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The Winter of Discontent: A Circumscribed Chevron

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THE WINTER OF DISCONTENT: A CIRCUMSCRIBED
CHEVRON

Nicholas R. Bednar[†]

Now is the winter of our discontent
Made glorious summer by this sun of York;
And all the clouds that lour'd upon our house
In the deep bosom of the ocean buried.¹

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I. INTRODUCTION

Anti-administrativists are poised for a *coup d'état*. For the last thirty years, courts have deferred to federal agencies' interpretations of law while rarely considering the constitutionality of the delegation underlying the agencies' policymaking authority.² In recent years, the Supreme Court's

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1. William Shakespeare, Richard III act 1, sc. 1.

2. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017) (showing that agencies win in 77.4 percent of cases where circuit courts applied *Chevron*); Catherine M. Sharkey, *State Farm "with Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1607 (2014) ("Aggressive judicial review of agency action peaked in the mid-twentieth century. Over time, although there has been wide variation among and within jurisdictions, the general trend has been towards leniency."); William N. Eskridge, Jr. & Lauren E. Baer, *The*

anti-administrativists—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch—have called for reconsideration of administrative law’s core doctrines and constitutional roots.³ With the appointment of Justice Kavanaugh, the anti-administrativists now have a majority on the Supreme Court.⁴ Accordingly, administrative law scholars and practitioners should anticipate a doctrinal revolution during the next decade.

I use “anti-administrativists”⁵ as shorthand for individuals who believe modern administrative law requires reform to ensure fidelity to the United States Constitution and the rule of law. In the words of Aaron Nielson, anti-administrativists argue that “administrative law can be *better* as a matter of procedural fairness, substantive outcomes, and compliance with statutory and constitutional law.”⁶ At the core of anti-administrative ideology is the belief that bureaucratic governance frustrates the separation of powers. Agencies exercise the enumerated powers of the other branches by promulgating binding rules like Congress,⁷ interpreting

Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083, 1129 (2008) (showing that agencies win in 76.2 percent of cases where the Supreme Court applied *Chevron*).

3. See, e.g., *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“[W]hether *Chevron* should remain is a question we may leave for another day.”); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (arguing that the PTAB violates Article III); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring) (“I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (Roberts, C.J.) (holding that the Sarbanes-Oxley Act interferes with the President’s constitutional obligations); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring) (“On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”).

4. Christopher J. Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (Jul. 26, 2018, 2:55 PM), <http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers> [https://perma.cc/8XXA-LHZ2].

5. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017) (using this phrase).

6. Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1, 1 (2017).

7. See, e.g., *Whitman*, 531 U.S. at 488 (Stevens, J., concurring in part and concurring in judgment) (“I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”); *Id.* at 487 (Thomas, J., concurring) (“I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 378–95 (2002) (identifying

statutes like courts,⁸ and—with respect to independent agencies—acting outside the reaches of presidential oversight.⁹ The strongest anti-administrativists argue that the entire foundation of the modern administrative state violates basic principles of the Constitution.¹⁰ More lenient anti-administrativists acknowledge that delegation has become an integral part of modern government but insist on strict oversight of agencies.¹¹

To be clear, one should not interpret the phrase “anti-administrativist” as pejorative. While I do not self-identify as an anti-administrativist,¹² I sympathize with their concerns. We should strive for a system of government that embraces efficiency, expertise, transparency,

numerous situations where Congress delegated broad “legislative” authority to administrative agencies).

8. See, e.g., *Oil States Energy Servs., LLC*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting) (“Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job.”); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986) (arguing that current standards of review for agency actions swap the intended role for the judiciary).

9. *Free Enter. Fund*, 561 U.S. at 484 (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”); PRESIDENT’S COMM’N ON ADMIN. MGMT., REPORT WITH SPECIAL STUDIES 40-41 (1937), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015019768939;view=1up;seq=62> [<https://perma.cc/XXE4-529M>] (“The independent commissions present a serious immediate problem. No administrative reorganization worthy of the name can leave hanging in the air more than a dozen powerful, irresponsible agencies free to determine policy and administer law. Any program to restore our constitutional ideal of a fully coordinated Executive Branch responsible to the President must bring within the reach of that responsible control all work done by these independent commissions which is not judicial in nature.”).

10. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (answering “Yes” to the question posed in the title).

11. See generally Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017) (arguing that Courts should accept delegation to remedy the undermining of separation of powers).

12. Notably, I believe the historical record demonstrates that Congress has the constitutional authority to “delegate” policymaking decisions to agencies, which the agencies resolve through the rulemaking process. See generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

and the separation of powers. Anti-administrativists have contributed much to the dialogue about how our government should function. Now, with a majority on the Supreme Court, they have the opportunity to reshape administrative law in ways that comport with their ideology.

Anti-administrativists have already fired the first shots of the revolution at the *Chevron* standard of review. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court announced a two-step standard of review for assessing whether a court should defer to an agency's reasonable interpretation of an ambiguous statute.¹³ *Chevron* is an easy target. It is the most cited case in administrative law.¹⁴ More importantly, since its inception, jurists and scholars have warned that *Chevron* has expanded bureaucratic authority by depriving the courts of their power to interpret the law.¹⁵ In recent years, these concerns have led many commentators to call on the Supreme Court to overturn the *Chevron* doctrine and restore *de novo* review as the proper standard for reviewing agency interpretations of law.¹⁶ Even Congress has proposed legislation that would eliminate *Chevron* by amending the Administrative Procedure Act to require reviewing courts to "decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules."¹⁷

Yet it seems unlikely that the Supreme Court will overturn *Chevron*. Elsewhere, Kristin E. Hickman and I argue that deference is the inevitable result of Congress's delegation of policymaking authority to agencies.¹⁸ The Supreme Court acknowledges that statutory interpretation "is often more a question of policy than of law,"¹⁹ and policymaking belongs to the political

13. 467 U.S. 837, 841-43 (1984).

14. Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1394 n.5 (2017) (calculating that, as of June 2017, *Chevron* had been cited more than 81,000 times).

15. See generally Breyer, *supra* note 8, at 370-71; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 350 (1987) (Cass R. Sunstein).

16. See generally 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); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). But see Jeffrey Pojanowski, *Without Deference*, 81 MO. L. REV. 1975 (2016).

17. Separation of Powers Restoration Act, H.R. 4768, 114th Cong. (2016) (emphasis added); see also Bednar & Hickman, *supra* note 14, at 1456-60 (discussing SOPRA's implications for judicial review of agency interpretations of statutes).

18. See generally Bednar & Hickman, *supra* note 14.

19. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

branches—not the courts.²⁰ Chief Justice Roberts agrees. Dissenting in *City of Arlington v. FCC*, Chief Justice Roberts remarked, “*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”²¹ Indeed, courts have long deferred to agency interpretations of statutes to avoid straying too far into the policymaking realm.²² Unless the Court revives the nondelegation doctrine in its harshest form, Congress will continue to delegate policymaking authority to agencies under incomplete statutes, agencies will fill the gaps in those statutes, and courts will defer to the agencies’ policy decisions.

However, Hickman and I never suggest that *Chevron* will live a peaceful existence. If *Chevron* survives, how will it function when the Supreme Court completes its anti-administrativist revolution? Although *Chevron*’s boilerplate remains relatively consistent, its application varies depending on which judge or justice authors the opinion.²³ *Chevron*’s rigor depends on how clear Congress must speak to foreclose deference, how reasonable the agency’s interpretation must be to warrant deference, and whether the judge applies a formalistic construction of the two steps.²⁴ Even outside of the anti-administrativist critique, scholars have called on the Supreme Court to provide lower courts with more guidance as to when and how *Chevron* applies.²⁵ An anti-administrativist Supreme Court could—and undoubtedly will—weaken *Chevron* without disposing of it.

20. *Gregory v. Ashcroft*, 501 U.S. 452, 487 n.1 (1991) (Blackmun, J., dissenting).

21. *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

22. *See, e.g., Batterton v. Francis*, 432 U.S. 416, 425 (1977) (“In a situation of this kind, Congress entrusts to the Secretary [of Health, Education, and Welfare—the precursor to the modern Department of Health & Human Services], rather than to the courts, the primary responsibility for interpreting the statutory term A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.”); *AT&T Co. v. United States*, 299 U.S. 232, 236 (1936) (stating the Court is “not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.”).

23. Bednar & Hickman, *supra* note 14, at 1444–45 (describing *Chevron* as “just” a standard of review).

24. *Id.* at 1446.

25. Kent Barnett & Christopher J. Walker, *Chevron Step Two’s Domain*, 93 NOTRE DAME L. REV. 1441, 1470 (2018) (“The Supreme Court, with plenty of theoretical foundation to guide it, should look for ways to bring coherence to the *Chevron* framework.”); Beermann, *supra* note 16, at 783 (“The *Chevron* opinion was poorly constructed and unclear on basic issues such as the proper role of interpretation, legislative history, and policy arguments. It is still not clear whether *Chevron* concerns review of statutory interpretation or review of policy decisions.”).

This article draws from current trends among anti-administrativists to explore how the Supreme Court may curtail *Chevron* in future cases. That is not to suggest that the Supreme Court will implement all of the changes I identify here. Rather, this article is best understood as a menu of *à la carte* options that the Supreme Court may use to address anti-administrativist concerns. The more limitations that the Supreme Court orders, the less often lower courts will defer to agency interpretations of law.

II. THE CRITIQUES AND PERSISTENCE OF CHEVRON

A. *The Chevron Standard*

The Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁶ provides courts with a two-step standard for reviewing "an agency's construction of [a] statute which it administers." At step one, the court asks whether "Congress has directly spoken to the precise question at issue."²⁷ The court employs all "traditional tools of statutory construction" to ascertain Congress's intent.²⁸ If Congress's intent is clear, then the court "must give effect to the unambiguously expressed intent of Congress."²⁹ "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."³⁰ But "if the statute is silent or ambiguous with respect to the specific issue," the court moves to step two.³¹ At step two, the court determines whether the agency's interpretation is "based on a permissible construction of the statute."³² The court must defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."³³

However, the *Chevron* opinion itself provided little guidance to lower courts as to when and how the standard applies. The *Chevron* Court acknowledged that Congress may explicitly or implicitly delegate an issue of statutory interpretation to the agency.³⁴ With respect to explicit

26. 467 U.S. 837 (1984).

27. *Id.* at 842.

28. *Id.* at 843 n.9.

29. *Id.* at 842-43.

30. *Id.* at 843 n.11.

31. *Id.* at 843.

32. *Id.* at 843.

33. *Id.* at 844.

34. *Id.* at 843.

delegations, the *Chevron* Court stated, “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”³⁵ With respect to implicit delegations, the Court stated, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”³⁶

On the face of its opinion, the *Chevron* Court appears to have created a single standard of review for both agency statutory interpretation and agency gap-filling. Agencies engage in both statutory interpretation and gap-filling while enforcing the law, but scholars treat them as distinct agency actions. Statutory interpretation refers to the traditional exercise whereby the court decides “what the law is.”³⁷ Courts employ an interpretive methodology—typically purposivism or textualism—and their various tools (textual canons, substantive canons, legislative history, etc.) to arrive at the “best meaning” of the statutory text. Yet some ambiguities have no discernable “best meaning” because Congress intended for the agency to fill the gaps in these statutes. Filling statutory gaps requires policymaking, which is a task suited for the political branches. Courts have long recognized the power of administrative agencies to fill gaps in Congress’s statutory regimes.³⁸ The historical distinction between statutory interpretation and gap-filling has led some scholars to argue that the *Chevron* Court intended to limit the application of *Chevron* to cases involving gap-filling.³⁹

Along the same lines, the Supreme Court has failed to adequately explain *Chevron*’s scope. For more than fifteen years,⁴⁰ lower courts struggled to decide whether older standards of review remained good law, whether the agency had to produce its interpretation through notice-and-comment rulemaking, and whether certain substantive questions (notably those concerning interpretations of the agency’s scope of power) were beyond deference.⁴¹ Finally, in a trilogy of cases, the Court announced that

35. *Id.* at 843–44.

36. *Id.* at 844.

37. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

38. Ilan Wurman, *The Specification Power* (Aug. 6, 2018) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226964 [<https://perma.cc/NS4F-MMAZ>].

39. *Id.* at 22–27 (arguing that several pre-*Chevron* cases that appear to involve statutory interpretation actually involve gap-filling).

40. *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L. J. 833 (2001) (summarizing confusion around *Chevron*’s scope and addressing how the Court might resolve this confusion).

41. Bednar & Hickman, *supra* note 14, at 1404–05.

Chevron applies when the agency promulgated its interpretation pursuant to a statutory grant of authority to act with the force of law.⁴² Since these initial cases, the Supreme Court has continued to refine *Chevron's* scope but, in doing so, has injected further nuance and confusion into the doctrine.⁴³

With respect to the substance of its two steps, the Supreme Court has fared even worse.⁴⁴ The circuit courts continue to differ as to which tools are appropriate at step one. Most circuits examine legislative history at step one,⁴⁵ but the Third Circuit does not.⁴⁶ Major disagreements persist over whether and when substantive canons apply in the *Chevron* analysis.⁴⁷

The confusion surrounding step one is not the fault of the Supreme Court alone. Judges disagree about which interpretive ideology—textualism or purposivism—best determines Congress's intent.⁴⁸ Judges also disagree about the line between clarity and ambiguity.⁴⁹ As Justice Scalia predicted shortly after *Chevron's* inauguration, future battles over acceptance of agency interpretations of law would be fought over “[h]ow clear is clear?”⁵⁰ In light of these disagreements, step one may take the form of a strong textualist inquiry, a strong purposivist inquiry, a weak textualist inquiry, or a weak purposivist inquiry.

The Supreme Court has provided even less guidance about the contours of step two. Step two may embrace one of two inquiries. Step two

42. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see also* *Barnhart v. Walton*, 535 U.S. 212 (2002); *Christensen v. Harris County*, 529 U.S. 576 (2000).

43. *See* *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (concluding that *Chevron* does not apply to questions of “economic and political significance”); *City of Arlington v. FCC*, 569 U.S. 290, 306–07 (2013) (holding that *Chevron* applies to an agency’s interpretation of the scope of its regulatory authority); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”).

44. *Bednar & Hickman*, *supra* note 14, at 1419–23 (describing inconsistencies and ambiguities within the *Chevron* opinion’s descriptions of the two steps).

45. *See, e.g.*, *Sierra Club v. EPA*, 781 F.3d 299, 308 (6th Cir. 2015); *Sumpter v. Sec’y of Labor*, 763 F.3d 1292, 1297 (11th Cir. 2014); *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009).

46. *United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008) (“[L]egislative history should not be considered at *Chevron* step one.”).

47. *Bednar & Hickman*, *supra* note 14, at 1427.

48. *Id.* at 1446 (arguing that statutory ambiguity is unavoidable).

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

50. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (1989).

may ask “whether the agency’s answer is based on a *permissible* construction of the statute.”⁵¹ Under this view, step two acts as a secondary interpretive analysis. However, this construction possibly renders step one and step two redundant.⁵² Instead, step two may import the arbitrary-and-capricious standard of section 706(2)(A) of the Administrative Procedure Act. This approach requires the agency to provide the policymaking rationale for its interpretation.⁵³ Since *Chevron*’s inception, courts have expressed confusion about whether the *Chevron* Court intended the interpretive or the arbitrary-and-capricious form of step two.⁵⁴ The Supreme Court has invalidated an agency’s interpretation at step two in only four cases and, within these cases, has done little to explain step two’s role.⁵⁵

In sum, the Supreme Court has provided little guidance as to how *Chevron* should apply.⁵⁶ *Chevron* is simply a standard of review, which—like many other standards of review—evolves as judges apply it in new situations.⁵⁷ Many versions of *Chevron* have emerged over the years. *Chevron* is malleable, and its malleability is perhaps its greatest asset for an anti-administrativist Supreme Court.

B. *The Inevitability of Deference and Delegation*

Chevron’s survival presumes that delegation survives. Deference is the byproduct of delegation, and without delegation, the Supreme Court can abandon deference.⁵⁸ In theory, Congress could stop delegating policymaking authority to administrative agencies. In reality, Congress builds the scaffolding necessary for regulatory programs and leaves agencies to use their expertise to finish the structure. Congressional staffers

51. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (emphasis added).

52. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

53. Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1270 (1997).

54. 744 F.2d 133, 150–51, 151 n.46 (D.C. Cir. 1984).

55. See Barnett & Walker, *supra* note 25, at 1448–51 n.83 (discussing four cases: *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *Rapanos v. United States*, 547 U.S. 715 (2006); and *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999)).

56. Bednar & Hickman, *supra* note 14, at 1418–41.

57. *Id.* at 1444–45 (quoting Martha S. Davis & Steven Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 561 (1986)).

58. Bednar & Hickman, *supra* note 14, at 1453–56.

routinely asks the implementing agency for assistance in drafting legislative proposals to ensure that Congress provides the agency with a sufficient foundation to implement the regulatory regime.⁵⁹ Moreover, delegation allows members of Congress to shift blame for politically undesirable policies to administrative agencies.⁶⁰ Even if Congress could stop delegating, it is unlikely to do so. If the Supreme Court truly wishes to jettison *Chevron*, it will need to revive the nondelegation doctrine. However, a complete revival of the nondelegation doctrine also seems unlikely.⁶¹

The traditional anti-administrativist narrative argues that the Supreme Court readily enforced principles of nondelegation until the New Deal but abandoned these principles shortly thereafter. John Locke professed that the legislature—having been granted authority to make laws by the people—“can have no power to transfer their authority of making laws, and place it in other hands.”⁶² The Supreme Court recognized the Lockean nondelegation principle in Article I’s Vesting Clause, which vests “[a]ll legislative Powers”⁶³ in Congress and, by implication, excludes the exercise of legislative power by other branches.⁶⁴ Beginning in 1887, Congress began to reorganize the federal government by building a vast administrative state to manage new regulatory programs that policed business and transportation.⁶⁵ The courts actively resisted the delegation of

59. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1388–89 (2017).

60. See SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* 45–51 (2017) (describing this dynamic between Congress and the Federal Reserve); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 52–54 (1974).

61. Bednar & Hickman, *supra* note 14, at 1398.

62. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. XI, § 141 (1690).

63. U.S. CONST. art. I, § 1.

64. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693–94 (1892) (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”) (quoting *Cincinnati, W & Z. R.R. Co. v. Comm’r of Clinton Cty.*, 1 Ohio St. 77, 88–89 (1852)). Some trace the origins of the nondelegation doctrine to *The Aurora*, 11 U.S. (7 Cranch) 382 (1812). See RICHARD J. PIERCE, JR., 1 *ADMIN. LAW TREATISE* § 2.6 (2010). However, the clearest statement of the nondelegation rule comes from *Field v. Clark*.

65. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985) (“[T]he development of administrative law seems mostly a contribution of the 20th century. . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis.”); see generally STEPHEN SKOWRONEK, *BUILDING A NEW*

policymaking authority to this “headless” fourth branch of government.⁶⁶ At the climax of this narrative, in 1935, the Supreme Court struck down New Deal legislation for violating the nondelegation doctrine.⁶⁷ Shortly thereafter, the Court stopped caring about unconstitutional delegations, failing to invalidate even “easy kills.”⁶⁸ By 1989, the Supreme Court had interred the nondelegation doctrine.⁶⁹

Whether the anti-administrativists’ narrative accurately portrays history has little bearing on whether the Supreme Court will revive the nondelegation doctrine.⁷⁰ Indeed, many anti-administrativists continue to point to *The Federalist* No. 47 and its decree that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny” as a sign that the Founders intended for the Constitution to prevent delegations.⁷¹ At a minimum, Chief Justice Roberts is undoubtedly correct that “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.”⁷²

AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 285-92 (1982).

66. Metzger, *supra* note 5 (noting attacks on the administrative state by the Supreme Court).

67. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

68. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994).

69. *Id.* at 1240 (“The Supreme Court . . . has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on.”); see also *Mistretta v. United States*, 488 U.S. 361, 378-79 (1989).

70. For sources challenging this narrative, see *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (stating that Article I does not “purport to limit the authority of either [the Executive or the Legislature] to delegate authority to others”); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 44-50 (2012); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 429-30 (2017) (conducting an empirical study of early nondelegation cases and concluding that the courts never meaningfully enforced the doctrine); Posner & Vermeule, *supra* note 12, at 1729-41 (evaluating the potential sources of legitimacy for the nondelegation and coming up empty handed).

71. *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (quoting *THE FEDERALIST* NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961)); *City of Arlington v. FCC*, 569 U.S. 290, 1877 (2013).

72. *City of Arlington*, 569 U.S. at 1878 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

But even anti-administrativists acknowledge that “the Court does not want to tear everything down.”⁷³ In the end, as Gary Lawson suggests, “the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”⁷⁴ The Court itself has acknowledged that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁷⁵ Perhaps the administrative state has become too big to fail. During oral arguments in the Supreme Court’s most recent nondelegation case, *Gundy v. United States*, Justice Breyer expressed concerns that the petitioners’ approach to the nondelegation doctrine would require overturning the 300,000 regulations on the books.⁷⁶

The Supreme Court’s anti-administrativists have more or less acquiesced to delegation. Justice Alito suggests that “the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking.”⁷⁷ Meaningful enforcement of the modern nondelegation doctrine requires assessing when administrative policymaking strays too far into the realm of “legislating.” As Justice Scalia stated in *Whitman v. American Trucking Ass’n*, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”⁷⁸ To avoid directly tackling the problem of delegation, conservatives often justify administrative rulemaking as a constitutional exercise of the executive power incidental to the enforcement of the law.⁷⁹

73. Nielson, *supra* note 6, at 10.

74. Lawson, *supra* note 68, at 1241.

75. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

76. Transcript of Oral Argument at 7:18–9:1, *Gundy v. United States*, 138 S. Ct. 1260 (2018) (No. 17-6086), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-6086_6khn.pdf [<https://perma.cc/A2LN-BSEL>]. *But see id.* at 8:18–19, 26:5–16 (questioning the accuracy of the 300,000 figure).

77. *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

78. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (1989) (Scalia, J., dissenting)).

79. *See Ass’n of Am. R.R.* at 1237 (citing *City of Arlington v. FCC*, 569 U.S. 290, 328 n.4 (2013)); *Whitman*, 531 U.S. at 475 (“It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”).

Although Justices Thomas and Gorsuch continue to endorse a revival of the nondelegation doctrine, it seems improbable that the Supreme Court will revive the doctrine in any meaningful way.⁸⁰ It is quite possible that the Supreme Court will begin to enforce the nondelegation doctrine in the most egregious cases. The Court has one such opportunity during the 2018-2019 term in *Gundy v. United States*.⁸¹ But few of the anti-administrativist justices appear to have interest in using the nondelegation doctrine to wholly demolish the administrative state.

If delegation is here to stay, so too is deference.⁸² Kristin Hickman and I argue, “*Chevron* is a byproduct of congressional delegation.”⁸³ The *Chevron* Court recognized that the interpretation of regulatory statutes often involves policymaking:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”⁸⁴

In other words, with or without *Chevron*, courts must defer to agencies’ reasonable interpretations of statutes to avoid policymaking.⁸⁵

Moreover, Congress wants agencies to use their policy and scientific expertise to fill statutory gaps.⁸⁶ Congressional staffers agree that Congress

80. *Whitman*, 531 U.S. at 487 (“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”); *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (“[H]ow do you know an impermissible delegation of legislative authority when you see it? By its own telling, the Court has had a hard time devising a satisfying answer. But the difficulty of the inquiry doesn’t mean it isn’t worth the effort.” (citation omitted)).

81. Mila Sohoni, *Argument Analysis: Justices Grapple with Nondelegation Challenge*, SCOTUSBLOG (Oct. 3, 2018, 1:33 PM), <http://www.scotusblog.com/2018/10/argument-analysis-justices-grapple-with-nondelegation-challenge> [https://perma.cc/F2UA-YXXX].

82. Bednar & Hickman, *supra* note 14, at 1453.

83. *Id.* at 1443.

84. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

85. See Bednar & Hickman, *supra* note 14, at 1460.

86. *Id.* at 1454.

intends to delegate interpretive authority to agencies rather than the courts.⁸⁷ Deference is a necessary component of the administrative state because it gives agencies flexibility to implement policy decisions and courts an exit from cases that otherwise require them to intervene in the policymaking process.

C. *Anti-Administrativist Critiques of Chevron*

Accepting *Chevron's* persistence, how should the Supreme Court resolve concerns that *Chevron* transfers authority from the courts and Congress in ways that frustrate the separation of powers?⁸⁸

By far the most recurring critique of *Chevron* is that it transfers to agencies the power to “say what the law is” by allowing them to engage in near-binding statutory interpretation.⁸⁹ Shortly after the Supreme Court announced *Chevron*, Justice Breyer warned that a strong reading of the standard would result in “a greater abdication of judicial responsibility to interpret the law than seems wise.”⁹⁰ More recently, in a concurring opinion in *Michigan v. EPA*, Justice Thomas argued that *Chevron* “wrests from Courts the ultimate interpretive authority to ‘say what the law is’ and hands it over to the Executive” in violation of Article III.⁹¹ Philip Hamburger places the blame on the judges who continue to defer to agency interpretations of law, claiming that American judges have “abandoned” the bench.⁹²

These concerns were made even more complicated by the Supreme Court’s holding in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*.⁹³ In *Brand X*, the Supreme Court held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”⁹⁴ Dissenting, Justice Scalia warned that the decision effectively allows the

87. Abbe R. Gluck & Lisa Shultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013).

88. Kavanaugh, *supra* note 49, at 2150; Beermann, *supra* note 16, at 782–84.

89. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

90. Breyer, *supra* note 8, at 381.

91. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

92. HAMBURGER, *supra* note 10, at 316.

93. 545 U.S. 967, 982–85 (2005).

94. *Id.* at 982.

agency to set aside binding precedent by reinterpreting the statute and seeking deference.⁹⁵ In the majority opinion, Justice Thomas disagreed, arguing that the Court's previous interpretation remains "binding law," and the agency—consistent with the Court's finding of ambiguity—may change its interpretation of the statute as the authoritative interpreter of the statute.⁹⁶

In a lengthy critique of *Chevron* and *Brand X*, then-Judge Gorsuch argued that the Founders sought to prevent the politicization of the courts by preventing the elected branches of government from overturning the courts' decisions.⁹⁷ He expressed concerns that *Brand X* allows the executive branch to reverse the court's interpretation of the law.⁹⁸ More broadly, Gorsuch emphasized that *Chevron* abdicates judicial authority by allowing agencies to create binding interpretations of statutes.⁹⁹

Not all anti-administrativist judges seem concerned that *Chevron* violates Article III. As Chief Justice Roberts observed in his dissent in *City of Arlington v. FCC*, "We do not ignore [*Marbury v. Madison*] when we afford an agency's statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'"¹⁰⁰

One can avoid *Chevron's* Article III concerns by restricting its application to agency gap-filling. However, some view the gap-filling framework as an effort to avoid the nondelegation doctrine. As Justice Thomas stated in *Michigan v. EPA*, "Although acknowledging this fact might allow us to escape the jaws of Article III's Vesting Clause, it runs headlong into the teeth of Article I's, which vests '[a]ll legislative Powers herein granted' in Congress."¹⁰¹ Cynthia Farina recognizes that *Chevron* shifts policymaking authority from Congress to the President:

At stake in *Chevron* was the fate of one relatively small but not insignificant slice of the regulatory power pie: the authority to interpret the statutes that define the policy-making universe. The Court's resolution deliberately moves that power squarely into

95. *Id.* at 1017 (Scalia, J., dissenting).

96. *Id.* at 982-83.

97. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-50 (10th Cir. 2016) (Gorsuch, J., concurring).

98. *Id.*

99. *See id.* at 1152.

100. *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

101. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (Thomas, J., concurring) (quoting U.S. CONST. art. I, § 1).

the President's domain. By relinquishing the authority to determine statutory "meaning" to agencies whenever Congress has failed to speak clearly and precisely, *Chevron* enlarges the quantum of administrative discretion potentially amenable to direction from the White House. It then goes even further and exhorts agencies to exercise this discretion, *not* by attempting to intuit and realize the objectives of the statute's enactors, but by pursuing the regulatory agenda of the current Chief Executive.¹⁰²

Likewise, Cass Sunstein calls *Chevron* "the quintessential prodelegation canon" because it rests on an assumption of "implicit delegations of interpretive (realistically, lawmaking) authority to agencies."¹⁰³ Again, this concern resonates less with those judges who view delegation as a modern necessity. To that end, Justice Kavanaugh sees a role for *Chevron* in some cases:

All of that said, *Chevron* makes a lot of sense in certain circumstances. It affords agencies discretion over how to exercise authority delegated to them by Congress. . . . The theory is that Congress delegates the decision to an executive branch agency that makes the policy decision, and that the courts should stay out of it for the most part. That all makes a great deal of sense and, in some ways, represents the proper conjunction of the *Chevron* and *State Farm* doctrines.¹⁰⁴

Even Justice Gorsuch—an ardent fan of the nondelegation doctrine—acknowledges that agencies have an inherent authority to fill gaps in statutes.¹⁰⁵

Anti-administrativists also argue that *Chevron* allows agencies to expand the scope of their regulatory authority beyond Congress's intended delegation. Drawing from his personal experience in the White House, Justice Kavanaugh states, "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."¹⁰⁶

The Supreme Court's decision in *City of Arlington v. FCC* exacerbated these concerns. In that case, the Supreme Court held that *Chevron* applies to agency's interpretation of the scope of its regulatory

102. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989) (emphasis added).

103. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329–30 (2000).

104. Kavanaugh, *supra* note 49, at 2152.

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

106. Kavanaugh, *supra* note 49, at 2150.

authority.¹⁰⁷ Writing for the majority, Justice Scalia argued that there is no distinction between “jurisdictional” interpretations (those that concern the agency’s scope of authority) and “nonjurisdictional” interpretations:

The false dichotomy between “jurisdictional” and “nonjurisdictional” agency interpretations may be no more than a bogeyman, but it is dangerous all the same. . . . Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the “jurisdictional” card in every case. Some judges would be deceived by the specious, but scary-sounding, “jurisdictional”-“nonjurisdictional” line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.¹⁰⁸

Indeed, Justice Scalia’s premonition may sound quite compelling to those who seek to keep the power of statutory interpretation in the courts. In a dissent joined by Justices Kennedy and Alito, Chief Justice Roberts warned of “the danger posed by the growing power of the administrative state.”¹⁰⁹ Courts—not agencies—must decide whether Congress intended to delegate authority for an agency to decide a particular ambiguity within a statute.¹¹⁰ In sum, courts cannot “leave it to the agency to decide when it is in charge.”¹¹¹

Nathan Sales and Jonathan Adler offer a scholarly explanation as to why agencies should not receive deference for interpretations of their regulatory jurisdiction.¹¹² According to Sales and Adler, deference to jurisdictional interpretations interferes with the “legislative deal” by allowing the agency to expand the scope of its statutory authority beyond what the relevant interest groups may have intended.¹¹³ In sum, Sales and Adler argue that deference to jurisdictional questions leads to agency self-aggrandizement and an unwarranted expansion of regulatory authority.¹¹⁴

107. *City of Arlington v FCC*, 569 U.S. 290, 1871-75 (2013).

108. *Id.* at 1872-73 (citation omitted).

109. *Id.* at 1879 (Roberts, C.J., dissenting).

110. *Id.* at 1883.

111. *Id.* at 1886.

112. Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009).

113. *Id.* at 1541-42.

114. *Id.* at 1551-54.

As this section shows, there is no single strand of anti-administrativist ideology. The justices each worry about different normative and constitutional problems that arise from *Chevron*. Certain efforts to revise *Chevron* will appeal to some anti-administrativists more than others. The remainder of this article examines how an anti-administrativist Supreme Court may pare *Chevron*'s scope and substance to reduce separation-of-powers concerns.

III. *CHEVRON*'S SCOPE

Many of the anti-administrativists' concerns relate to *Chevron*'s scope. An expansive view of *Chevron*'s scope allows agencies to unconstitutionally exercise the powers of the other branches of government. For example, anti-administrativists argue that statutory interpretation—as opposed to gap-filling—falls within the exclusive power of the courts and cannot be exercised by administrative agencies. Moreover, many anti-administrativists argue that Congress should decide the scope of an agency's authority, and *Chevron* should not enable agencies to unilaterally expand their authority. This Part addresses how an anti-administrativist Supreme Court may curb *Chevron*'s scope to better respect the separations of powers. Part II.A. examines how the Supreme Court may use the major-questions doctrine to prevent agencies from deciding “major” questions that the Court believes ought to be left to Congress. Part II.B. describes how the Supreme Court may restore judicial power by limiting *Chevron*'s application to gap-filling.

A. *The Major-Questions Doctrine*

The major-questions doctrine prevents agencies from deciding questions of “economic and political significance” without express statutory approval from Congress.¹¹⁵

The doctrine finds its earliest roots in *MCI Telecommunications Corp. v. AT&T Co.*¹¹⁶ In that case, the Supreme Court considered whether the Federal Communications Commission (FCC) permissibly interpreted the Communications Act of 1934 in waiving rate-filing requirements for all nondominant long-distance carriers.¹¹⁷ The petitioner—a nondominant

115. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). For more thorough examinations of the major-questions doctrine, see generally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

116. 512 U.S. 218 (1994).

117. *Id.* at 220.

long-distance carrier—sought deference for the agency’s interpretation because the statute permitted FCC to “modify” any of the Act’s rate-filing requirements.¹¹⁸ Writing for the Court, Justice Scalia observed that “[r]ate filings are, in fact, the essential characteristic of a rate-regulated industry.”¹¹⁹ By exempting certain carriers from filing rates with the FCC, the agency made it impossible for customers to enforce their rights against the exempted carriers. Scalia reasoned, “It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”¹²⁰

In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court declined to defer to a Food & Drug Administration (FDA) interpretation of the Food, Drug, and Cosmetic Act that permitted the agency to regulate nicotine as a “drug” and tobacco products as “devices.”¹²¹ Writing for the Court, Justice O’Connor reviewed the extensive history of tobacco legislation and concluded that Congress viewed itself as the primary regulator of tobacco and could not have intended for FDA to regulate nicotine under the Act.¹²² Justice O’Connor drew from *MCI Telecommunications’s* proposition that Congress would not leave to an agency the choice of whether a whole industry is subject to a regulatory scheme. Justice O’Connor described a general principle that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation” of interpretive authority.¹²³ The Court was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power” in light of tobacco’s “unique political history.”¹²⁴ Simply put, “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”¹²⁵

Over a decade later, Chief Justice Roberts reinvigorated *Brown & Williamson Tobacco*. In *King v. Burwell*, the Supreme Court considered whether to defer to the Internal Revenue Service’s (IRS) interpretation of

118. *Id.* at 224 (quoting 47 U.S.C. § 203).

119. *Id.* at 231.

120. *Id.*

121. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–29 (2000).

122. *Id.* at 144–57.

123. *Id.* at 159.

124. *Id.* at 159–60.

125. *Id.* at 160.

the Internal Revenue Code (IRC) to award tax credits under the Affordable Care Act to individuals who purchased health insurance on a federal exchange.¹²⁶ Under normal circumstances, the Court reviews IRS interpretations of the IRC under *Chevron*.¹²⁷ But the Court refused to apply *Chevron* in this case. Writing for the Court, Chief Justice Roberts argued that the IRS's interpretation did not warrant consideration under *Chevron* because it concerned a question of "deep 'economic and political significance.'"¹²⁸ As evidence of the question's significance, he cited concerns that the interpretation involved billions of dollars and affected the healthcare plans of millions of people.¹²⁹ He further reasoned that the IRS "has no expertise in crafting health insurance policy" and, therefore, Congress would have expressly stated if it wished the IRS to resolve this question.¹³⁰ Nevertheless, the Supreme Court still adopted the interpretation advanced by the IRS as the best reading of the statute.

Shortly after the Court decided *King v. Burwell*, Kristin Hickman argued that Chief Justice Robert used *King v. Burwell* to change *Chevron*'s scope in a way that comported with his dissent in *City of Arlington v. FCC*.¹³¹ In *City of Arlington*, Chief Justice Roberts argued that, in order for *Chevron* to apply, Congress must have intended for the agency to resolve the ambiguity in the specific statutory provision at issue.¹³² Hickman speculated that *King v. Burwell* did not necessarily "signal a new beginning for *Brown & Williamson Tobacco*'s extraordinary cases language as a new limitation on *Chevron*'s scope."¹³³ "[I]f a majority of the Justices are not really on board with the doctrinal adjustment, then much like *Brown & Williamson Tobacco*, *King v. Burwell* will fade into obscurity as doctrinally insignificant with respect to *Chevron*'s scope."¹³⁴ But she acknowledged, "sometimes a decision will take on a life of its own."¹³⁵

Three years have passed, and we see signs that the major-questions doctrine may persist as a permanent limitation on *Chevron*'s scope. Since *King v. Burwell*, several lower courts have applied the major-questions doctrine. In *Texas v. United States*, the Fifth Circuit considered whether

126. *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

127. *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 55 (2011).

128. *King*, 135 S. Ct. at 2489.

129. *Id.* at 2488-89.

130. *Id.* at 2489.

131. Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 58 (2015).

132. *City of Arlington v. FCC*, 569 U.S. 290, 1880-83 (2013).

133. Hickman, *supra* note 131, at 64.

134. *Id.* at 66.

135. *Id.* at 71.

the Department of Homeland Security exceeded its statutory authority in creating the Deferred Action for Parents of American and Lawful Permanent Residents program (DAPA), which permitted certain undocumented-immigrant parents of United States citizen children to remain in the United States.¹³⁶ The Fifth Circuit held that “DAPA undoubtedly implicate[d] ‘questions of deep “economic and political significance”’” because the program “would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits.”¹³⁷ Similarly, in *Chamber of Commerce v. Department of Labor*, the Fifth Circuit used the major-questions doctrine at *Chevron* step two to invalidate the Department of Labor’s fiduciary rule to transform the workings of “trillion-dollar markets” for IRA investments, annuities, and insurance products.¹³⁸ These are just two examples.¹³⁹

However, the most important post-*King* application comes from then-Judge Kavanaugh of the D.C. Circuit. Dissenting in *United States Telecom Ass’n v. FCC*, Judge Kavanaugh presented the most coherent articulation of the major-questions doctrine.¹⁴⁰ He began with an extensive review of the Supreme Court cases invoking the major-questions doctrine and the scholarly literature exploring this precedent.¹⁴¹ Following this review, Judge Kavanaugh stated, “the major rules doctrine constitutes an important principle of statutory interpretation in agency cases.”¹⁴² He then described the standard as follows: “In order for the FCC to issue a major rule, Congress must provide clear authorization. We therefore must address two questions in this case: (1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?”¹⁴³

136. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

137. *Id.* at 181 (citation omitted).

138. *Chamber of Commerce v. U.S. Dep’t of Labor*, 885 F.3d 360, 363 (5th Cir. 2018).

139. For further example of lower courts recognizing the major-questions doctrine as a limitation on *Chevron*’s scope, see *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 291–92 (4th Cir. 2018) (en banc) (Gregory, J., concurring); *New Mexico v. Dep’t of Interior*, 854 F.3d 1207, 1221–27 (10th Cir. 2017); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 796–99 (2017) (discussing the application of the major-questions doctrine in the lower courts after *King v. Burwell*).

140. *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of rehearing).

141. *Id.* at 419–22.

142. *Id.* at 422.

143. *Id.*

In answering the first question, Judge Kavanaugh considered “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, . . . the degree of congressional and public attention to the issue,” and whether the agency relied on a long-extant statute to support a “bold new assertion of regulatory authority.”¹⁴⁴ Despite Judge Kavanaugh’s best efforts to draw a workable standard from the Supreme Court’s precedent, he admitted, “To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.”¹⁴⁵ He concluded that the FCC’s net-neutrality rule was a major rule because the rule had a “staggering” impact on the economy, Congress had attempted to pass legislation concerning net neutrality for years, and the FCC relied on the Communications Act of 1934 to assert control over a twenty-first century issue.¹⁴⁶

He then turned to whether Congress clearly authorized the FCC to promulgate the net-neutrality rule. Examining the Communications Act, he noted that Congress “articulated a general philosophy of limited regulation of the Internet” and that the FCC had adhered to that philosophy until 2015 by classifying the Internet as an “information service.”¹⁴⁷ To create the net-neutrality regulations, FCC re-classified the Internet as a “telecommunications service” in order to regulate internet-service providers as common carriers.¹⁴⁸ Judge Kavanaugh concluded that Congress did not clearly authorize such a classification because “the Act is ambiguous about whether Internet service is an information service or a telecommunications service.”¹⁴⁹ Judge Kavanaugh’s dissent offers a template for other courts seeking to invoke the major-questions doctrine.

Chief Judge Roberts and Judge Kavanaugh may not be the only anti-administrativist justices to adopt the major-questions doctrine. In his concurrence in *Whitman*, Justice Thomas opined that the current formulation of the nondelegation doctrine—the “intelligible principle” standard—still permits too much cession of power because “there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”¹⁵⁰ The major-questions doctrine offers a partial

144. *Id.* at 422-23.

145. *Id.* at 423.

146. *Id.* at 423-24.

147. *Id.* at 424.

148. *Id.* at 425.

149. *Id.* at 424.

150. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 487 (2001).

remedy to Justice Thomas's concerns. At the very least, the major-questions doctrine prevents agencies from delegating politically and economically significant decisions to themselves.

The major-questions doctrine pairs well with anti-administrativist concerns about the delegation of too much authority to agencies. Kent Barnett and Chris Walker argue that the major-questions doctrine perfectly comports with the theoretical underpinnings of *Chevron*.¹⁵¹ *Chevron* applies when Congress has delegated authority to the agency to resolve ambiguities or fill gaps in statutes. Absent delegation, however, the agency lacks the authority to do either of these things. The major-questions doctrine asks courts to stop and ask whether Congress *really* intended for the agency to decide the issue before simply deferring to the agency's interpretation.¹⁵² It protects against situations where a territorial agency seeks to unilaterally expand its authority into new policy areas.¹⁵³

The doctrine also acts as a complement to the nondelegation doctrine by demanding that Congress specify when it wants an agency to decide a significant question. Major questions look like major delegations.¹⁵⁴ If Congress revises the statute and explicitly delegates to the agency the authority to decide the major issue, a reviewing court can decide whether the delegation violates the nondelegation doctrine—assuming the Supreme Court breathes life into the nondelegation doctrine. Until then, the major-questions doctrine acts as a check on agencies from unilaterally expanding their authority beyond the metes and bounds envisioned by Congress.

B. Interpretation v. Gap-Filling

As described above, *Chevron* applies to agency statutory interpretation *and* gap-filling. The administrative state is replete with examples of statutes that require gap-filling. Congress does not want to decide what constitutes a “safe drug,” a “reasonable hazard,” or a

151. Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 155 (2017).

152. *Id.* at 156.

153. Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 993 (2017) (“Where it is unlikely or implausible that Congress would have delegated interpretive authority to an administrative agency, there should be no *Chevron* deference.”).

154. Coenen & Davis, *supra* note 139, at 806 (“When, in particular, a statutory ambiguity implicates a ‘major question,’ the resolution of that ambiguity starts to look more ‘legislative’ in character.”).

“crashworthy automobile.”¹⁵⁵ The courts are regularly called upon to determine whether an agency has permissibly “interpreted” Congress’s directive.¹⁵⁶

Justice Kavanaugh argues that *Chevron* should only apply in situations where the agency has engaged in gap-filling.¹⁵⁷ He argues that deference is appropriate “in cases involving statutes using broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’”¹⁵⁸ Indeed, these terms are the hallmark signals of Congress’s intent for the agency to fill a statutory gap. According to Justice Kavanaugh, courts have a duty to ensure that the agency “choose[s] among reasonable options allowed by the text of the statute” and to ensure that the agency has not engaged in arbitrary-and-capricious decision-making.¹⁵⁹

However, “in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency’s interpretation is the best reading of the statutory text.”¹⁶⁰ Absent these restrictions on *Chevron*, Justice Kavanaugh fears that “[i]n certain major *Chevron* cases, different judges will reach different results even though they may actually *agree* on what is the best reading of the statutory text.”¹⁶¹

While still a judge on the Tenth Circuit, Justice Gorsuch acknowledged that, even under the nondelegation doctrine, agencies possess the authority to fill gaps in statutory regimes:

Congress can leave “details” to the Executive. Congress can’t punt to the President the job of devising a competition code for the chicken industry. Such widely applicable rules governing private conduct must be enacted by the Legislature. But once Congress enacts a detailed statutory scheme on its own—once it says, for example, that margarine manufacturers must pay a tax and place a stamp on their packages showing the tax has been paid—Congress may leave to the President “details” like designing an appropriate tax stamp.”¹⁶²

155. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 246 (1989).

156. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217–20 (2009).

157. Brett M. Kavanaugh, Book Note, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2160 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

158. *Id.* at 2153.

159. *Id.* at 2153–54.

160. *Id.* at 2154.

161. *Id.* at 2153.

162. *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting) (citations omitted).

In *Gutierrez-Brizuela*, Justice Gorsuch suggested that *Chevron* would serve as an acceptable standard if limited to situations where Congress allowed the agency to fill the gaps in a statute.¹⁶³

Limiting the application of *Chevron* to situations where the agency has filled a gap in the statute restores the power of statutory interpretation to the Judiciary. Recent work by Ilan Wurman suggests that the Founders believed that the executive branch had an inherent constitutional power to fill the gaps in statutes.¹⁶⁴ Limiting *Chevron*'s application to cases where the agency has filled a gap in a statute would preserve this historic constitutional power. This limited *Chevron* keeps the courts away from the policymaking inherent in gap-filling while restoring the Judiciary's power to "say what the law is."

IV. STEP ONE

Chevron step one asks whether the intent of Congress is clear with respect to the specific statutory provision at issue. Yet, the Supreme Court has provided rather opaque instructions for step one.¹⁶⁵ Is step one a purposivist search for "the intent of Congress," or is it a textualist search for whether statutory text prevents the agency's interpretation?¹⁶⁶ How clear must Congress's intent be to foreclose deference at step one? These uncertainties lead to the malleability of the *Chevron* standard of review.

Empirical work by Kent Barnett and Chris Walker demonstrates that the circuit courts continue to leniently apply step one.¹⁶⁷ Circuit courts conclude their *Chevron* analyses at step one in thirty percent of cases.¹⁶⁸ In thirty-nine percent of cases resolved at step one, courts conclude that Congress's clear intent mandated the interpretation adopted by the agency.¹⁶⁹ When the courts reach step two, they defer to agency interpretation at a rate of nearly ninety-four percent.¹⁷⁰

163. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., dissenting) (citation omitted) ("[W]e know Congress may allow the executive to resolve 'details' (like, say, the design of an appropriate tax stamp). Yet *Chevron* pretty clearly involves neither of these kinds of executive functions and, in this way and as a historical matter, appears instead to qualify as a violation of the separation of powers.").

164. Wurman, *supra* note 38, at 37-41.

165. Bednar & Hickman, *supra* note 14, at 1419-20 (parsing the *Chevron* opinion for the meaning of step one).

166. *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

167. Barnett & Walker, *supra* note 2, at 32-33.

168. *Id.* at 33.

169. *Id.*

170. *Id.*

The leniency with which courts apply step one alarms anti-administrativists. Concurring in *Pereira v. Sessions*, Justice Kennedy expressed concerns that persistent leniency results in great abdication of judicial power:

In according *Chevron* deference to the [agency's] interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress's intent could be discerned, and whether the BIA's interpretation was reasonable. . . . This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes.

The type of reflexive deference exhibited in some of these cases in troubling.¹⁷¹

Anti-administrativists can restore the courts' power to "say what the law is" by strengthening step one. Justice Gorsuch has already begun this process by engaging in "*Chevron* avoidance." Since joining the Supreme Court, Justice Gorsuch has authored the majority opinion in three *Chevron* cases and has never deferred to the agency's interpretation.¹⁷² In two cases, Justice Gorsuch applied such a strong step one that it calls into question whether Justice Gorsuch would ever find ambiguity. In *SAS Institute v. Iancu*, Justice Gorsuch used traditional textualist tools to reject the agency's interpretation at step one, concluding that "[t]he statutory provisions before us deliver unmistakable commands."¹⁷³ Justice Gorsuch waited to address *Chevron's* applicability until after completing this interpretive analysis.¹⁷⁴ In *Wisconsin Central Ltd. v. United States*, Justice Gorsuch again engaged in a robust textualist analysis to foreclose deference at step one.¹⁷⁵ Again, he waited until the last moment to cite

171. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (citations omitted).

172. See *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

173. *SAS Inst. Inc.*, 138 S. Ct. at 1358. For a longer discussion of *SAS Institute v. Iancu*, see Nicholas R. Bednar, *Coping with Chevron: Justice Gorsuch's Majority and Justice Breyer's Dissent in SAS Institute*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 25, 2018), <http://yalejreg.com/nc/coping-with-chevron-justice-gorsuchs-majority-and-justice-breyers-dissent-in-sas-institute-by-nicholas-r-bednar> [https://perma.cc/W4A6-KC2B].

174. *SAS Inst. Inc.*, 138 S. Ct. at 1358 ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984))).

175. *Wis. Cent. Ltd.*, 138 S. Ct. at 2070-74.

Chevron as the standard of review, stating that the statute was “clear enough.”¹⁷⁶

There are three ways to understand Justice Gorsuch’s *Chevron*-avoidance approach. First, the Supreme Court is biding its time until it can overrule *Chevron* for good. In *SAS Institute Inc.*, the petitioner argued that the Court should “embrace the ‘impressive body’ of pre-*Chevron* law recognizing that ‘the meaning of a statutory term’ is properly a matter for ‘judicial rather than administrative judgment.’”¹⁷⁷ Other justices do not seem to sympathize with this plan. Indeed, Chief Justice Roberts and Justice Kavanaugh have noted the important role *Chevron* plays in preventing courts from engaging in policymaking. The Supreme Court may have the votes to curb *Chevron*’s strength, but it likely lacks the votes to overturn *Chevron*.

Second, the Supreme Court may preserve *Chevron* as a tool to restrain lower-court decision-making while exercising de novo review itself.¹⁷⁸ Adrian Vermeule states that it “is easy to imagine a situation in which the Justices more or less require lower courts to apply *Chevron* (within bounds), but interpret statutes de novo themselves.”¹⁷⁹ That the Supreme Court would apply a different *Chevron* standard from the lower courts is not unfounded. Kent Barnett and Chris Walker observe notable differences between Supreme Court applications (*Chevron* Supreme) and circuit court applications of *Chevron* (*Chevron* Regular).¹⁸⁰ They argue, “*Chevron* Supreme, with its comparatively broader discretion, will shift power from the circuit courts to the Supreme Court and agencies but leave *Chevron* Regular in place to create more certainty in the lower courts and, thus, greater national uniformity in federal administrative law.”¹⁸¹ Moreover, Michael Coenen and Seth Davis argue that there are normatively appealing reasons to have two *Chevron* standards: one for the Supreme Court and the other for the lower courts.¹⁸²

A dissent from Justice Alito provides reasons to doubt that the justices will strike an *in camera* deal to review agency interpretations de novo at the Supreme Court. In *Pereira v. Sessions*, a majority of eight

176. *Id.* at 2074.

177. *SAS Inst. Inc.*, 138 S. Ct. at 1358 (citations omitted).

178. Barnett & Walker, *supra* note 151, at 70–73.

179. Adrian Vermeule (@Vermeullarmine), TWITTER (July 6, 2018, 8:23 AM), <https://twitter.com/Vermeullarmine/status/1015255019023667200> [<https://perma.cc/GRJ6-NRMC>]. It is rather surreal to cite tweets as sources of debate in administrative law. Yet, Twitter has a rather active administrative law community.

180. Barnett & Walker, *supra* note 151, at 70–73.

181. *Id.* at 73.

182. *See generally* Coenen & Davis, *supra* note 139, at 799–820.

Justices concluded that they need not review the statute under *Chevron* because the statute was clear.¹⁸³ Justice Alito accused the Court of ignoring *Chevron*:

Although this case presents a narrow and technical issue of immigration law, the Court's decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). . . . Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.

. . . .

In recent years, several Members of this Court have questioned *Chevron's* foundations. But unless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.¹⁸⁴

The third and most likely option is that the Supreme Court simply strengthens step one to require an aggressive search for clarity.¹⁸⁵

What does a more searching inquiry look like if the Supreme Court limits *Chevron* to situations where the agency has engaged in gap-filling? The existence of a gap implies that the agency may select a policy within a range permitted by the statute. However, the agency cannot decide to adopt a policy that conflicts with Congress's clear intent. As revised, step one asks whether the agency's decision falls within the range of permissible policy choices.¹⁸⁶ The court rejects the agency's decision if the statute prohibits the agency's interpretation. As Justice Scalia has quipped, "It does not matter whether the word 'yellow' is ambiguous when the agency interpreted it to mean 'purple.'"¹⁸⁷ A textualist formulation would ask whether the statute's text clearly prohibits the agency's decision. A purposivist formulation would ask whether evidence of congressional intent and the statute's purpose clearly prohibit the agency's decision.

183. *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018).

184. *Id.* at 2121, 2129 (Alito, J., dissenting) (citations omitted).

185. Bednar & Hickman, *supra* note 14, at 1423.

186. *Cf.* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598–600 (2009) (describing two conceptions of step one that work in unison).

187. 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring).

Justice Scalia's opinion in *Entergy Corp. v. Riverkeeper, Inc.* illustrates what step one looks like when a court reviews an agency's gap-filling. That case concerned the EPA's interpretation of the phrase "best technology available" in the Clean Water Act to allow for consideration of cost-benefit variances.¹⁸⁸ Justice Scalia noted the ambiguity in the phrase "best technology available," which could mean either the technology that produces the most of some good or the technology that most efficiently produces some good.¹⁸⁹ Other provisions of the Clean Water Act expressly permit the EPA to conduct a cost-benefit analysis.¹⁹⁰ Yet Justice Scalia rejected the dissent's argument that these provisions showed that Congress's silence sought to foreclose a cost-benefit analysis with respect to this provision. Justice Scalia stated, "It is eminently reasonable to conclude that [the statutory provision's] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."¹⁹¹ He therefore concluded, "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden."¹⁹²

Justice Scalia's opinion generally shows how step one applies in gap-filling cases. However, one can imagine that anti-administrativists will more easily find that the agency's hands are tied with a more aggressive step one.

V. STEP TWO

Most *Chevron* skeptics focus on narrowing *Chevron's* scope and increasing the strength of step one. Indeed, the Supreme Court could condense the standard into a single step, stating: "Unless refuted by clear language of the statute, a court must defer to the agency interpretation."¹⁹³ As a result, anti-administrativist jurists have paid little attention to *Chevron's* second step. Yet further refinement of step two may better increase judicial oversight of agency policymaking.

The Supreme Court's step two analyses lack a coherent pattern from which to draw a single meaningful standard. This has led to confusion about the substance of step two in the lower courts. Chris Walker and

188. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217 (2009).

189. *Id.* at 218.

190. *Id.* at 221-22.

191. *Id.* at 222.

192. *Id.* at 223.

193. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618 (1992); see also Stephenson & Vermeule, *supra* note 186 (proposing a one-step *Chevron*).

Kent Barnett have recently composed a typology of three ways the lower courts apply step two: (1) a hypertextualist approach, (2) a hyperpurposivist approach, and (3) an arbitrary-and-capricious approach.¹⁹⁴

A hypertextualist step two uses textualist tools to examine whether the agency's decision is reasonable in light of the statute's text.¹⁹⁵ Some commentators lament that a hypertextualist step two conflates steps one and two because it is redundant with the interpretive inquiry of step one.¹⁹⁶ Redundancy increases if the anti-administrativists endorse a robust step one. Accordingly, a hypertextualist step two offers little for anti-administrativists who seek more opportunities to scrutinize agency action.

A hyperpurposivist step two asks whether the agency's interpretation comports with the statute's purpose.¹⁹⁷ An agency's interpretation that conflicts with the statute's purpose may survive a textualist step one if the agency adopts a textually permissible interpretation. A hyperpurposivist approach provides courts an opportunity to use purposivist tools—perhaps legislative history and substantive canons—that may otherwise fall to the wayside at step one.

A hyperpurposivist approach to step two may appeal to Chief Justice Roberts, who emphasizes statutory purpose in statutory interpretation. Looking at his decision in *King v. Burwell*, Stephanie Hoffer and Chris Walker note that Roberts “seem[s] to be embracing a brand of contextualism that departs from the textualism that has predominated during Justice Scalia’s tenure on the Court.”¹⁹⁸ In *King v. Burwell*, Roberts emphasized that “[a] fair reading of legislation demands a fair understanding of the legislative plan.”¹⁹⁹ The hyperpurposivist approach to step two asks whether the agency's interpretation or decision comports with that “legislative plan.”

Finally, step two may embrace the Administrative Procedure Act's arbitrary-and-capricious standard by asking whether the agency arrived at its decision through reasoned decision-making.²⁰⁰ Rather than asking whether the agency's interpretation comports with the statute's text and purpose, an arbitrary-and-capricious approach asks whether the agency has provided sufficient reasoning to support its interpretation. This approach

194. Barnett & Walker, *supra* note 25, at 1451–55.

195. *Id.* at 1451–52.

196. Stephenson & Vermeule, *supra* note 186, at 599.

197. Barnett & Walker, *supra* note 25, at 1452–53.

198. Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?* 2015 PEPP. L. REV. 33, 34 (2015).

199. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

200. Barnett & Walker, *supra* note 25, at 1454.

requires agencies to engage in a traditional policy assessment, such as factfinding and cost-benefit analysis, to support its decision. This approach ensures that the agency's interpretation reflects its expertise rather than other irrelevant considerations.²⁰¹

It is difficult to predict whether the Supreme Court will ultimately adopt the hyperpurposivist approach or the arbitrary-and-capricious approach. However, if the anti-administrativist Court gets an opportunity to refine step two, one should expect that the Court will sharpen step two's teeth.

VI. CONCLUSION

Chevron—or at least deference more generally—will not go away. This article has described the various options an anti-administrativist Supreme Court has for creating a more rigorous *Chevron* standard of review. The Supreme Court can restore the power of statutory interpretation to the courts by limiting *Chevron's* application to situations where an agency has filled a gap in the statute. The Court also can prevent agencies from exercising substantial policymaking power by invoking the major-questions doctrine where Congress has not explicitly called upon the agency to decide a significant political and economic issue. Substantively, the Court can prevent lower courts from engaging in “reflexive deference”²⁰² by clarifying the analytical requirements of *Chevron's* two steps.

The Supreme Court will not necessarily adopt all of these changes. However, an anti-administrativist Supreme Court has the potential to create an incredibly robust *Chevron* standard of review without wholly eliminating it. Scholars can debate whether all of these limitations make *Chevron* unworkable. However, the ways things stand, it is more likely that the Supreme Court will tack additional limitations onto *Chevron* before abandoning the doctrine all together.

201. Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 *FORDHAM L. REV.* 2359, 2438 (2018).

202. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018).

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