

FOREWORD

THE FUTURE OF *CHEVRON* DEFERENCE

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World-class appellate lawyers, as a rule, do not downplay favorable precedent. Yet during oral argument in *BNSF Railway Co. v. Loos*,¹ prominent appellate advocate Lisa Blatt concluded her argument to the U.S. Supreme Court with this remarkable statement: “I hate to cite it, but I will end with *Chevron*.”² “*Chevron*,” of course, refers to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³ perhaps the most cited case in all of administrative law.⁴ The *Chevron* doctrine is a familiar one: where an administering agency’s interpretation of an ambiguous statute is reasonable, courts should defer to it.⁵ In *BNSF Railway*, that doctrine would have helped Ms.

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1. *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893 (2019).
2. Transcript of Oral Argument at 58, *BNSF Ry.*, 139 S. Ct. 893 (No. 17-1042); *see also, e.g.*, Daniel Hemel, *Argument Analysis: Hating on Chevron*, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), <http://www.scotusblog.com/2018/11/argument-analysis-hating-on-chevron> [<https://perma.cc/HG8A-9QQR>] (discussing counsel’s unwillingness to push for deference).
3. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
4. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1393–94 (2017) (documenting citation counts of several prominent cases); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 772 (2017) (evaluating most-cited cases).
5. *Chevron*, 467 U.S. at 842–43.

Blatt's client.⁶ Rather than trumpet *Chevron*, however, Ms. Blatt "treat[ed it] as no more than a last resort."⁷

Why did Ms. Blatt "hate to cite" *Chevron*? Perhaps because the Supreme Court has not been very receptive to *Chevron* deference claims in recent years. In fact, the Court has been reluctant to apply the doctrine.⁸ Noting this trend, Justice Samuel Alito has observed that *Chevron* is "now [an] increasingly maligned precedent" that the Court feels comfortable "simply ignoring."⁹ Two Justices have suggested that *Chevron* is unconstitutional,¹⁰ two more have criticized it as conceptually muddled,¹¹ and two more still have urged that it be significantly narrowed.¹² Both the upsurge of "anti-administrativist" rhetoric in recent years¹³ and the elevation of Justice Amy Coney Barrett—whose exact views are unknown, but who many predict will be less pro-*Chevron* than the late Justice Ruth Bader Ginsburg¹⁴—have left some wondering whether *Chevron* is long for this world.¹⁵ Indeed,

6. See *BNSF Ry.*, 139 S. Ct. at 908 (Gorsuch, J., dissenting) ("And the *Chevron* doctrine, if it retains any force, would seem to allow BNSF to parlay any statutory ambiguity into a colorable argument for judicial deference to the IRS's view, regardless of the Court's best independent understanding of the law."); see also Brief for Petitioner at 36, *BNSF Ry.*, 139 S. Ct. 893 (No. 17-1042), 2018 WL 3572364, at *36 (claiming *Chevron* deference for the agency's interpretation).

7. *BNSF Ry.*, 139 S. Ct. at 908 (Gorsuch, J., dissenting).

8. See, e.g., *Babb v. Wilkie*, 140 S. Ct. 1168 (2020) (failing to mention *Chevron*, despite disagreement in the briefs over *Chevron*'s applicability); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (declining to resolve whether a Federal Communications Commission final order was eligible for *Chevron* deference); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (rejecting deference where "the Executive seems of two minds" because the U.S. Department of Justice and the National Labor Relations Board disagreed about how to interpret the statute).

9. *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

10. See Kristin Hickman & Aaron Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 934-35 & n.15 (2021) (describing suggestions from Justices Clarence Thomas and Neil Gorsuch that *Chevron* violates the separation of powers).

11. See *id.* & nn.14, 16 (explaining that Justices Stephen Breyer and Brett Kavanaugh have each offered important conceptual criticisms of *Chevron*, albeit different ones).

12. See *id.* at 935 (observing that Chief Justice John Roberts, joined by Justice Alito, has urged a narrower version of *Chevron* deference).

13. See, e.g., Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 44-50 (2017).

14. See, e.g., Jeff Overley, *Chevron Deference's Future in Doubt If Barrett Is Confirmed*, LAW360 (Oct. 23, 2020, 11:11 PM), <https://www.law360.com/articles/1318381/chevron-deference-s-future-in-doubt-if-barrett-is-confirmed> [<https://perma.cc/R9SG-VGCP>].

15. See, e.g., *id.* ("Judge Amy Coney Barrett's expected ascent to the U.S. Supreme Court would likely propel a conservative crusade against so-called *Chevron* deference to the brink of a triumph . . .").

if law is nothing more than prediction,¹⁶ then perhaps *Chevron* has already been overruled.

That view, however, is too simplistic. Even if they might sometimes do so only grudgingly,¹⁷ lower court judges regularly rely on *Chevron*¹⁸—and the Supreme Court rarely reverses those decisions. *Chevron* continues to play a significant role in the law, even if it is rarely cited by the Justices. Nor is it clear that the Supreme Court is looking to toss out *Chevron* altogether. In its 2019 decision in *Kisor v. Wilkie*,¹⁹ a divided Court rejected a chorus of calls to overrule *Chevron*'s cousin, *Auer v. Robbins*,²⁰ which prescribed judicial deference when an agency interprets ambiguities in its own regulations.²¹ Instead, the Court merely narrowed *Auer*'s scope.²² The Court's reluctance to overrule *Auer*, a much less important decision than *Chevron*, suggests that the Court may not be inclined to overrule *Chevron* deference outright.²³

So what is *Chevron*'s future? That may be the most significant question right now in all of administrative law. In *Narrowing Chevron's Domain*, also published in this issue, we predict that the Supreme Court will curtail *Chevron* but not overrule it.²⁴ We also offer the

16. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).

17. See, e.g., 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, 1302 (2018) (explaining that outside of the D.C. Circuit, federal appellate judges generally “are not fans of *Chevron*”).

18. See, e.g., *Lambert v. Saul*, 980 F.3d 1266, 1268 (9th Cir. 2020) (“We conclude that we must defer to the SSA’s intervening interpretation of the statute, which is a reasonable one.”); *Santana v. Barr*, 975 F.3d 195, 199 (2d Cir. 2020) (deferring to the Board of Immigration Appeals under the *Chevron* standard); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5–6 (2017) (reviewing 2,272 decisions and concluding that “agencies won significantly more in the circuit courts when *Chevron* deference applied”).

19. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

20. *Auer v. Robbins*, 519 U.S. 452 (1997).

21. *Id.* at 461 (stating that an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation” and citing cases).

22. See *Kisor*, 139 S. Ct. at 2414 (“We take the opportunity to restate, and somewhat expand on, [*Auer*’s limiting] principles here to clear up some mixed messages we have sent.”).

23. That said, a cryptic statement from the Chief Justice—whose vote was necessary to save even a weakened version of *Auer* deference in *Kisor*—arguably suggests some willingness to revisit *Chevron* itself. See *id.* at 2425 (Roberts, C.J., concurring in part) (“Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes . . . I do not regard the Court’s decision today to touch upon the latter question.”).

24. See Hickman & Nielson, *supra* note 10, at 996–98.

Justices what we believe is a coherent path forward. The Court should hold that *Chevron* only applies in the rulemaking context and not to agency interpretations announced through agency adjudications.²⁵ Limiting *Chevron*'s scope in this way would be more faithful to the underlying theoretical justifications for *Chevron* deference in the first place.²⁶ It also would put a stop to the unfair retroactivity that motivates some of the sharpest criticisms of *Chevron* and cut off the opportunity for some agencies to bootstrap their way into *Chevron* deference through their procedural choices.²⁷ We agree with Justice Neil Gorsuch, for example, that allowing agencies to change the law retroactively by means of *Chevron* deference for agency adjudications should stop.²⁸ Nor, in our view, is *stare decisis* quite the obstacle to such reform that one might think. After all, the instances in which the Court has deferred under *Chevron* overwhelmingly have arisen in the context of rulemaking—including but by no means limited to *Chevron* itself—and the Court's "precedent on precedent" from cases like *Kisor* and *Mead*²⁹ recognizes that *stare decisis* has less force when it comes to decisions curtailing deference short of overruling it.³⁰

We do not have a monopoly on wisdom, however, much less a crystal ball. A topic as important as judicial deference to administrative action will always be the launching pad for new thinking and debate. Accordingly, it is appropriate that this year's Symposium addresses the future of *Chevron* from a number of different perspectives.

Professor Thomas Merrill—who himself has played an outsized role in *Chevron*'s development³¹—sets the stage by positing a distinction between the "*Chevron* decision" and the "*Chevron* doctrine."³² As he puts it, *Chevron* itself was rightly decided, but it is a mistake to turn *Chevron* into "a mechanical doctrine that fails to reflect

25. *See id.* at 964.

26. *See id.* at 964–80.

27. *See id.* at 938.

28. *See id.* at 963 (discussing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring)).

29. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

30. *See Hickman & Nielson, supra* note 10, at 992.

31. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 n.49 (2019) (Gorsuch, J., concurring) (citing Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1085–86 (1997)); *Mead*, 533 U.S. at 230 n.11 (2001) (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001)); *Lawrence v. Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting) (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1023 (1992)).

32. *See* Thomas W. Merrill, *Re-Reading Chevron*, 70 DUKE L.J. 1153, 1154 (2021).

the broader traditions of administrative law.”³³ Instead, Merrill advocates reframing *Chevron* deference around rule-of-law, constitutional, accountability, and process values.³⁴ Focusing on those values, in his view, would create a doctrine that better accords with the judiciary’s proper role.³⁵ According to Merrill, moreover, the actual *Chevron* decision—with the exception of a pair of “provocative” paragraphs—supports this more nuanced approach.³⁶ Notably, Merrill’s concern with how *Chevron* has evolved since 1984 accords with recent remarks from Judge Lawrence Silberman, one of *Chevron*’s earliest defenders,³⁷ urging a more muscular *Chevron* Step Two to prevent agencies from “exploit[ing] statutory ambiguities, assert[ing] farfetched interpretations, and usurp[ing] undelegated policymaking discretion.”³⁸ Merrill’s tradition-focused view of the role that deference should play in administrative law may also have appealed to the late Justice Antonin Scalia, at one time the Court’s most vigorous defender of *Chevron*³⁹ but also someone who, in his later years, began to experience buyer’s remorse about what it had become.⁴⁰

Professors Elizabeth Fisher and Sidney Shapiro also seek a new understanding of *Chevron* by exploring how *Chevron*’s critics and supporters think about administrative law more generally. They cast

33. *Id.* at 1155.

34. *Id.* at 1156–77.

35. *Id.* at 1174–77.

36. *Id.* at 1195.

37. See Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) (“*Chevron*’s rule . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.”).

38. *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

39. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 (defending *Chevron* as a background rule of law against which Congress can legislate that “is unquestionably better than what preceded it,” given an era of “[b]road delegation to the Executive” and “agency rulemaking powers [as] the rule rather than, as they once were, the exception”).

40. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109–11 (2015) (Scalia, J., concurring) (questioning whether the Court’s “elaborate law of deference to agencies’ interpretations of statutes and regulations” is compatible with the Administrative Procedure Act); *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 494 (2012) (Scalia, J., concurring in part) (accusing the Court of “add[ing] yet another lop-sided story to the ugly and improbable structure that our law of administrative review has become”); Adam J. White, *Scalia and Chevron: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white> [<https://perma.cc/A24Z-WJXW>] (recognizing Justice Scalia’s late-career concerns about *Chevron* deference).

the debate about *Chevron*'s legitimacy as rooted in a disagreement over "whether administrative law is to be the law of public administration"—that is, pursuing administrative competence as opposed to merely constraining agency action.⁴¹ Fisher and Shapiro argue that Congress establishes agencies, and agencies develop administrative competence, because effective government requires not only "the articulation of rules" but also "expert administrative capacity" to both "execute . . . legislative mandates" and "articulate what those mandates mean."⁴² They assert that this understanding of administrative competence dates back to the Founding generation and *Marbury v. Madison*⁴³ and that *Chevron*'s opponents have lost sight of that history.⁴⁴ Considered within the frame of pursuing administrative competence, Fisher and Shapiro contend that "*Chevron* requires a judge to assess the nature of administrative competence at both steps one and two," appreciating "that *legal* questions of statutory construction are entangled with understandings of administrative competence" and that "understandings of administrative competence inform the overall process of statutory interpretation."⁴⁵

For their part, Professors Jonathan Masur and Eric Posner address an unintended consequence of *Chevron*.⁴⁶ Whereas the Court once justified *Chevron* as facilitating agency policy choice,⁴⁷ Masur and Posner explain that the doctrine is now used to stifle rather than further sensible policymaking by manipulating *Chevron* deference and statutory interpretation "to deprive agencies of the power to consider certain benefits generated by regulations."⁴⁸ In particular, Masur and Posner argue that the Trump administration attempted to evade statutorily required cost-benefit analysis that could have hindered the

41. Elizabeth Fisher & Sidney Shapiro, *Disagreement About Chevron: Is Administrative Law the "Law of Public Administration"?*, 70 DUKE L.J. ONLINE 111, 112 (2021).

42. *Id.* at 119.

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

44. Fisher & Shapiro, *supra* note 41, at 127–29.

45. *Id.* at 129, 132.

46. See Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L.J. 1109, 1109 (2021).

47. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (explaining that "federal judges . . . have a duty to respect legitimate policy choices made by" the expert and more politically accountable executive branch); cf. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (plurality) (arguing that judicial deference generally allows agencies to better use their "unique expertise," often of a scientific or technical nature" to address "complex or changing circumstances") (citing *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991)).

48. See Masur & Posner, *supra* note 46, at 1113–14.

administration's deregulatory agenda by "Chevronizing" around such statutory requirements.⁴⁹ As they observe, strategic use of statutory interpretation to evade good-government measures—a process aided and abetted by a broad conception of *Chevron*—raises difficult questions. Masur and Posner suggest that it may be possible to find a "middle way" that strengthens, or at least retains the current version of, *Chevron* for some policies but restricts the availability of deference for others.⁵⁰ But what if a "middle way" is not possible—for example, because it requires line drawing that courts are unable to do?

Professor Matthew Lawrence similarly addresses a field where *Chevron* may have an unintended consequence: appropriations.⁵¹ As he explains, annual appropriations "preserve congressional power" over agency decisionmaking because agencies will be reluctant to depart too far from congressional preferences if they know that doing so may result in less money going forward, yet permanent appropriations "destroy" Congress's ability to exercise that sort of influence over agency policymaking.⁵² Thus, to understand the separation of powers, one must evaluate the time dimension of an appropriation—and this has implications for *Chevron*. According to Lawrence, when courts defer to an agency's interpretation of permanent appropriations statutes, they further minimize Congress's authority, whereas deference in the context of annual appropriations statutes is less problematic because Congress has other means of control.⁵³ This dynamic complicates how we should think about *Chevron*, especially the theory that *Chevron* recognizes and respects an implicit grant of power from Congress to agencies. Would Congress really wish to reduce its own authority over policymaking?

49. *See id.* The Biden administration may also be tempted to "Chevronize" around cost-benefit analysis, albeit in service of a regulatory agenda. The Obama administration's regulatory agenda suffered significant defeats because of inadequate cost-benefit analysis. *See, e.g.,* *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149–50 (D.C. Cir. 2011); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (faulting an agency for failing to consider the costs as well as the benefits of its interpretive choice).

50. *See* Masur & Posner, *supra* note 46, at 1150.

51. *See* Matthew B. Lawrence, *Congress's Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057, 1057 (2021).

52. *Id.* at 1060.

53. *Id.* at 1057.

Another increasingly important part of the debate over *Chevron* is the effect that deference has on individual liberty.⁵⁴ Many think of *Chevron* deference as a doctrine concerned with big business.⁵⁵ The “*Chevron*” giving rise to the *Chevron* doctrine, after all, is a global energy company, and many important *Chevron* cases have dealt with corporations.⁵⁶ Thus, for many, the debate over *Chevron* is part of a larger ideological disagreement over the role of private industry in American society.⁵⁷ Yet *Chevron* applies in a wide array of contexts with more individualized and deeply personal consequences, including immigration.⁵⁸ Professors Shoba Sivaprasad Wadhia and Christopher Walker tackle this distinct question by presenting “the case against *Chevron* deference in immigration adjudication.”⁵⁹ As they put it, “the theoretical foundations for *Chevron* deference crumble” in the context of immigration adjudication.⁶⁰ Rather than focusing on judicial reform alone, moreover, they urge the political branches to narrow *Chevron*’s domain, for example, by choosing rulemaking rather than adjudication as “the predominant administrative tool for implementing Congress’s immigration laws and for making immigration policy at the agency level,” and also “by not seeking *Chevron* deference in immigration adjudication.”⁶¹ As Wadhia and Walker acknowledge, the feasibility of the latter is hotly debated but seems to be supported by Justices Gorsuch and Stephen Breyer.⁶²

All of this leads to a question: Assuming it makes sense to reform *Chevron*, what role should *stare decisis* play? In *Narrowing Chevron’s*

54. See, e.g., Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (explaining that courts do and should apply *Chevron* differently when “intrusion[s] on physical liberty” are concerned).

55. See, e.g., Overley, *supra* note 14 (suggesting that overruling *Chevron* would “strengthen corporate America’s hand in litigation with federal regulators”).

56. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 304 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129 (2000); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994); *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 675 (D.C. Cir. 2016).

57. See, e.g., Joshua S. Sellers, “*Major Questions’ Moderation*,” 87 GEO. WASH. L. REV. 930, 933 (2019) (linking debates about the proper scope of *Chevron*’s domain “to the broader debate over the legitimacy of the regulatory state itself”).

58. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999).

59. See Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1234 (2021).

60. *Id.* at 1201.

61. *Id.* at 1203.

62. *Id.* at 1240; see also Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 642–47 (2020) (documenting the origin and evolution of the debate over *Chevron*’s waivability).

Domain, we address this question as part of our broader recommendation and contend that our view is, in fact, more consistent with the justification the judiciary itself has articulated for deference.⁶³ Not everyone will agree with our position, however. And, of course, *other* reforms may reject the theories underlying *Chevron* but nonetheless urge retention of deference. Would reform along any of these lines be permissible under rules of precedent? Professor Randy Kozel thus examines whether a revised version of *Chevron* is at all compatible with stare decisis principles.⁶⁴ Specifically, Kozel addresses “retheorization, or the recasting of a prior judicial decision based on a new rationale.”⁶⁵ The question he addresses, of course, has implications far beyond debates about *Chevron* or even administrative law. But his arguments about retheorization and stare decisis are particularly important for debates over the future of *Chevron* and administrative law more generally, given the Supreme Court’s expressed eagerness to revisit fundamental aspects in this area.⁶⁶

Finally, Professor Richard Pierce maintains that the nation’s present state of political polarization has thoroughly undermined *Chevron*’s original promise as a sensible standard that “required courts to give effect to democratic values in the process of reviewing agency decisions.”⁶⁷ According to Pierce, *Chevron*’s original appeal resided in the Court’s association of judicial deference with political accountability—that is, by “anchor[ing] judicial deference to agency policy decisions in constitutional allocations of decisionmaking power and the basic principles that underlie our constitutional democracy”—rather than comparative agency expertise.⁶⁸ *Chevron* was supposed to give agencies leeway to adjust their interpretive policy choices in response to public preferences as expressed through electoral politics.⁶⁹ But instead of facilitating a sober flexibility, Pierce argues that the combination of *Chevron* and increased political polarity has supported erratic agency flip-flopping between policy extremes.⁷⁰ The resulting

63. See Hickman & Nielson, *supra* note 10, at 982–99.

64. See Randy J. Kozel, *Rethorizing Precedent*, 70 DUKE L.J. 1025, 1025 (2021).

65. *Id.* at 1026.

66. See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 166 (2019).

67. Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021).

68. *Id.* at 93–94.

69. *Id.* at 94.

70. *Id.* at 103.

legal uncertainty “makes it impossible for individuals, corporations, and prospective investors to make wise decisions.”⁷¹ Pierce lays the blame for this state of affairs squarely at the foot of Congress and its inability to legislate, which leaves presidents with “no choice but to assert unprecedented power to act in response to serious national problems.”⁷² He offers a few ideas for political reform to resolve that problem.⁷³ In the meantime, however, Pierce reluctantly supports replacing *Chevron* with the *Skidmore*⁷⁴ standard.⁷⁵

In short, *Chevron* is at a crossroads. Scholars, policymakers, and judges are asking hard questions about both the legality and the wisdom of judicial deference.⁷⁶ A doctrine that once seemed sensible may have lost its coherence or its utility with the passage of time and changed circumstances. The simple conception of *Chevron* once embraced and defended by Justice Scalia and others may have proved too simple for an increasingly complex administrative state that would leave the Framers “rubbing their eyes.”⁷⁷ Or perhaps *Chevron* still serves a useful purpose and will merely evolve, as legal standards often do. Regardless, it is safe to say that the Supreme Court is thinking hard about the future of *Chevron*. This Symposium should give the Justices even more to think about.

71. *Id.*

72. *Id.* at 105.

73. *See id.* at 107–09.

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

75. *See Pierce*, *supra* note 67, at 103.

76. *See, e.g.*, Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 *GEO. J.L. & PUB. POL’Y* 103, 104 (2018).

77. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation omitted).