it.<sup>350</sup> In Justice Kavanaugh’s framing, agencies cannot take “major regulatory action[s] without clear congressional authorization.”<sup>351</sup> This is different and, Deacon argues, far broader than the Supreme Court’s major questions doctrine.<sup>352</sup> It also, he argues, imposes an anti-regulatory bias.<sup>353</sup> Jody Freeman notes that Justice Kavanaugh focused questioning in oral arguments during the D.C. Circuit’s review of the Obama EPA’s Clean Power Plan on whether it was too significant to qualify for deference.<sup>354</sup>

Additional evidence that Justice Kavanaugh may take a narrow view of deference is his view on the amount of certainty needed to judicially

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343. See generally Kavanaugh, *supra* note 38.

344. *Id.* at 2144–45, 2150.

345. *Id.* at 2150–51.

346. *Id.* at 2152.

347. *Id.* at 2153–54.

348. See Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018, 2:55 PM), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/>.

349. See 855 F.3d 381, 417–18 (2017) (en banc) (Kavanaugh, J., dissenting) (per curiam).

350. Daniel Deacon, *Judge Kavanaugh and “Weaponized Administrative Law,”* YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2018), <https://www.yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/>.

351. *U.S. Telecom Ass’n*, 855 F.3d at 420 (Kavanaugh, J., dissenting).

352. See Deacon, *supra* note 350.

353. *Id.*

354. See Amanda Reilly, *Would Kavanaugh Limit the Chevron Doctrine?*, E&E NEWS (July 10, 2018), <https://www.eenews.net/stories/1060088675>.

dispose of an interpretive question rather than defer to an agency, i.e. decide at *Chevron* Step One. In Justice Kavanaugh's view, some judges might require 90 percent certainty, but "I probably apply something . . . approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it's not ambiguous—don't resort to [*Chevron* deference]."355 This suggests a very expansive view of Step One, in line with the Supreme Court's current vision or perhaps even more expansive. A statutory provision more ambiguous than Justice Kavanaugh's 60/40 certainty is near or equivalent to "absolute equipoise"; as Justice Scalia observed in 1989, a *Chevron* deference doctrine restricted to such cases "becomes virtually meaningless."356 Nevertheless, Justice Kavanaugh cannot be right that his approach to Step One is so different from other judges; as noted above, he defers to agency interpretations slightly *more* often than average.357 Perhaps his self-judgment is inaccurate, or perhaps it reflects how he would *really like* to rule, if he had the authority to do so—as he now does on the Court. Alternatively, maybe it is his assessment of other judges that is wrong and far less than 90 percent certainty is typically needed to deny deference. The Supreme Court cases suggest as much, but the persistently high success rate of agencies in the circuit courts does not.

So far, Justice Kavanaugh has not said much about *Chevron* from the Supreme Court bench. His most notable non-statement is his refusal to join Justice Thomas' *Chevron* critique in *PDR*; he wrote his own concurrence in the judgment, which Justices Thomas and Gorsuch joined,358 but he was unwilling to join theirs. That could suggest he is not as critical as they are of deference, but I would be cautious before reading much into it at all, much less as a change from Justice Kavanaugh's earlier positions. Justice Kavanaugh's most significant statement on agencies' relationship with the Court more generally is his dissent from denial of certiorari in *Paul v. United States*, in which he urges adoption of a more robust nondelegation doctrine, as advocated in Justice Gorsuch's *Gundy* dissent.359 In this dissent, he echoes his existing

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355. Brett Kavanaugh, Judge, U.S. Ct. of Appeals for D.C., The Joseph Story Distinguished Lecture: Address at the Heritage Foundation (Oct. 25, 2017), <https://www.heritage.org/josephstory2017>; see also Walker, *supra* note 346 (quoting a relevant part of the lecture and discussing implications for *Chevron*).

356. See Scalia, *supra* note 19, at 520.

357. See Barnett et al., *supra* note 340.

358. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056–57 (2019) (Kavanaugh, J., concurring).

359. 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., dissenting from denial of certiorari) ("I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

concerns with agencies that “exercise regulatory authority over a major policy question of great economic and political importance” and citing in support *UARG*, *Brown & Williamson*, and *MCI*.<sup>360</sup> This suggests a close connection between nondelegation and the major questions doctrine that should chill any ambitious regulator to the bone. As Andy Hessick has put it, “*Chevron* is just a battle, and nondelegation is the war.”<sup>361</sup> That said, the implications for *Chevron* specifically are yet unclear.

It is impossible to be sure how Justice Kavanaugh would vote if given the opportunity to overturn *Chevron*, even harder to guess than with Justices Gorsuch and Thomas, who have made their opposition clear. But Justice Kavanaugh’s record does make it clear that he supports continuing the long process of constraining and weakening *Chevron*. Limiting *Chevron* to “broad and open-ended terms,” as he suggested in his *Harvard Law Review* Article, except for “major rules” as he suggested in *United States Telecom Association v. FCC*, would push that narrowing project even further than it has gone already.<sup>362</sup> It might not make much difference in practice, given the low rate of deference to agency interpretations already evident on the Court, but it would make *Chevron*’s decline more obvious.

#### 4. Outside Voices

*Chevron* has always had its critics.<sup>363</sup> But that criticism has increased notably in recent years,<sup>364</sup> likely driven by, and possibly itself driving, the critiques within the Court. Cass Sunstein has characterized *Chevron* as

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360. *Id.*

361. Andy Hessick (@AndyHessick), TWITTER (Feb. 28, 2020, 1:30 PM), <https://twitter.com/AndyHessick/status/1233459391346728960>.

362. See *supra* text accompanying notes 347–49.

363. Among early academic criticisms, see generally, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989). See also Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 761 (1991) (A “strong reading of *Chevron* should be rejected because it is unconstitutional, represents poor political theory, produces bad policy outcomes, and rests on shaky doctrinal foundations. *Chevron* is based on two questionable premises . . .”).

364. Christopher J. Walker, *The Federalist Society’s Chevron Deference Dilemma*, L. & LIBERTY (Apr. 3, 2018), <https://lawliberty.org/the-federalist-societys-chevron-deference-dilemma/> (“In recent years, there has been a growing call to eliminate *Chevron* deference. This call has come from the Hill, the federal bench, and the legal academy. Last year it was front and center during the Senate Judiciary Committee’s hearing on Neil Gorsuch’s nomination to the Supreme Court.”).

“under siege.”<sup>365</sup> Criticism has come from academics,<sup>366</sup> interest groups,<sup>367</sup> and even Congress itself.<sup>368</sup> Some states have recently moved to reject deference to agency interpretations of statutes in state courts,<sup>369</sup> though others never recognized it.<sup>370</sup> Some of its critics called for *Chevron* to be rejected entirely,<sup>371</sup> while others called for it to be retained but further constrained.<sup>372</sup> Christopher Walker has compiled an exhaustive literature review of these critiques,<sup>373</sup> so it is not necessary to do so here in detail.

Combined with the decline of deference at the Court itself, these external critiques make it appear that *Chevron* has reached a critical moment. Some have speculated that it might be overturned.<sup>374</sup> For reasons explored in Part V below, in my view that is unlikely. But open criticism of the doctrine further erodes its power and significance; it exposes publicly what has been true at the Court for at least a decade. Deference is dead.

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365. Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615 (2019).

366. See generally, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); see also Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1160–61 (2019) (arguing stare decisis should not be a barrier to overturning *Chevron*).

367. See, e.g., Joseph Postell & Paul Larkin Jr., *Not Above the Law: Ending the Misguided Chevron–Auer Deference Regime*, HERITAGE FOUND. (Sept. 7, 2018), <https://www.heritage.org/courts/report/not-above-the-law-ending-the-misguided-chevron-auer-deference-regime>.

368. See Brent Owen, *U.S. Congress Considers Law That Would Overturn Chevron Deference*, 6 NAT'L L. REV., no. 224, Aug. 11, 2016, <https://www.natlawreview.com/article/us-congress-considers-law-would-overturn-chevron-deference>.

369. See Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 24, 2020), <https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/> (“[W]hile the Supreme Court has chosen incremental reform rather than a more dramatic rejection of deference, several states in recent years have made a different and more dramatic decision. At least seven state supreme courts have issued decisions that decisively reject *Chevron* or *Auer* like deference. And two more states have rejected deference via legislation or referendum.”).

370. See *id.* (describing Delaware as “a longtime skeptic of deference”).

371. See, e.g., Beermann, *supra* note 366, at 779.

372. See Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1104–05 (2016); see also Adler, *supra* note 11, at 984–85.

373. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 110–20 (2018).

374. See generally Valerie C. Brannon & Jared P. Cole, *Deference and its Discontents: Will the Supreme Court Overrule Chevron?*, CONG. RSCH. SERV.: LEGAL SIDEBAR (Oct. 11, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10204> (discussing predictions that *Chevron* will be overturned).

*D. Effects of Chevron's Decline at Agencies*

Before exploring what the death of deference at the Court means for the future, it is worth briefly exploring what it has meant for agencies so far. To what extent, if any, may agencies still count on deference to their interpretations of statutes?

Some recent opinions suggest they cannot count on it at all. *BNSF* is particularly illustrative: the majority does not cite *Chevron* or discuss deference, instead simply interpreting the statute in light of past Court precedent; it effectively applies de novo review.<sup>375</sup> As Justice Gorsuch notes in his dissent, *Chevron* deference was almost absent from consideration of the case, from briefs through oral argument and in the opinion:

In the past, the briefs and oral argument in this case likely would have centered on whether we should defer to the IRS's administrative interpretation. . . . But . . . *BNSF* devoted scarcely any of its briefing to *Chevron*. At oral argument, *BNSF*'s lawyer didn't even mention the case until the final seconds—and even then “hate[d] to cite” it. No doubt, *BNSF* proceeded this way well aware of the mounting criticism of *Chevron* deference. And no doubt, too, this is all to the good. 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. 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>376</sup>

In this sense, *BNSF* is a post-*Chevron* case. *Chevron*'s weakness, driven by its descent into muddy indeterminacy, has spilled out into the open. Once the key citation at the core of many administrative law cases, upon which the outcome depended, *Chevron* appears to have become a case litigants “hate to cite.” Sometimes the Court may consider deference *sua sponte* despite no party actually asking for it, but in such cases, the agency's refusal to request deference appears to make the Court less

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375. See *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 900–04 (2019).

376. *Id.* at 908–09 (Gorsuch, J., dissenting) (alteration in original).

willing to grant it.<sup>377</sup> Such “*Chevron* waiver,” if it becomes regular practice or Court doctrine, creates a deference death spiral. Agencies are less likely to cite *Chevron*, either because they do not think it will do much good or because it actively repels some Justices, and as a result deference could be waived even if the Court might otherwise have been willing to grant it.<sup>378</sup>

Continued refusal by the Court or parties to cite *Chevron* in cases where it should doctrinally be relevant will make it much more difficult to assess future trends in *Chevron*’s significance. The Justices will notice its absence, of course, as with Justice Kagan’s concurrence in *Little Sisters of the Poor* in which she notes puzzlement at the majority’s omission of *Chevron* in the kind of case that in her view it was “built for.”<sup>379</sup> But casual observers of the Court, or specialists in fields other than administrative law, may not. If litigants do hate to cite *Chevron*, that will create problems for research as well. Salmanowitz and Spamann’s work on how often the Court applies *Chevron* is based on using parties’ briefs to determine when *Chevron* is relevant; they assume that “[i]f neither party argued for *Chevron* deference, then the case is not plausibly a *Chevron* case.”<sup>380</sup> That seems like an entirely reasonable assumption, unless parties are refusing to cite *Chevron* because they fear annoying its opponents on the Court or think space in briefs is better used on arguments more likely to determine the outcome of the case. Like astronomers in a rapidly expanding universe, we may be living in the last era in which the subject of our study is observable.

Other evidence for agency response to decline in deference at the Court is inconclusive. The largest effect might be hidden: as noted above, a robust *Chevron* empowers agencies to interpret statutes more boldly; a weakened, narrowed, and muddied *Chevron* does the reverse. Agencies might react to the decline of deference by interpreting statutes more narrowly or by not regulating at all in areas of statutory ambiguity. But because we only see the products of rulemaking, not internal

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377. See, e.g., *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (seeming to deny *Chevron* deference in part because the S.G. had not requested it, though Justice Breyer’s discussion of deference is somewhat cryptic); see also *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 140 S. Ct. 789, 789–90 (2020) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (“[T]he government expressly waived reliance on *Chevron*. . . . This Court has often declined to apply *Chevron* deference when the government fails to invoke it.”).

378. But see *Hickman*, *supra* note 290 (arguing the Court has not adopted *Chevron* waiver and is not likely to do so).

379. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

380. Salmanowitz & Spamann, *supra* note 17878, at 83.

deliberations, any decline in agency ambition would be hard or impossible to observe.

In a recent paper, Daniel Hornung describes how wariness about application of the major questions doctrine affected agency deliberations during formulation of the Clean Power Plan, aimed at reducing greenhouse gas emissions from power plants.<sup>381</sup> Based on this experience, he concludes that expansion of the doctrine—and therefore denial of *Chevron* deference—will have a negative effect on agencies.<sup>382</sup> “If the courts continue to rely on the major questions doctrine, the critical role agency lawyers play within these rulemaking processes will deteriorate further, leading to less deliberative processes and statutory interpretation that is less comprehensive.”<sup>383</sup> More research on internal agency assumptions about and reactions to declining *Chevron* deference, potentially including interviews of agency general counsel, would be a valuable research project.

A look at the observable output of agencies—rulemakings—shows some changes in treatment of *Chevron* over time and across presidential administrations, but no clear trends. On the one hand, citations of *Chevron* in economically significant rulemakings have clearly and sharply declined in recent years; only five such rulemakings cite *Chevron* since 2017.<sup>384</sup> In 2017 and 2018, not a single significant rulemaking cited *Chevron*; this had not happened since at least before 1995.<sup>385</sup>

But a broader view suggests there is no clear trend away from agency appeal to *Chevron* deference. Considering *all* rulemakings, not just economically significant ones, citations of *Chevron* were low in 2017–18 at five citations but substantially higher in 2019 and 2020.<sup>386</sup> Even if there is a real decline in the rate at which *Chevron* is cited in significant rulemakings, that might not be a signal of declining relevance of the

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381. See Daniel Hornung, Note, *Agency Lawyers’ Answers to the Major Questions Doctrine*, 37 YALE J. ON REGUL. 759, 771, 776–78 (2020).

382. *Id.* at 762.

383. *Id.*

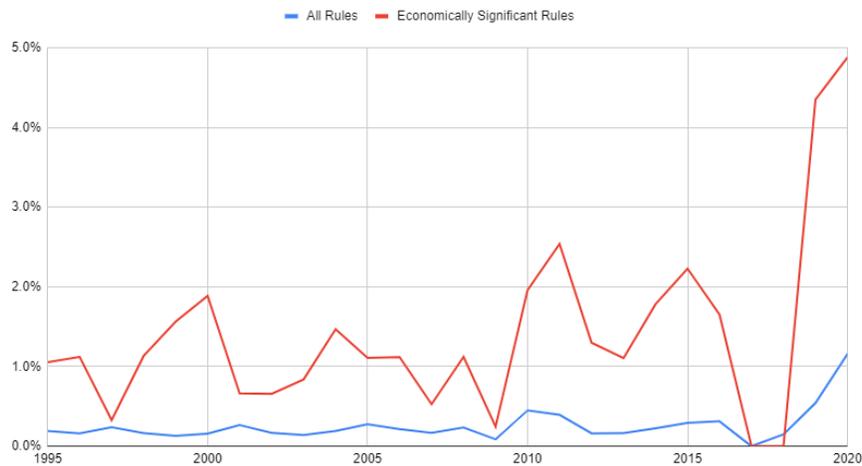
384. Nathan Richardson, *Chevron Citations in Rulemakings (Public)*, GOOGLE SHEETS, <https://docs.google.com/spreadsheets/d/11wDygZyJ8NQv7BINV5z5k99DEw0pG3Jr07ZE8k4cpGU/edit?usp=sharing> (Oct. 28, 2020). Data was obtained via a search of final rules in the Federal Register citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). This search is likely to be slightly overinclusive, to the extent it includes any rulemakings citing *Chevron* for substantive Clean Air Act precedent, rather than as a deference doctrine. The Federal Register has data searchable back to 1994; 1995 is the first full year included. See FEDERAL REGISTER, <https://www.federalregister.gov/> (last visited Jan. 24, 2021).

385. *Id.*

386. *Id.* During 2020, the twenty-two citations are the highest in any year back to at least 1995. *Id.*

doctrine at the Court so much as antipathy toward *Chevron* specifically or the regulatory state generally among Trump administration leadership.<sup>387</sup> The Trump administration has also issued fewer rulemakings and fewer significant rulemakings than past administrations, so some decline in the raw number of citations to *Chevron* is to be expected.<sup>388</sup> Indeed the *rate* of such citations, i.e. the share of rulemakings citing *Chevron*, has not changed much across presidential administrations since at least the mid-1990s, from when searchable Federal Register data is available. Nor is there much of a long-term trend, though there is substantial year-to-year fluctuation.<sup>389</sup>

Rate of Chevron Citations

Figure 1<sup>390</sup>

387. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 1 (2017).

388. See Richardson, *supra* note 384.

389. See *infra* Figures 1–2.

390. Richardson, *supra* note 384.

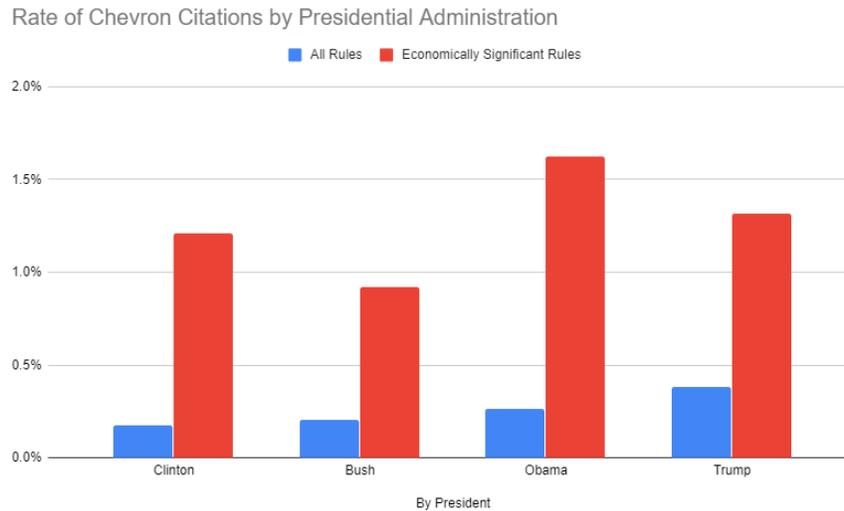


Figure 2<sup>391</sup>

If agency citations to *Chevron* in rulemakings had appreciably declined, that would have been additional evidence that its predictive power and doctrinal influence had declined, though the anti-regulatory sentiment of the Trump administration would be a plausible alternative cause. Indeed, one might not expect to see any drop in agency citations until quite recently, despite the long-term decline in *Chevron*'s influence at the Court. It is possible that *Chevron*'s weakness did not become clear until high-profile losses by the Obama administration at the Supreme Court in *Chevron* cases like *Michigan* and victories despite denial of deference in others like *King*.<sup>392</sup> It is also possible that President Obama's ambitious regulatory agenda in the face of a recalcitrant Congress in most of his time in office required agencies to continue to rely on *Chevron* deference even as they became aware that it was not much help.<sup>393</sup>

Another reason agency citations to *Chevron* might not decline even as deference has declined at the Supreme Court is that, as Barnett and Walker have found, *Chevron* retains influence in the lower courts.<sup>394</sup> Not all agency rules are challenged in court, and when they are, those

391. *Id.*

392. *See supra* Sections IV.A.3–4.

393. *See Metzger, supra* note 387, at 3 & n.7.

394. *See Barnett & Walker, supra* note 14, at 29.

challenges are usually resolved in the lower courts.<sup>395</sup> To the extent rulemakings are speaking to courts on matters of statutory interpretation, they are primarily defending against challenges there, at least outside of the highest-profile actions that agencies may assume will eventually reach the Supreme Court. Or perhaps agencies are just going through the motions, citing *Chevron* more out of habit than hope.

An alternative measure of agency reliance on *Chevron* might be found in the frequency of *Chevron* citations in their briefs, or those of the S.G., in cases before the Court. As discussed above, there are at least a few recent cases in which the agency or S.G. does not advance *Chevron* deference arguments,<sup>396</sup> and one case—*County of Maui*—in which Justice Breyer raised the issue *sua sponte*.<sup>397</sup> Extracting evidence of a trend from agency briefs is likely to be difficult, however. First, as the debate between Eskridge/Baer and Salmanowitz/Spamann illustrates,<sup>398</sup> it is hard to identify the universe of cases in which *Chevron* deference is applicable, i.e. the denominator. Salmanowitz & Spamann's method for escaping this meta-interpretive quagmire, reference to the agency and S.G. briefs, is of no use if the briefs themselves are the subject of inquiry.<sup>399</sup> Second, the reasons for agency refusal to cite *Chevron* might also be tied up with the specific facts of the case; for example, an agency might change its position, muddying the deference inquiry. And finally, there just are not that many Supreme Court statutory interpretation cases. Any evidence uncovered from briefs would have to come with substantial caveats about sample size bias.

It may be, therefore, that there is an evidentiary gap. The large number of rulemakings makes for a robust data set, but it is not very useful for observing effects of changes in deference at the Court because those rulemakings are only secondarily or tertiarily, if at all, concerned with Supreme Court litigation. Briefs in Supreme Court cases are obviously *only* concerned with appealing to the Court, but there may not be enough of them to draw any conclusions, though as noted above reluctance to cite *Chevron* makes identifying the universe of briefs to examine difficult. Nevertheless, exploration of briefs in recent cases is likely a valuable qualitative research project.

Whether or not agencies rely on *Chevron* deference in their internal planning, if they expect an interpretive question to reach the Supreme

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395. See *id.* at 73.

396. See text accompanying notes 376–85.

397. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474–75 (2020).

398. See discussion *supra* Section III.D.

399. See Salmanowitz & Spamann, *supra* note 178, at 82–83.

Court, they rely on it. Seeking deference at the Court as an agency increasingly resembles a cruelly designed game: deference is supposedly available, but the list of exceptions, carve-outs, and interpretive canons, some explicit and some unstated, is so mind-numbingly extensive and vague that in practice meaningful deference is unavailable. I am increasingly sympathetic to administrative law students who learn “official” *Chevron* and its two steps, spend weeks learning various exceptions and reading cases that set inconsistent boundaries, and then decide they can do little but throw up their hands and go through the motions on the exam. Agency lawyers who think their interpretations are likely to reach the Court likely feel the same way. This is no mere technical change. It substantially constrains the power of the executive branch, just as *Chevron* expanded it.<sup>400</sup>

*E. Why?*

Why is *Chevron* under such attack, and why has deference declined so much at the Court? Three factors seem most important.

1. Anti-Administrativism

First, the decline of deference is part of a wider rhetorical and ideological anti-administrative shift on the Court. In Gillian Metzger’s view, this trend has become sufficiently ascendant that the administrative state can be described as “under siege,” with battles over the scope of administrative power once thought resolved in the New Deal era now being refought.<sup>401</sup> For many critics of *Chevron* and architects of its decline, the reduction in agency power is the point. Justices Thomas’s and Gorsuch’s calls for *Chevron* to be reconsidered are explicitly motivated by concern over agency authority.<sup>402</sup> Justice Kavanaugh’s call

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400. See generally Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012).

401. See Metzger, *supra* note 387, at 2–3.

402. See, e.g., *Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring) (“Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? . . . [W]e should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here.”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power . . .”).

for it to be reformed and constrained is driven by similar institutional concerns.<sup>403</sup>

*Chevron* itself was a deregulatory decision,<sup>404</sup> but in shifting power from courts to agencies *Chevron* allowed future administrations more regulatory freedom. After *Brown & Williamson* and its progeny, agencies are on notice that assertions of new authority will be met with skepticism at best and outright hostility at worst from the Court. The suggestion that an agency today might receive deference for a similarly bold statutory reinterpretation seems laughably quaint.<sup>405</sup> The resulting expansion or revival of the major questions doctrine is aimed directly at constraining perceived excesses of agency power. The relative absence of any parallel decline in deference in the lower courts might have similar roots: cases that reach the Court are more likely to involve broad or significant agency assertions of authority that alarm anti-administrativists, making them particularly unlikely to defer to agency interpretations and making deference arguments advanced by other Justices less likely to attract their votes.

This puts deference's decline within a larger ideological project. As Cass Sunstein notes, "[t]he current struggle over *Chevron* might well be seen a proxy war in a larger battle over the legitimacy of the administrative state, or perhaps as a significant skirmish in that battle."<sup>406</sup> Attacking *Chevron* may not even be the most important part of the anti-administrative project; the Court's moves toward a revived nondelegation doctrine<sup>407</sup> and, perhaps, more robust hard-look review

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403. See Kavanaugh, *supra* note 38, at 2151 ("We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope.").

404. See Metzger, *supra* note 387, at 15 ("If anything, the Reagan era sowed the seeds for what conservatives today view as executive overreach. It was the Reagan Administration's deregulatory efforts that produced the *Chevron* doctrine and deference to an agency's reasonable interpretation of ambiguous statutes that it implements.").

405. To be clear, by "bold" I mean an assertion of broad new authority, not interpretive creativity. The FDA's interpretation was a straightforward application of statutory text, however big the regulatory change it would have wrought. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127 (2000).

406. Sunstein, *supra* note 365, at 1618.

407. In his *Gundy* dissent, Justice Gorsuch calls for a reinvigoration of the nondelegation doctrine. See *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2142 (2019) (Gorsuch, J., dissenting). He is joined by Justice Thomas and Chief Justice Roberts, while Justice Alito writes separately but expresses sympathy for their views. See *id.* at 2131; *id.* at 1230 (Alito, J., concurring). Justice Kavanaugh took no part in *Gundy* but later indicated support for Justice Gorsuch's position in his dissent from denial of certiorari in *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., dissenting from denial of certiorari). This indicates there are five votes on the court for a revived nondelegation doctrine, though we

under the APA<sup>408</sup> might do more in the long run to constrain agencies. The track record of agencies in federal courts in recent years has been extremely poor,<sup>409</sup> though that is usually attributed more to the Trump administration's pairing of norm-breaking policy with a careless approach to administrative details.<sup>410</sup>

It is noteworthy that opposition to *Chevron* deference on the Court appears to have survived intact during a deregulatory presidential administration.<sup>411</sup> Deference to agencies under deregulatory leadership leads to less regulation, though it does still shift power to agencies relative to the courts. This suggests that views on *Chevron* have hardened. Until and unless a change of heart or personnel on the Court halts its anti-administrative turn, deference to agency interpretations will remain rare.

## 2. Textualism

Another possible cause of deference's decline is the parallel rise of textualism to become the dominant mode of statutory interpretation, led by Justice Scalia. The battles over interpretive methodology that

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will likely soon see whether these five have the courage to pull that trigger when they are in the majority, and what form a revived doctrine would take.

408. See, e.g., *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (rejecting an agency rulemaking on the grounds its stated rationale was pretextual).

409. See *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. SCH. L.: INST. POL'Y INTEGRITY, <https://policyintegrity.org/trump-court-roundup> (Jan. 20, 2021) (tracking success rate in administrative law cases; by its end, the administration had lost 80 percent of such cases—148/185).

410. See, e.g., Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 12:05 PM), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html) (“[T]he rulings so far paint a remarkable portrait of a government rushing to implement far-reaching changes in policy without regard for long-standing rules against arbitrary and capricious behavior.”).

411. Cf. Adrian Vermeule, *Two Futures for Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 30, 2016), <https://www.yalejreg.com/nc/two-futures-for-administrative-law-by-adrian-vermeule/>. Vermeule had predicted either “a new coalition between liberal lawyers and conservative lawyers in the courts, both deciding—for different reasons—that the administrative law of the Obama era is too favorable to presidential administration” or “a bewildering switch of places” between conservative and liberal lawyers’ views on administrative law questions “but no major change in legal doctrine.” *Id.* Neither prediction seems to have been entirely borne out; conservatives on the Court and outside government have remained skeptical of administrative authority generally and *Chevron* specifically, even if their views on executive power more broadly have shifted, and vice versa for liberals. *But cf.* Sunstein, *supra* note 365, at 1619 (“With respect to *Chevron*, the right and the left have switched sides.”).

paralleled *Chevron's* rise and fall<sup>412</sup> are, for now, largely over. As Justice Kagan famously remarked, “we’re all textualists now.”<sup>413</sup> At first glance, this jurisprudential trend seems unrelated: *Chevron's* innovation was to require deference when there is statutory ambiguity, regardless of which of the traditional tools of statutory interpretation are used to establish whether ambiguity exists. Whether one wants a broad range of interpretive tools or just one (text, in context), that wouldn’t seem to change. But restricting the range of interpretive tools—textualism’s essential project—means less ambiguity. That may seem paradoxical; bringing more tools to bear on interpreting a statute should allow more interpretive work to be done, resolving more ambiguity, right? In practice, no; because different sources of statutory meaning—text, context, purpose, legislative history, etc.—may point in different directions, a smaller set of tools will often produce *greater* certainty, not less.

Textualist analysis may also lead itself rhetorically to more conclusive claims of statutory meaning. If judges must consider multiple, sometimes contradictory, lines of evidence, their written opinions must then balance those often-conflicting sources to reach a conclusion about a statute’s best meaning. Purely textualist analysis is perhaps more likely to result in a single definitive statement about a statute’s meaning. This is somewhat of an oversimplification; even committed textualists acknowledge that multiple lines of evidence of meaning are available within textualism, including context and, perhaps, statements of statutory purpose.<sup>414</sup> Linda Jellum identified the relationship between textualism’s rise and *Chevron's* decline significantly earlier, writing in 2006 that “[a]s the Court embraced a textualist *Chevron*, it simultaneously adopted a more intentional pre-step—step zero—and limited *Chevron's* application.”<sup>415</sup> In any case, the result on a textualist-dominant Court is that much or all of the statutory interpretation action happens in *Chevron* Step One, as the cases discussed above illustrate. In the last five terms, nine or ten of the fifteen Supreme Court *Chevron* cases have been resolved by finding

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412. See generally Jellum, *supra* note 9.

413. See Harvard Law School, *The Antonin Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

414. See Scalia, *supra* note 19, at 515; see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 316–19 (2014) (adopting different operative definitions of the same text in the same statute depending on context).

415. See Jellum, *supra* note 9, at 781 (alteration in original).

a definitive interpretation of the statute,<sup>416</sup> making the agency's reading and any deference due to it irrelevant.

Textualism may not have this effect on deference forever. Textualism seems to be on the way to losing whatever political valence it may have once had, as Justice Gorsuch's textualist approach in extending the protection of Title VII of the Civil Rights Act to sexual orientation in *Bostock v. Clayton County* illustrates.<sup>417</sup> To use Carol Rose's metaphor again, once-crystalline textualism has, perhaps inevitably, been muddied as it has become dominant. It is even possible that *Chevron's* muddying is merely an epiphenomenon of a larger contemporaneous jurisprudential crystallization, which appears to have now peaked and begun its own muddying. I am no legal philosopher, however, and will not speculate any further than that.

### 3. Inherent Instability

Finally, the seeds of *Chevron's* decline may have been within it the whole time. Carol Rose's core insight embodied in the crystals and mud framework is that crystalline rules are inherently unstable.<sup>418</sup> Their muddying over time is normal, expected, and perhaps inevitable. *Chevron* seems particularly vulnerable to muddying. As noted above, it is a judge-made doctrine that reduces judicial power and requires judges to accept statutory interpretations that they view as suboptimal. Judges will inevitably chafe under its restrictions. Justice Breyer noted this source of instability in 1986, just two years after *Chevron* was decided.<sup>419</sup> Viewed in isolation, the Court's move away from *Chevron's* initial clarity is radical, even if gradual. But perhaps it should not be so surprising. *Chevron* is almost as old to us today as the APA was when *Chevron* was decided. *Chevron* had a good run. And its muddying decline was probably baked in from the beginning. As Rose suggests, the evolution from

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416. See discussion and Table 1 *infra* Section IV.B.

417. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

418. See Rose, *supra* note 15, at 595.

419. See Breyer, *supra* note 22, at 379 ("[N]either a strict view of *Chevron*, nor any other strictly defined verbal review formula requiring deference to an agency's interpretation of law can prove successful in the long run [because] such a formula asks judges to develop a cast of mind that often is psychologically difficult to maintain. It is difficult, after having examined a legal question in depth with the object of deciding it correctly, to believe both that the agency's interpretation is legally wrong, *and* that its interpretation is reasonable. More often one concludes that there is a 'better' view of the statute for example, and that the 'better' view is 'correct,' and the alternative view is 'erroneous.'").

crystals to mud and back is cyclical, with the seeds of each change planted in the previous one.<sup>420</sup>

That cyclical story matches *Chevron's* rise and fall. The imprecision and unpredictability of *Skidmore*-era deference decisions cried out for a clarifying rule, which *Chevron* supplied or was drafted into. Perhaps inevitably, the rule soon came under attack for its failure to account for circumstance. Early on, it was claimed that deferring to agency interpretations of criminal statutes violates important norms, including the rule of lenity. Then, it was claimed that deference should not allow agencies to make sweeping changes to major areas of policy—*Brown & Williamson*. And surely deference should not be available for small-potatoes agency decisions without much process—*Mead*. Perhaps each of these, and the myriad other exceptions to *Chevron*, can be defended on its own merits, but the trend is clear and the result is a muddied doctrine that has lost whatever power it once had.

Implicit erosions of *Chevron* have followed a similar pattern. Judges over time created more and more discretionary authority within the threshold ambiguity inquiry, Step One, and unsurprisingly the outcomes usually tracked judges' preferences. The major question exception is an initially implicit restriction on *Chevron* that over time became explicit. Indeed, the seeds of *Chevron's* internal, implicit erosion were embedded from the beginning. By giving judges the power to decide in Step One which cases were within *Chevron's* zone of deference, the doctrine gave them the power to chip away at the crystal. In essence, *Chevron* locked judges into a cell, but handed them the keys. As noted above, there was probably no alternative, at least absent congressional action. But because of this internal contradiction, a permanently crystalline range of *Chevron* deference was never plausible.

In an earlier paper, I argued that this tension meant that the major questions doctrine should be valued by defenders of agency authority, not criticized as it typically is.<sup>421</sup> Because judges will find it particularly difficult to defer to agency statutory interpretations in high-profile and high-stakes major questions cases, separating these cases from the mainline of *Chevron* jurisprudence avoids setting precedent that undercuts deference more generally—an example is the continued expansion of judges' power at Step One, *Brown & Williamson*-style.<sup>422</sup> In light of the general decline in deference at the Court documented here, I am no longer convinced that view on the major questions doctrine is

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420. See *infra* Parts II–III.

421. See Richardson, *supra* note 158, at 423.

422. *Id.* at 421–25.

correct. This is not because the Court is relying too frequently on the major questions doctrine—it remains rarely cited, at least explicitly, though adoption of Justice Kavanaugh’s major rules version would change that. Instead, there just is not much mainline *Chevron* deference to protect, at least at the Supreme Court. In the lower courts, where meaningful deference persists, the major questions doctrine has never much been applied; it is largely a Supreme Court-only doctrine.<sup>423</sup>

Alternatively, it is possible to view *Chevron*’s instability not as an independent cause of its decline, but as the means by which other forces, such as anti-administrativism and the rise of textualism, were able to bring about that decline. Crystals do not just become mud on their own; they yield to external pressure brought to bear on their inherent contradictions. Under this view, *Chevron*’s inherent instability is the most important factor in its decline but not the *primary* cause.

#### V. *CHEVRON*’S FUTURE

If *Chevron* has lost most of its influence and power and is under open attack from multiple Justices, one might conclude that it is likely to be overruled. Many scholars and observers have done so.<sup>424</sup> A weak *Chevron* seems vulnerable to a killing blow, and critics may smell blood in the water. Justices Thomas and Gorsuch appear ready to reject *Chevron* today. Justices Alito and Kavanaugh have shown some similar inclinations, though their views are less clear. Chief Justice Roberts’s dissent in *City of Arlington* shows deep concern with *Chevron* in some circumstances, though it stops well short of indicating an appetite to overrule it. Nevertheless, it is not hard to count to five votes here.

##### A. *Rejection?*

I do not think the Court is likely to overrule *Chevron* any time soon, however. The Supreme Court does not overrule cases lightly and is particularly unlikely to overrule a precedent with the name recognition and *perceived* importance of *Chevron*. But *stare decisis* protects the *name*

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423. Justice Kavanaugh’s “major rules” statement in *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 420–22 (2017) (en banc) (Kavanaugh, J., dissenting) (per curiam), is a notable exception, but it is in dissent of denial of en banc review, not a merits opinion. The doctrine is rarely invoked, but this is not to suggest that it *never* is. See Hornung, *supra* note 38181, at 762, 783–84 & nn.115–19 (identifying nine invocations of the doctrine in the lower courts since *UARG* in 2014).

424. See generally Brannon & Cole, *supra* note 37474 (summarizing and referencing a wide variety of predictions of *Chevron*’s demise). See also Sunstein, *supra* note 365, at 1622.

of precedent more than its content. The principle has not protected *Chevron* from the erosion discussed above. This is not an unfamiliar pattern—the Court frequently limits the scope of precedent without overruling it; in the extreme, a case may be “limited to its facts,” overruled in all but name. As one scholar describes a doctrinal shift in the opposite direction, from mud to crystal, in another area of law:

Given the Supreme Court’s adherence to the minimum contacts language for seventy years now, it seems unlikely that the vocabulary will soon change. The question rather is whether the vocabulary will continue to be a cloak to hide jurisdictional doctrine that is in truth no less rigid than that of the nineteenth and early twentieth century. The minimum contacts *test* is in its twilight because it has become almost completely separated from the fairness rationale that underlay the test as it was originally conceived. So while the minimum contacts *language* will almost certainly persist, the *test* as a meaningful exposition of the Due Process Clause may not live to see the next dawn, if indeed it is still alive at all.<sup>425</sup>

I predict this is where *Chevron* is headed; as litigants and Justices themselves recognize the decline in *Chevron*’s power and influence, it will likely play a smaller role in briefs, oral arguments, and opinions.

To illustrate the same point in the opposite direction, it is widely believed that applying *Chevron* deference substantially constrains judges’ role in a case. Then-Judge Gorsuch argues as much in his *Gutierrez-Brizuela* concurrence:

*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. Of course, *some* role remains for judges even under *Chevron*. At *Chevron* step one, judges decide whether the statute is “ambiguous,” and at step two they decide whether the agency’s view is “reasonable.” But where in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.<sup>426</sup>

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425. Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 4 (2014).

426. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (2016) (Gorsuch, J., concurring).

This is a good description of the textbook understanding of *Chevron* and was perhaps how it worked in practice in the 1990s, at least outside the major questions line of cases and other early excisions, like criminal cases. But the ever-growing list of judge-made exceptions to *Chevron* and dramatic expansion in judicial power at Step One, detailed above, make it a wildly inaccurate characterization of *Chevron* as applied at the Court today. It serves Justice Gorsuch's rhetorical purposes to characterize *Chevron* as shackling judges, but it has not meaningfully done so in a long time at the Supreme Court, at least since *Brown & Williamson*, and in some areas of law—including criminal—far longer than that. As the Court's *Chevron* cases decided in the last few years illustrate, Justices have ample power to control the flow of a *Chevron* case through the two—or three—step framework and reach any outcome a majority supports.

This increase in judges' power and flexibility under *Chevron* and the corresponding reduction in power and predictability for agencies makes formal rejection of the doctrine less likely, not more. Why spend the time, effort, or political capital to formally overrule a decision that has little impact today?<sup>427</sup> If the goal of *Chevron*'s critics is to shift interpretive authority from agencies back to courts, that has largely been achieved already, at least at the Supreme Court level. To tie *Chevron*'s future to the reasons for its decline discussed in the previous section, the anti-administrativists need not overturn it if it no longer meaningfully empowers agencies and textualists need not overturn it as they have already won their fight. The doctrine's inherent instability has declined as it has declined in influence and been muddied, riddled with exceptions. To the extent that work remains to be done, there is no evidence that it cannot be accomplished via the same methods that have eroded *Chevron* deference already. It is easy to imagine a future for *Chevron* in which it persists but continues to shrink in significance.

### B. Continued Decline

If *Chevron* is not overturned explicitly, then what? Predictions are, of course, dangerous and usually wrong. But having made one already that *Chevron* will not be overruled anytime soon, I am emboldened to speculate. Broadly speaking, implicit and explicit erosion of *Chevron* is

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427. I have made a similar prediction for similar reasons that *Massachusetts* will not be overturned, despite criticism. See Nathan Richardson, *The Rise and Fall of Clean Air Act Climate Policy*, 10 MICH. J. ENV'T & ADMIN. L. (forthcoming 2021) (manuscript at 104), <https://osf.io/preprints/socarxiv/wqy93/>.

likely to continue. The trend for the foreseeable future is most likely more mud, not crystal.

One possibility is that it fades away silently. *Chevron* will be given lip service at best. Some Justices will cite *Chevron* less often; when they do, it will be with some reluctance, to buttress an opinion in which the agency wins a close case. Other Justices will not cite *Chevron* at all in their majority opinions, a practice some on the Court appear to have already adopted: *Little Sisters* from the 2020 term, discussed briefly above, is a good illustration of what might become the norm.<sup>428</sup> Justice Thomas, fiery in his criticism of *Chevron* when writing separately, does not mention it at all in his majority opinion.<sup>429</sup> He does not just pull the punch, he refuses to fight at all. This is no cowardice. *Chevron* just is not that important. One can imagine a future in which fewer opinions even bother to cite *Chevron* and go through the process of siting their statutory analysis within its Step One. Instead, their authors will just do the analysis and move on. *Chevron*'s defenders, like Justice Kagan, will presumably continue to cite it and purport to apply the framework, but will rarely if ever be able to command a majority for opinions in which deference is outcome-determinative. When not outcome-determinative, citation of *Chevron* will prompt the by now standard outrage from its critics in dissent or separate concurrence. But that need never mature into critique, much less rejection, in a majority opinion. Decades of battle over the scope and impact of *Chevron* will have been reduced to theater.

Another possibility is that explicit doctrinal change *does* happen, but by continuing erosion of *Chevron* at the margins, rather than by overturning it. This could come in a variety of explicit forms. For example, Chief Justice Roberts's dissent in *City of Arlington* advocating a *Chevron* exception for "jurisdictional" interpretive questions might become the majority position in a future case, without Justice Scalia on the Court to hold the line.<sup>430</sup> Or the form of agencies' *Chevron* arguments might be constrained, such as by forcing them to adopt a single interpretation of statutory text, rather than arguing in the alternative that it is either clearly in their favor or ambiguous but within the scope of deference. The Court could also state clearly that *Chevron* deference is only available to procedurally complete agency decisions, such as notice-and-comment rulemaking and formal adjudication. This has, after *Mead*, been strongly implied but not formally required. The Court could also

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428. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

429. See *id.* at 2372–86 (majority opinion).

430. See Adler, *supra* note 11, at 993–94 (calling for *City of Arlington* to be rejected).

overturn *NCTA v. Brand X* insofar as that case allows agencies to overrule judicial interpretations of statutes, as that decision's author, Justice Thomas, has recently called for.<sup>431</sup>

Alternatively, *Chevron's* decline might continue silently. The Court might just further expand the scope of existing exceptions to *Chevron*. The major questions doctrine could grow as future cases steadily create precedent increasing its scope—it is relatively easy to argue the doctrine should be applied to a case that is only slightly less major than the previous lower bound, especially because the criteria that make a case major are never defined. Or the Court could be even more aggressive than it has already become at ferreting out statutory meaning, leaving no cases of statutory ambiguity in which agencies get interpretive deference. As Justice Scalia pointed out more than thirty years ago, *Chevron* is irrelevant if it only applies when interpretive questions are in true equipoise, as that never happens in practice.<sup>432</sup> Justice Kavanaugh's claim that he is willing to decide cases at Step One when he is only "60/40" certain of a statute's meaning points in this direction.<sup>433</sup> It is easy to imagine a future in which *Chevron* deference remains nominally available but is never granted in practice because every case can be disposed of at Step Zero or Step One. It does not matter much if a dish is on a restaurant menu if the kitchen is closed or always out of a necessary ingredient.

In short, the long process of *Chevron's* muddying could continue; however weak *Chevron* is now, the number of potential explicit exclusions and incremental moves to broaden Step One is infinite. Eventually, Supreme Court doctrine in agency statutory interpretation cases may become indistinguishable from *Skidmore's* multifactor deference test. This is not to say an imperial court will ignore agencies entirely; agencies will still get "deference" in that their arguments are—sometimes—taken more seriously than those of other litigants, but there will no longer be a deference *rule*. Crystals to mud.

### C. Holding the Line

A final possibility, suggested by Cass Sunstein, is that *Chevron* could be re-crystallized, but with an explicitly narrower scope; as he puts it, *Chevron* could be "domesticated."<sup>434</sup> Judicial primacy in determining

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431. See *Baldwin v. United States*, 140 S. Ct. 690, 694–95 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari).

432. See Scalia, *supra* note 19, at 520.

433. Kavanaugh, *supra* note 355.

434. See Sunstein, *supra* note 365, at 1622.

whether statutory ambiguity exists, i.e. Step One, could be clarified—including a more sharply defined major questions doctrine, the menu of interpretive canons could be clearly established, and the scope of deference available at Step Two could be more clearly defined.<sup>435</sup> This domestication could come in a Supreme Court opinion or, conceivably, from Congress.<sup>436</sup>

The Court has already taken a very similar approach in constraining and crystallizing the related *Auer/Seminole Rock* doctrine regarding deference to agency interpretations of their own regulations.<sup>437</sup> In *Kisor v. Wilkie*, Justice Kagan announced a five-factor test for when deference would be available.<sup>438</sup> But these factors are not really new<sup>439</sup> and are quite similar to Sunstein's suggestions for *Chevron*. Deference is only available where judges determine the regulation at issue is "genuinely ambiguous" after applying "'traditional tools' of construction."<sup>440</sup> The agency's interpretation must also be "reasonable," reflect the agency's "authoritative . . . position" and "fair and considered judgment," and lie within its "substantive expertise."<sup>441</sup> All of these factors have *Chevron* parallels: Step One, Step Two, the *Mead* exception, the stay-in-your-lane principle, and the exception for mere litigating positions.<sup>442</sup> *Kisor* clarifies that these apply in the context of agency interpretations of regulations, while collecting and systematizing them. *Kisor* also suggests, though it does not say, that its list of factors is complete<sup>443</sup>; if a reason not to grant deference cannot be found in the five-factor test, deference applies—though of course the Court could add to the list later. In this sense, it is a recrystallization of *Auer* deference.

Could the same be done for *Chevron*? Maybe. On one hand, it is less necessary; as noted, all of *Kisor*'s factors already exist in the *Chevron* context. One view of *Kisor* is that all it really did was clarify that *Chevron*'s steps, exceptions, and limitations applied to *Auer* deference, too. Doing the same for deference to agency interpretations of statutes would just be a restatement, not a recrystallization. On the other hand,

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435. *Id.* at 1672–78.

436. *See id.* at 1676–77.

437. *See* Matthew A. Melone, *Kisor v. Wilkie: Auer Deference Is Alive but Not So Well. Is Chevron Next?*, 12 NE. U. L. REV. 581, 610 (2020).

438. 139 S. Ct. 2400, 2415–18 (2019).

439. More precisely, they may be new in the *Auer* context, but all already existed in the *Chevron* context.

440. *Kisor*, 139 S. Ct. at 2415.

441. *Id.* at 2415–17.

442. *See supra* Part III.

443. *See Kisor*, 139 S. Ct. at 2408.

many observers believed *Auer* would be overturned in *Kisor*. The fact that it was not is probably due to Justice Kagan's efforts in producing a robust list of exclusions and limitations sufficient to satisfy at least some of the Justices with objections to the doctrine. A similar process might save *Chevron* and even, to the extent that it recrystallizes the doctrine, forestall further erosion. That certainly seems to be the thrust of Sunstein's proposal.

But even if that comes to pass, it is worth asking whether the rump *Chevron* deference that it would preserve would really be deference at all. No deference was available in *Kisor* because multiple factors took the case outside of the scope of deference.<sup>444</sup> It is possible that few if any future cases involving agency interpretations of regulations will survive application of the *Kisor* factors. *Auer* may be dead in all but name, *Kisor* having killed it in a failed attempt to save it. The same could happen with a *Kisor*-style restatement/recrystallization for *Chevron*, but in that case it is not necessary to speculate whether much would be left of deference. We can already observe from the Court's *Chevron* cases that there is little or no deference available anymore. At best, a restatement could only slow the decline, not restore any lost deferential power—or, as seems to have happened in *Kisor*, forestall a skeptical Court from overturning it. It is, at best, a defensive approach.

One other possible future for *Chevron*, suggested by Aaron-Andrew P. Bruhl, is for it to become a lower courts-only doctrine.<sup>445</sup> Deference would be available in the federal district and appellate courts, but not at the Supreme Court.<sup>446</sup> This would de facto overrule *Chevron* at the Supreme Court level and is perhaps the most radical shift in the doctrine short of tossing it entirely. This approach has some virtues: it acknowledges and accepts the current, sharp divergence between the level of deference available at the Supreme Court and in lower courts. In doing so it removes a source of doctrinal tension: Supreme Court cases denying deference to agencies no longer risk confusing the lower courts or unintentionally muddying *Chevron* doctrine there. In my view, such a "hierarchically variable"<sup>447</sup> *Chevron* is unlikely. It probably would not satisfy either *Chevron*'s proponents or its critics on the Court. In particular, Justices Gorsuch and Kavanaugh are unlikely to forget their

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444. *Id.* at 2424 (declining to find *Auer* deference and remanding the issue of whether it applied).

445. See Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 777–79 (2013).

446. See *id.*

447. See *id.* at 779.

recent and documented frustration with deference as appellate judges and condemn their erstwhile colleagues to defer to agency interpretations that they would not. It would also increase the Court's workload by creating a class of cases that only it can properly resolve, though overturning *Chevron* completely would probably increase that workload even more, as the Court would face interminable statutory interpretation circuit splits. But Bruhl's suggestion cannot be ruled out. It may even be the best available description of the status quo.

In short, there are many possible futures for *Chevron* deference, but of these overturning it seems the least likely, despite being the most discussed.

#### D. The Longer Term

This is not to suggest that criticism of *Chevron* will necessarily abate, both within and outside the Court. It may: if *BNSF* becomes the model and *Chevron* is frequently ignored, then there will be little need to critique it. If the Court continues to at least play lip service to *Chevron*, going through the two-step motions, then dissenting, or even concurring, Justices and outside critics may of course blame *Chevron* and continue to call for its rejection. But only if the majority actually grants deference will these critiques have any weight. Recent cases suggest the Court will rarely grant such deference anymore, though sample size is small,<sup>448</sup> and this seems unlikely to change. Until and unless it does, criticism of *Chevron* will at least not increase in volume.

As noted above, *Chevron* deference continues to play a meaningful role at the district court level.<sup>449</sup> But decline of the doctrine at the Supreme Court may eventually lead to decline in the lower courts too. Explicit exclusions of classes of cases from *Chevron*'s scope are and will continue to be followed by lower courts. Implicit weakening of *Chevron*, primarily via liberal interpretation of Step One, will likely continue to create room for lower courts to reject agency views in favor of their own preferred readings of statutes.

Carol Rose's framework is cyclical; it strongly suggests recrystallization will happen eventually.<sup>450</sup> Overturning *Chevron* would in one sense further muddy the doctrine: agency statutory interpretation cases would become slightly less predictable under a *de novo* or revived *Skidmore* standard. But it would be a meta- or second-order

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448. See *supra* Table 1.

449. See Barnett & Walker, *supra* note 14, at 1, 29–31.

450. See Rose, *supra* note 15, at 595.

recrystallization, in that it would at least clarify the Court's deference doctrine, if not the results. The same can be said for other future paths for *Chevron* that explicitly reduce its scope as would overruling *Brand X*, summarize and restate existing exclusions and limitations *Kisor*-style, or limit it to lower courts. Each would add doctrinal but not interpretive clarity.

Even if these predictions are right, they are unlikely to persist forever. Over the longer term, as political and policy trends shift, and particularly as the makeup of the Court changes, a revival of deference to agency interpretations is plausible. Administrative law has never been stable for long. The same desire for clarity and predictability that drove *Chevron*'s adoption<sup>451</sup> might again motivate a deference rule in agency statutory interpretation cases. A change in the ideological balance of the Court would certainly render any predictions made today almost useless. One or both parties might change their position on deference again; or pressing policy issues like climate change might make stronger administrative government necessary, or at least raise its status with elites enough to shift views on the Court. A new deference doctrine might replace *Chevron* as *Chevron* replaced *Skidmore*, intentionally or unintentionally.

Alternatively, Congress could act at any time, in either direction. *Chevron* is based on, at least allegedly, an implied delegation of interpretive authority by Congress to agencies. Congress could at any point make this delegation explicit—generally, in some range of cases, or only for a specific statute or statutes.

I make no predictions here about when or how a doctrinal recrystallization might happen. Muddy legal doctrine can last a long time—witness the long persistence of many of the Court's multifactor tests.<sup>452</sup> But Carol Rose's historical analysis suggests neither crystals nor mud last forever.

## VI. CONCLUSION

Though it may not have been intended to do so, *Chevron* rapidly, though never completely, crystallized the degree of deference to agency

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451. Or, more precisely, drove the Court to apply *Chevron* in rule-like fashion, whether that was Justice Stevens's intent or not. See *supra* note 46. A future recrystallization may similarly not be immediately obvious when it happens.

452. See, e.g., *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (adopting a famed multifactor test for determining whether regulatory action is a compensable taking within the scope of the Fifth Amendment).

interpretations of statutes in federal law. Across a wide range of cases and similarly wide range of possible statutory interpretations, agencies and judges had a clear mandate and a two-step roadmap for getting there. Relative to the *Skidmore* test that preceded it, *Chevron* crystallized deference doctrine and in doing so shifted power from judges to agencies.

Almost immediately, however, that crystal began to yield. Classes of cases were excluded from *Chevron*'s reach, and the court chipped away at *Chevron*'s power and predictability by increasing the range of cases that judges, or at least Justices, could decide. This process of muddying accelerated in the early 2000s, most notably with the announcement of the major questions doctrine in *Brown & Williamson*. It has only accelerated since.

Today, agency statutory interpretations appear to get no meaningful deference at all at the Supreme Court, though deference remains robust in the lower courts, for now. Agencies have prevailed in only three of the last fifteen *Chevron* cases, and none in the last three years.<sup>453</sup> In only one case over that period did the Court actually defer to an agency interpretation. That holding prompted a Justice to call for *Chevron* to be overturned. Two or possibly three further Justices have since called for the doctrine to be substantially narrowed or rejected entirely, and similar voices outside the Court have increased in volume. Deference is dead at the Court; indeed, it has been on life support for some time, possibly since *Brown & Williamson* two decades ago.

*Chevron*'s decline is driven in large part by a wider ideological project skeptical of administrative authority and may also be a side-effect of the rise to dominance of textualism over the same time period. But *Chevron*, like all crystalline doctrines, was inherently unstable from the beginning. Its decline should come as no surprise. Adrian Vermeule has argued that the long arc of administrative law bends towards deference and that this is a defining, positive feature.<sup>454</sup> He may be right over the long term, but if so, we are currently in a reactionary moment. Whether this is good or bad depends on one's policy and institutional priors and on how the Court rules in unknown future cases. Just because deference is unavailable does not mean agencies always lose, as *King v. Burwell* illustrates.

For some, *Chevron*'s decline in clarity and influence signals its imminent demise. Instead, however, it is likely to persist, at least in name. It remains influential on the lower courts. Even if there are sufficient votes on the Court to overturn it, *Chevron*'s weakness means

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453. See *supra* Table 1.

454. See generally VERMEULE, *supra* note 13.

there is little reason for its opponents to spend the political and institutional capital to overturn it. It is far easier to just criticize *Chevron* in dissents and concurrences, discrediting it to the point where it becomes a precedent litigants hate to cite and its remaining defenders on the Court are reluctant to use.

*Chevron* is therefore likely to persist indefinitely, not because it or deference generally is necessary or inevitable, but because it does not matter very much anymore at the Court. In the short term, its decline could be made obvious by a decision clearly stating its accumulated exceptions and restrictions, as the Court did for related *Auer* deference in *Kisor*. It could even be relegated to a doctrine for the lower courts only. The evolution of crystal to mud is predictable but it is also cyclical. In the more distant future, deference doctrine is likely to be recrystallized and possibly restrengthened, shifting power back to agencies. But this seems like a distant prospect from today's perspective, likely requiring big changes in personnel on the Court and wider shifts in American politics and policy. Until then, at least at the Supreme Court, deference is dead, though *Chevron* lives.