

ADMINISTRATIVE LAW REVIEW ACCORD

VOLUME 68

SYMPOSIUM: KEYNOTE ADDRESS

# THE STATE OF *CHEVRON*: 15 YEARS AFTER *MEAD*

SETH P. WAXMAN\*

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW  
MARCH 24, 2016

## I. INTRODUCTION

I want to begin by thanking the *Administrative Law Review* for inviting me to speak today. I am honored to be part of a discussion with today's distinguished participants. The views on the state of *Chevron* deference I will offer reflect my experience writing briefs, making arguments—particularly before the Supreme Court—and from watching closely while other advocates have done so and how the Court has responded. I hope that by providing a perspective from the advocate's podium, I can add something of value to the conversation. My goal is less to offer conclusions than to raise questions that may help spur further constructive debate.

My thinking about these remarks preceded the death of Justice Antonin Scalia, without whom no conversation about *Chevron* can be complete. Justice Scalia thought deeply about the relationship between the judiciary and administrative agencies—from the time he was a professor of

---

\* My remarks today reflect my views only, and nothing I say today should be imputed to my law firm, Wilmer Cutler Pickering Hale & Dorr LLP. I am indebted to colleagues Arpit Garg, Beth Neitzel, and Jonathan Cedarbaum for their considerable assistance.

administrative law and an active member of the Administrative Conference of the United States; to his stint as head of the Office of Legal Counsel and his service on the D.C. Circuit;<sup>1</sup> to his important contributions on the Supreme Court, not least those made in his solo dissent in *Mead*<sup>2</sup> and his majority opinion in *City of Arlington v. FCC*.<sup>3</sup>

But in these remarks, I will focus largely on the current Court. Thus, while I will include some discussion of Justice Scalia's work, it will be confined largely to the last decade or so.

## II. AN EMERGING CONSENSUS?: "NEW *CHEVRON* SKEPTICS"

A panel at a recent Federalist Society conference was titled "The New *Chevron* Skeptics."<sup>4</sup> That title reflects a view that seems to have gathered considerable currency in the last few years. The emerging consensus seems to be that the Supreme Court is undertaking a fundamental change of course on judicial deference to administrative agencies. Whereas, it is said, the Court showed great deference to agencies from the 1980s—when a unanimous Court (albeit with only six members participating) handed down *Chevron*—through much of the last decade, in more recent years a majority of the Court seems to have grown considerably more skeptical of agency interpretations.

Some might hold up Justice Scalia as a "poster boy" for this shift toward *Chevron* skepticism. In a 1989 speech at Duke Law School,<sup>5</sup> Justice Scalia extolled the virtues of *Chevron*, concluding by describing it as a rule that "more accurately reflects the reality of government, and thus more adequately serves its needs."<sup>6</sup> Last Term, by contrast, in his concurrence in *Perez v. Mortgage Bankers Ass'n*,<sup>7</sup> he expressed genuine doubt about *Chevron*'s legal validity. Observing that § 706 of the Administrative Procedure Act states that courts "shall decide all relevant questions of law" and "interpret . . . statutory provisions,"<sup>8</sup> Justice Scalia wrote that the Court had developed its deference doctrines "heedless of the original design of the APA"<sup>9</sup> and that this problem is "perhaps insoluble if *Chevron* is not to be

---

1. *Biography of Associate Justice Antonin Scalia*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographyScalia.aspx> (last visited May 21, 2016).

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

3. 133 S. Ct. 1863 (2013).

4. *New Chevron Skeptics*, FEDERALIST SOC'Y (Jan. 15, 2016), <http://www.fed-soc.org/multimedia/detail/the-new-chevron-skeptics-event-audiovideo>.

5. Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

6. *Id.* at 521.

7. 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring).

8. 5 U.S.C. § 706 (2012).

9. *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring).

uprooted.”<sup>10</sup> Though the *Perez* decision turned on *Auer*, rather than *Chevron* deference, Justice Scalia’s doubts about *Chevron*, expressed in characteristically pointed prose, understandably drew attention.<sup>11</sup> As Justice Scalia shifted, so, it has seemed to many, did the Court. Jeff Lubbers captures this emerging view well in the title of his essay, “Is the U.S. Supreme Court Becoming Hostile to the Administrative State?”<sup>12</sup>

### III. A DIFFERENT VIEW: WHAT’S NEW IS THE EXPLICITNESS OF THE COURT’S SKEPTICISM

The premise of the notion that the Court’s *Chevron* skepticism is new, of course, is that the Court used to embrace *Chevron* wholeheartedly. Let me suggest a more modest explanation. *Chevron* skepticism is not particularly new in practice. Rather, what is new is that the Justices are more willing to be *explicit* in their skepticism.

#### A. The Court Was Always Implicitly Skeptical

Before we can posit that the Court has recently become markedly more skeptical of *Chevron*, we need a baseline. What was the Court like *before*? Was it applying *Chevron*’s principles consistently or not?

##### 1. Empirical Research

In 2008 Bill Eskridge and Laura Baer reported the results of a major study in which they reviewed more than 1,000 Supreme Court decisions from the time *Chevron* was decided in 1984 until *Hamdan v. Rumsfeld*<sup>13</sup> was handed down in 2006.<sup>14</sup> Eskridge and Baer concluded that during that period, the Court applied *Chevron* in just 8.3% of cases evaluating agency statutory interpretations.<sup>15</sup> Strikingly, the Court relied on no deference regime of any kind—whether *Chevron*, *Auer*, *Skidmore*, or otherwise—in more than half of all cases (53.6%) that were, according to *Mead* and other

---

10. *Id.* at 1212.

11. See, e.g., Brian Wolfman & Bradley Girard, *Opinion Analysis: The Court Slays the D.C. Circuit’s Paralyzed Veterans Doctrine, Leaving Bigger Issues for Another Day*, SCOTUSBLOG (Mar. 10, 2015, 9:22 AM), <http://www.scotusblog.com/2015/03/opinion-analysis-the-court-slays-the-d-c-circuits-paralyzed-veterans-doctrine-leaving-bigger-issues-for-another-day>.

12. Jeffrey S. Lubbers, *Is the U.S. Supreme Court Becoming Hostile to the Administrative State?*, in THE GLOBAL SERIES: PAPERS FROM THE ADMINISTRATIVE LAW DISCUSSION FORUM (Carolina Academic Press) (forthcoming 2016).

13. 548 U.S. 557 (2006).

14. William N. Eskridge Jr. & Laura E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

15. *Id.* at 1090.

authorities, *Chevron*-eligible.<sup>16</sup> Instead, according to Eskridge and Baer, the Court invoked the usual multi-factor statutory-interpretation approach that it deploys elsewhere—meaning that the Court considered the statutory language and structure, legislative history and statutory purpose, the evolution of the statute, policy rationales, and so forth.<sup>17</sup>

Also surprising is the not-so-significant difference in agency win rates between cases in which the Court engaged in such ad hoc statutory construction and ones in which it applied a deference regime, whether *Chevron* or *Auer*. Eskridge and Baer report that the agency won 66% of the time in cases in which the Court invoked no deference doctrine, and just ten percent more—76% of the time—where *Chevron* or *Auer* played an explicit role.<sup>18</sup> That is hardly a meaningless difference, but one also less dramatic than many of us might have expected.

The evidence also reveals little doctrinal consistency as to when the Court invoked *Chevron* during this period and, if it did, how the Court applied the doctrine. Connor Raso and Bill Eskridge describe the Court as treating “*Chevron* as a Canon, not a Precedent.”<sup>19</sup> There are almost always two conflicting canons of statutory construction on every point, canons do not really lead judges to reach particular outcomes in particular cases.<sup>20</sup>

I read this scholarship as suggesting that if the Court is judged more by its actions than its words, the Court has long shown at least an *implicit* skepticism about *Chevron* deference. That is to say, while the Court has regularly paid lip service to *Chevron*, both its operative reasoning and its results undercut the notion that *Chevron* ever really reigned supreme.

I want to make clear that this “canon-not-precedent” conclusion applies only to the Supreme Court. There is little empirical literature on the lower courts—it would be an overwhelming exercise—but the research I have seen suggests that the courts of appeals do, in fact, follow *Chevron* as precedent.<sup>21</sup> But Professor Eskridge’s studies with his colleagues suggest to me that the Supreme Court has long applied *Chevron* with a considerable dose of at least implicit skepticism.

---

16. *Id.*

17. *Id.* at 1092–93.

18. *Id.* at 1099.

19. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (2010).

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

21. See, e.g., Orin Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59 (1998).

## 2. *FDA v. Brown & Williamson*

My own experience confirms this finding. One notable case I lost as Solicitor General was the Food & Drug Administration (FDA) cigarette regulation case, *FDA v. Brown & Williamson Tobacco Corp.*<sup>22</sup> For reasons I'll explain, the FDA's copiously documented determination to regulate nicotine as a "drug" and cigarettes as drug-delivery "devices" appeared to present the very paradigm for application of *Chevron's* doctrinal approach. But instead of applying the doctrine, the Court questioned whether the FDA was even authorized to resolve the dispositive question of statutory interpretation.<sup>23</sup>

By the 1990s, decades of evidence had shown that cigarettes were addictive and caused serious deleterious health effects (though, of course, the CEOs of the tobacco companies were seemingly the last people in America to learn of these facts).<sup>24</sup> What appeared for the first time in 1990s was evidence that tobacco manufacturers intentionally controlled the level of nicotine in cigarettes to maintain their addictive properties.<sup>25</sup> Relying on this evidence, and recognizing that cigarette smoking was the single greatest cause of preventable deaths in the country, the FDA decided to regulate cigarettes.<sup>26</sup>

Now consider the statute on which the FDA relied, the Federal Food, Drug, and Cosmetic Act (FDCA).<sup>27</sup> The FDCA defined "drug" as "*articles* (other than food) *intended* to affect the structure or any function of the body."<sup>28</sup> The definition of "device" was equally broad: "*an instrument . . . intended to affect the structure or any function of the body.*"<sup>29</sup> A faithful application of *Chevron* Step One would seem clearly to favor the FDA's determination. At a minimum, given the new evidence about the intentional spiking of cigarettes with nicotine,<sup>30</sup> it seemed entirely

---

22. 529 U.S. 120 (2000).

23. *Id.*

24. Courts later found that these CEOs actively conspired to hide the truth. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095, 1105–06 (D.C. Cir. 2009) (stating that the tobacco companies engaged in a "decades-long conspiracy to deceive the American public about the health consequences and addictiveness of smoking cigarettes").

25. Some of this historical context can be found in Theodore Ruger, *The Story of FDA v. Brown & Williamson and The Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 1, 1–3 (Eskridge, Garrett, and Frickey eds.) (2010), an early draft of which is available at [https://www.law.upenn.edu/cf/faculty/truger/workingpapers/FDA\\_for%20seminar.pdf](https://www.law.upenn.edu/cf/faculty/truger/workingpapers/FDA_for%20seminar.pdf).

26. *Brown & Williamson*, 529 U.S. at 126–27.

27. 21 U.S.C. § 321

28. *Id.* § 321(g)(1)(C) (emphasis added).

29. *Id.* § 321(h).

30. *See supra* note 25 and accompanying text.

reasonable for the FDA to conclude that nicotine was a “drug” because it was “intended” to cause addiction, and thus cigarettes qualified as “devices” that delivered nicotine to the body.

Going against us, of course, was the weight of history; there is no doubt that the 1938 Congress that enacted the FDCA had no earthly intimation that the definitions they enacted would conceivably encompass cigarettes. But, although I knew how fond Justice Scalia was of his cigars, his staunch defense of *Chevron* led me to think that I could count on his vote.

I was wrong. Justice Scalia joined the five-Justice majority that rejected the agency’s view.<sup>31</sup> But the most openly skeptical member of the majority was the author of the Court’s opinion, Justice O’Connor. At oral argument, her questions and comments showed that she simply could not fathom that Congress intended for the FDA to regulate tobacco.<sup>32</sup> The transcript cannot capture the full force of her incredulity.

And her skepticism resulted in a novel exception to the doctrine of *Chevron* deference—what I came to call the “Too Big To Defer” exception. In the final section of her opinion, Justice O’Connor observed that *Chevron* deference turns on the “nature of the question presented.”<sup>33</sup> “In extraordinary cases,” she wrote, “there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>34</sup> She then expressed the Court’s “confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>35</sup> The majority opinion did not dispute the ambiguity in the statutory definitions of “drug” and “device,” but it nevertheless concluded that “Congress had *clearly* precluded the FDA from asserting jurisdiction to regulate tobacco products.”<sup>36</sup>

There are many insights to be gained from *Brown & Williamson*, but the one I want to highlight is that the Court’s skepticism toward *Chevron* deference has not sprung up in just the last few years. If we look closely, we can see the roots of that skepticism burrowing into the soil of the Court’s opinions much earlier.

### *B. The Court’s Explicit Skepticism*

That is not to say that the many scholars discussing the “New *Chevron*

---

31. *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000).

32. *See, e.g.*, Oral Argument at 2:46, 8:48, 9:43, 15:45, *Brown & Williamson*, 529 U.S. 120 (2000) (No. 98-1152), [https://apps.oyez.org/player/#/rehnquist10/oral\\_argument\\_audio/21127](https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/21127).

33. *Brown & Williamson*, 529 U.S. at 159.

34. *Id.*

35. *Id.* at 160.

36. *Id.* at 126 (emphasis added).

Skeptics” are not on to something. I think they are. But what is new, in my view, is the Court’s *explicit* questioning of *Chevron*, and of other doctrines of judicial deference to the interpretative authority of administrative agencies.

### 1. *Separate Writings by the Justices*

My point could be illustrated by looking at the writings of several Justices. Let me use Chief Justice Roberts and Justice Thomas to show what I have in mind.

Chief Justice Roberts wrote the dissent in *City of Arlington*, which is explicitly critical of judicial deference to agencies in two important ways.<sup>37</sup> First, in establishing the “background” for his legal position, the Chief Justice described at length the “danger[s]” resulting from the “vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities.”<sup>38</sup> In a particularly colorful line, he noted “hundreds of federal agencies poking into every nook and cranny of daily life.”<sup>39</sup> Second, doctrinally, his opinion is easily read as seeking to extend *Mead*. *Mead*, though famously inscrutable in some respects, has come to be widely understood as recognizing a so-called *Chevron* Step Zero.<sup>40</sup> In other words, many view *Mead* as having established a separate step to evaluate whether *Chevron* deference *even applies*, before reaching the traditional two steps through which a *Chevron* analysis itself is carried out.<sup>41</sup> Deference should be afforded, *Mead* held, only “when it appears [1] that Congress delegated authority to the agency *generally* to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>42</sup> The Chief Justice, however, wanted to go one step further. In his view, a grant of general rulemaking authority is insufficient: “If a congressional delegation of interpretive authority is to support *Chevron* deference,” he wrote, “that delegation must extend to the *specific statutory ambiguity at issue*.”<sup>43</sup> The Chief’s view would impose a significant limit on judicial deference to agency interpretations, and his was not a solo dissent. His opinion garnered the votes of Justices Kennedy and Alito.<sup>44</sup>

---

37. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–86 (2013) (Roberts, C.J., dissenting).

38. *Id.* at 1878–79 (Roberts, C.J., dissenting) (citation omitted).

39. *Id.* at 1879.

40. See Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

41. *Id.*

42. *United States v. Mead*, 533 U.S. 218, 226–27 (emphasis added).

43. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting) (emphasis added).

44. *Id.* at 1877–86.

Last Term, Justice Thomas offered a compendium of his views on the many constitutional infirmities in the administrative state—ranging from the comparatively minor issue of whether agency decisions should benefit from issue preclusion in federal court,<sup>45</sup> to the much more far-reaching question of whether to resuscitate the defunct non-delegation doctrine.<sup>46</sup> As to *Chevron* deference, he explained, it is stuck between a rock and a hard place.<sup>47</sup> It either requires agencies to interpret the law—violating the Vesting Clause of Article III—or it requires them to make the law—violating the exclusive grant of legislative power to Congress in Article I.<sup>48</sup> Thus, he wrote, “*Chevron* deference raises serious separation-of-powers questions.”<sup>49</sup> Justice Thomas’s current views are particularly surprising given that he wrote the Court’s 2005 opinion in *National Telecommunications Ass’n v. Brand X Internet Services*,<sup>50</sup> which held that a reasonable agency interpretation of a statutory ambiguity *trumps* a contrary judicial resolution of the same ambiguity.<sup>51</sup> That the author of one of the most pro-agency-deference opinions in the Supreme Court’s history has made an explicit about-face is indicative of an important overall shift at the Court toward explicit questioning of *Chevron* and its foundations.

## 2. *Chevron* Step Two and “Too Big To Defer”

Evidence of this explicit *Chevron* skepticism can be drawn not only from the Justices’ individual opinions. One can see it as well in the Court’s willingness to give new currency to previously rare categories of cases in which the agency loses under *Chevron*. I want to mention two of those categories.

The first category is where the agency loses at *Chevron* Step Two. As we all know, *Chevron* Step Two simply asks whether an agency’s position qualifies as a “reasonable” and thus “permissible” interpretation of the statute.<sup>52</sup> The Court has said that the agency’s interpretation will stand at Step Two unless it is “arbitrary, capricious, or manifestly contrary to the

---

45. See *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1310–18 (2015) (Thomas, J., dissenting).

46. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring in the judgment).

47. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

48. *Id.*

49. *Id.*

50. 545 U.S. 967 (2005).

51. *Id.* at 982–83.

52. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (“Under th[e] *Chevron* framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable.”).



statute.”<sup>53</sup> As that language would suggest, Step Two should not be terribly onerous. Consistent with that expectation, one empirical review of *Chevron* decisions in the courts of appeals in 2011 found that, although the agency does not lose very often under *Chevron*, when it does, there is a 90% chance that the loss will occur at Step One and only a 10 percent chance that it will happen at Step Two.<sup>54</sup>

And yet, the Court now seems increasingly willing to strike down agency interpretations as unreasonable. Looking at twenty-six recent decisions citing *Chevron*, nineteen have reached Step Two.<sup>55</sup> The agency won in fourteen cases, and lost in five.<sup>56</sup> But three of those five Step-Two losses came in the last two Terms.<sup>57</sup>

Another way to look at it is: if the agency loses, how? Among the cases I reviewed, the agency lost ten cases. Five losses were at either Step Zero or Step One; five losses were at Step Two. But again, three of the five Step-Two losses came in the last two Terms. In other words, in the first eight Terms of the Roberts Court, if the agency lost, it was very likely to lose at Step One. But over the past two Terms, there was an even chance that the agency’s loss might occur at Step Two instead of Step One.<sup>58</sup>

And the three recent Step Two decisions leave no doubt that the Court was expressly rejecting the agency interpretation at Step Two. In *Mellouli v. Lynch*,<sup>59</sup> a case about how to apply the categorical approach to an immigration removal provision, Justice Ginsburg, writing for a 7-2 court, skipped *Chevron* Step One entirely and dismissed the agency’s view as making “scant sense.”<sup>60</sup> In *Michigan v. EPA*,<sup>61</sup> a case about the Environmental Protection Agency’s (EPA’s) mercury rule for coal-fired power plants, Justice Scalia, writing for a 5-4 court, said the agency had “strayed far beyond th[e] bounds” of “reasonable interpretation.”<sup>62</sup> And if that were not strong enough, in *Utility Air Regulatory Group v. EPA*,<sup>63</sup> a case about the EPA’s greenhouse gas regulations for stationary sources, Justice Scalia called one of the agency’s decisions “patently unreasonable.”<sup>64</sup>

---

53. *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584, 1609 (2014) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984)).

54. See Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 640 (2014).

55. Analysis on file with the author.

56. See *id.*

57. *Id.*

58. Analysis on file with the author.

59. 135 S. Ct. 1980 (2015).

60. See *id.* at 1989.

61. 135 S. Ct. 2699 (2015).

62. *Id.* at 2707.

63. 134 S. Ct. 2427 (2014).

64. *Id.* at 2444.

The second category of cases, in which the Court has become more open in its willingness to cut back on *Chevron*, is what I referred to before as “Too Big To Defer.” That doctrine lay dormant for well over a decade after *Brown & Williamson*, but it has seen a recent resurgence.<sup>65</sup> For example, the “Too Big To Defer” language in *Brown & Williamson* was cited by Justice Scalia in the *Utility Air Regulatory Group* opinion,<sup>66</sup> and it was put front and center by the Chief Justice in *King v. Burwell*.<sup>67</sup>

The issue in *King*, of course, was the legality of an Internal Revenue Service (IRS) regulation stating that the Affordable Care Act’s tax subsidies would be available on federally-facilitated health insurance exchanges as well as on those established by state governments.<sup>68</sup> The Fourth Circuit, from which the Court had taken the case, recognized a textual ambiguity and accorded *Chevron* deference to the IRS’s interpretation of the Act.<sup>69</sup> The Chief Justice, writing for the majority, did not.<sup>70</sup> Quoting *Brown & Williamson*, he explained that the *Chevron* framework “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>71</sup> He then continued:

In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

---

65. 529 U.S. 150, 160–61 (2000); *but cf.* *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (holding that Congress did not give the Attorney General broad authority through an implicit delegation). The position has a variant in the “Congress . . . does not . . . hide elephants in mouseholes” principle, articulated by Justice Scalia in *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001), which cites *Brown & Williamson*. But that is best understood as a canon of statutory interpretation; it differs from the threshold question (somewhat akin to *Chevron* Step Zero) of whether a legal issue is simply too big to be left to the agency.

66. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (citing *Brown & Williamson*, 529 U.S. at 159–60 (2000)).

67. 135 S. Ct. 2480 (2015).

68. *Id.*

69. *King v. Burwell*, 759 F.3d 358, 367–76 (4th Cir. 2014), *aff’d on different grounds*, 135 S. Ct. 2480 (2015).

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

71. *Id.* at 2488.

*This is not a case for the IRS.* It is instead *our* task to determine the correct reading of [the provision.]<sup>72</sup>

Notably, the Chief Justice went on to *agree* with the agency's position.<sup>73</sup> This was not about the policy, however; it was about the principle. The tax-subsidies question was simply too big for deference to an administrative agency.

#### IV. A NEW STRUGGLE FOR JUDICIAL SUPREMACY?

That passage from *King* leads directly to the next question I would like to raise: What are we to make of the Court's increasing *express* skepticism towards agencies' interpretative authority?

In 1940, then-Attorney General Robert Jackson wrote an insightful and influential book entitled *The Struggle for Judicial Supremacy*, which examined what Jackson called "the basic inconsistency between popular government and judicial supremacy."<sup>74</sup> Jackson sought to document the Court's "repeated drift into struggles with strong Executives."<sup>75</sup> We are not now at a point remotely resembling the clashes Jackson witnessed in the opening years of the New Deal, during which, before the famous "switch in time that saved the Nine,"<sup>76</sup> the Supreme Court struck down Act after Act of New Deal legislation. But query whether we are not, in fact, witnessing yet another move towards judicial supremacy. The Court is seemingly firing a shot across the bow of the Administrative State on issues it believes to be significant. Is that not what the Chief Justice meant when he wrote, "This is not a case for the IRS"?<sup>77</sup>

##### *A. Background: Separation of Powers*

Let me step back for a moment to provide some theoretical grounding for my hypothesis. Two principal justifications exist for judicial deference to agency interpretations of statutes: expertise and separation of powers.

The former takes many forms. It might be that, in what Guido Calabresi has called "the Age of Statutes,"<sup>78</sup> agencies have expertise from

---

72. *Id.* at 2488–89 (citations omitted).

73. *Id.* at 2496.

74. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*, 311 (1941).

75. *Id.* at 315.

76. See generally Louis D. Bilonis, *The New Scrutiny*, 51 EMORY L.J. 481, 557 n.102 (2002) (providing historical reference to the "switch in time that saved the Nine"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 974 n.9 (2000) (discussing the origins of the phrase).

77. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

78. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

overseeing vast administrative schemes and understanding what best serves the effectiveness of those schemes. They often also have technical expertise in particularly complex or scientific areas of law and policy. And they may have a form of historical expertise, if they were involved in drafting the legislation. In any event, the basic gist is that a court is unlikely to reach the “correct” decision on its own; rather, the expert agency knows best.

For the most part, when the Court perceives agency rulemaking as steeped in technical expertise, and when the rules do not touch a “third-rail” policy issue, the Court continues readily to defer. For example, I have argued a number of cases in which the Court has readily afforded deference to the Federal Reserve Board, recognizing its “pivotal” role in certain areas of banking regulation.<sup>79</sup> Another recent example is *Astrue v. Capato*,<sup>80</sup> an under-the-radar case about whether Social Security survivor benefits can be awarded to posthumously conceived children, i.e., children born through in-vitro fertilization.<sup>81</sup> Clearly the 1930s authors of the Social Security Act had no intimation of such a medical feat, and the definition of “child” in the Act was literally “child.” The Social Security Administration adopted a somewhat technical position, referring to state intestacy law in the domicile of the deceased wage-earner, and the Court showed little hesitation in affording that view considerable deference.<sup>82</sup>

The second rationale for deference is where things may be shifting. This rationale posits that, from a separation-of-powers perspective, absent some strong indication to the contrary, questions of what a statute means and how it is best implemented are for the Executive, not the Judiciary. And one can support that justification under two different, albeit related, theories.

The first is based on a theory of congressional delegation. Congress has broad power under Article I to make the laws,<sup>83</sup> and when it chooses to delegate that power to administrative agencies, Article III courts must respect that delegation and accept the agency interpretation, just as they must respect the terms of statutes themselves.<sup>84</sup> The Court has acknowledged this delegation theory in many opinions, and I think Chief Justice Roberts articulated it very clearly in his *City of Arlington* dissent: “We give binding deference to permissible agency interpretations of statutory ambiguities,” he wrote, “*because* Congress has delegated to the agency the

---

79. *E.g.*, *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004).

80. 132 S. Ct. 2021 (2012).

81. *Id.* at 2025–26 (2012).

82. 132 S. Ct. 2021 (2012).

83. U.S. CONST. art. I, § 1.

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

authority to interpret those ambiguities with the force of law.”<sup>85</sup>

The second, and distinct, theory is a political accountability argument. *Chevron* cases arise at the intersection of law and policy. In *Brown & Williamson*, for example, the FDA had obviously made a policy decision to regulate tobacco, and the significance of that policy decision led the Court, at least in part, to reject the FDA’s legal arguments.<sup>86</sup> But policy judgments are emphatically for the political branches, not the judiciary. Here is what Justice Stevens wrote in the *Chevron* opinion:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved, by the agency charged with the administration of the statute in light of everyday realities.<sup>87</sup>

Whichever theory you accept, the conclusion is the same from a separation-of-powers perspective: absent clear textual indications to the contrary, questions about the implementation of statutes are to be resolved by the Article II body, not Article III courts.

### *B. Case Study: Environmental Regulation*

With this framework in mind, let’s explore my suggestion that the Court may be revising the separation-of-powers balance. That is, at least in cases not principally implicating the technical expertise of the agency, the Court is reclaiming a role for Article III. And, as a case study of the Court’s assertion of a more muscular judicial authority to resolve significant questions of statutory interpretation, let’s examine the Court’s recent cases involving environmental regulation.

For a long time, the Court deferred to the EPA on environmental issues. *Chevron* itself was a case about whether a cluster of buildings within an industrial plant could, under a “bubble” theory, constitute a single “stationary source” under the Clean Air Act.<sup>88</sup> The Court deferred to the agency then, and has done so in many cases since. In *Babbitt v. Sweet*

---

85. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J. dissenting).

86. *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 150, 160–61 (2000).

87. *Chevron*, 467 U. S. at 865–66 (1984).

88. *Id.* at 840.

*Home*,<sup>89</sup> an Endangered Species Act case in the mid-1990s, the Court wrote: “We need not decide whether the statutory definition of ‘take’ compels the Secretary’s interpretation of ‘harm,’ because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable sufficed to decide this case.”<sup>90</sup> In *Entergy Corp. v. Riverkeeper, Inc.*,<sup>91</sup> a Clean Water Act case from 2009, the Court deferred to the agency’s interpretation of how to engage in cost-benefit analysis, even while acknowledging that the agency’s approach may not be the “most reasonable” reading of the statute.<sup>92</sup> And, in *EPA v. EME Homer City Generation*,<sup>93</sup> a Clean Air Act case from 2014, the Court again deferred to the agency’s interpretation of how best to implement the Good Neighbor Provision in the Clean Air Act.<sup>94</sup>

But this regime has shifted. The Court has expressed great skepticism towards the EPA’s statutory interpretations in recent years. Indeed, two of the three recent cases I mentioned earlier—in which the Court rejected an agency’s interpretation at *Chevron* Step Two—were environmental cases.<sup>95</sup> They are worth a closer look for the precise language used by the Court.

*Michigan v. EPA*,<sup>96</sup> decided last Term, involved the EPA’s regulation of emissions from power plants.<sup>97</sup> The statutory language authorized such regulation if the EPA, after conducting a study on power plants, concluded such regulation was “appropriate and necessary.”<sup>98</sup> The EPA took the position in its final rule that “appropriate and necessary” did not require considering cost.<sup>99</sup> “Appropriate” meant whether the study found harmful health effects, and “necessary” meant whether other parts of the Clean Air Act adequately protected against those harms.<sup>100</sup> Thus, despite an analysis finding that regulating power plants would impose as much as \$10 billion in compliance costs and only \$4–6 million in direct benefits, the agency decided to regulate without considering these costs.<sup>101</sup>

In an opinion by Justice Scalia (reversing a 2-1 decision of the D.C. Circuit, in which the majority included Judge Garland, nominated to

---

89. 515 U.S. 687 (1995).

90. *Id.* at 703.

91. 129 S. Ct. 1498 (2009).

92. *Id.* at 1505.

93. 134 S. Ct. 1584 (2014).

94. *Id.* at 1593.

95. See *supra* text accompanying note 60.

96. 135 S. Ct. 2699 (2015).

97. *Id.*

98. *Id.* at 2705.

99. *Id.*

100. *Id.*

101. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

replace Justice Scalia), the Court struck down the agency's interpretation.<sup>102</sup> Here is the critical line from the opinion: "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."<sup>103</sup> It is somewhat exceptional for even the Supreme Court to call the considered decision of a major federal agency irrational. But five justices were willing to make such a statement, because they were so alarmed at the prospect of imposing billions of dollars in regulatory costs for what they viewed as marginal health gains.<sup>104</sup> So concerned was the Court that it did not credit the agency's defense that it would consider cost when later deciding *how much regulation* to impose.<sup>105</sup>

*Utility Air Regulatory Group v. EPA* presents another striking example.<sup>106</sup> This was a very complex case, so I will simplify. The Clean Air Act says, in plain terms, that the EPA must use a permitting system for factories and power plants that emit more than 250 tons per year of "air pollutants."<sup>107</sup> Following the Court's 2004 ruling in *Massachusetts v. EPA*<sup>108</sup> that in light of EPA's studies, the agency was required to regulate greenhouse gas emissions as an "air pollutant," the EPA sensibly concluded that greenhouse gases were indeed air pollutants and that it would therefore regulate emissions of greenhouse gases from the tailpipes of cars, trucks, and other vehicles.<sup>109</sup> But then the EPA had a problem. If greenhouse gases are "air pollutants" for cars and trucks, they have to be "air pollutants" for factories, power plants, and other "stationary sources" as well.<sup>110</sup> But there are literally millions of stationary sources that emit more than 250 tons per year of greenhouse gases.<sup>111</sup> It would be an enormous administrative challenge to run the permitting scheme,<sup>112</sup> so the EPA revised the rule to set a 100,000 tons per year limit.<sup>113</sup>

The Court held that the agency's approach was unreasonable, citing

---

102. 135 S. Ct. 2699 (2015).

103. *Id.* at 2707.

104. *Id.* at 2704–12.

105. *Id.* at 2709–10.

106. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

107. *Id.* at 2435–36 (detailing the relevant sections of the Clean Air Act).

108. 549 U.S. 497 (2007).

109. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436–37.

110. *Id.* at 2437–38.

111. *Id.* at 2437.

112. *See, e.g., id.* ("[T]he PSD program and Title V were designed to regulate 'a relatively small number of large industrial sources,' and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and 'unrecognizable to the Congress that designed' them.")

113. *Id.*

three related reasons.<sup>114</sup> The first was the administrative challenge: that the agency's view would "place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it."<sup>115</sup> The second was the revised threshold; this, the Court said, was an impermissible "rewriting [of] unambiguous statutory terms."<sup>116</sup>

The third is the most relevant here, as it relates to the EPA's authority more generally. Stating that the EPA's interpretation "would bring about an enormous and transformative expansion in EPA's regulatory authority," the Court was unwilling, absent express congressional authorization, to countenance an "agency laying claim to extravagant statutory power over the national economy."<sup>117</sup> That section of the Court's opinion also includes references to the agency's "unheralded power to regulate a significant portion of the American economy;" "agency decisions of vast economic and political significance"; and the agency "insist[ing] on seizing expansive power."<sup>118</sup> The Court called the agency's view "patently unreasonable—not to say outrageous."<sup>119</sup>

This is not the language of a Court merely rejecting an agency's view. It is a rebuke of the EPA's conduct, reminiscent of the famous Oliver Wendell Holmes quip, "not while this Court sits."<sup>120</sup> The Court might as well have called the agency "lawless."

So what is going on? The Obama Administration has not been shy about the fact that it wishes to make major strides against climate change, and consequently the EPA has made bolder efforts to regulate.<sup>121</sup> The EPA is no longer simply maintaining regulatory programs of the past; it is creating brand new ones with significant effects on the country as a whole.<sup>122</sup> The Court is obviously aware of this, and—viewing environmental regulation as a major social policy question—it is no longer

114. *Id.* at 2438–46.

115. *Id.* at 2444.

116. *Id.* at 2445.

117. *Id.* at 2444.

118. *Id.*

119. *Id.*

120. *See* *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 US 218, 223 (1928) (Holmes, J., dissenting).

121. *See, e.g.,* Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Environmental Plan with His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), [http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html?\\_r=0](http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html?_r=0) ("[T]he President came to see the fight against climate change as central to his legacy"); Coral Davenport, *New Limit for Smog-Causing Emission Isn't As Strict As Many Had Expected*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/us/politics/epa-to-unveil-new-limit-for-smog-causing-ozone-emissions.html> (describing "major new Clean Air Act regulations" as "a hallmark of the Obama administration").

122. *Id.*



willing to let the agency resolve these issues. The Court's 5-4 stay of the Administration's "Clean Power Plan," issued days before Justice Scalia's passing, is perhaps the best indicator of how far the Court is willing to go to be the authoritative resolver of major environmental issues.<sup>123</sup>

### *C. A Return of Judicial Supremacy?*

This flexing of the Court's Article III muscles is what sent me back to *The Struggle for Judicial Supremacy*.<sup>124</sup> The Court's "plain duty to enforce" the law, Justice Jackson wrote, "is easily rationalized into enforcing its own views of good policy."<sup>125</sup> While Jackson was responding to an unprecedented exercise of the Court's authority to declare Acts of Congress unconstitutional,<sup>126</sup> his observations resonate in the wake of the Court's recent *Chevron* muscularity.

One of the constitutional principles deployed by the Hughes Court was the so-called non-delegation doctrine. Twice in 1935, the Court struck down New Deal economic regulation on the rationale that Congress had unconstitutionally delegated legislative power to the Executive by authorizing rulemaking without attaching sufficiently "intelligible principles" to cabin the scope of those rules.<sup>127</sup> Never before, and never since, has the Court acted on such a theory—leading some to quip that the non-delegation doctrine had only one good year.<sup>128</sup> Indeed, in *Whitman v. American Trucking Associations*,<sup>129</sup> the Court (in yet another opinion by Justice Scalia) reversed a ruling by the D.C. Circuit, which had concluded that the Clean Air Act's delegation of authority to the EPA to set National Ambient Air Quality Standards without reference to cost violated the non-delegation doctrine.<sup>130</sup> The Supreme Court agreed that the Act authorized the EPA to regulate without reference to cost, but rejected the notion that Congress' broad delegation violated the separation of powers.<sup>131</sup>

One can see how the Court's *Chevron* skepticism may be viewed as a moderate version of the non-delegation doctrine. Under the latter, the response to far-reaching agency regulation would be that Congress *may* not

---

123. Order Granting Stay Pending Consideration of Petitions, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016).

124. JACKSON, *supra* note 74.

125. JACKSON, *supra* note 74, at 315.

126. See generally JACKSON, *supra* note 74 and accompanying text.

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

128. Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

129. 531 U.S. 457 (2001).

130. *Id.* at 486.

131. *Id.* at 472–76.

constitutionally delegate that much of its legislative authority. A more modest expression of the same instinct is simply to refuse to read Congress' words as having in fact *actually* delegated that much authority. Thus, in the *Utility Air Regulatory Group* case, the strong form of judicial supremacy would have held that Congress *could not* have given the agency the power to regulate greenhouse gas emissions from stationary sources. Instead, the Court held, as perhaps a shot across the bow, that Congress *did not* give the agency such power.<sup>132</sup> In this regard, one may view the Court's recent shift to explicit *Chevron* skepticism as a particular instantiation of the *Ashwander v. Tennessee Valley Authority*<sup>133</sup> doctrine of constitutional avoidance.<sup>134</sup>

If these recent *Chevron* decisions in fact reflect an underlying discontent with the balance of constitutional powers, it would be interesting to see what would happen if Congress subsequently clarified that the EPA had the broad power the Court previously declined to recognize. Four years before striking down the preclearance authority of the 1965 Voting Rights Act in *Shelby County v. Holder*,<sup>135</sup> the Court issued a last-chance warning in *Northwest Austin Municipal Utility District v. Holder*.<sup>136</sup>

Just raising this possibility may reveal something behind the Court's newly explicit skepticism. Under either of the separation-of-powers theories I discussed earlier, Congress plays a crucial role in the rationale for why courts defer to agencies. Either it is because Congress delegated them the power to make legislative rules, which means that if the agency exceeds that authorization, Congress would block that action. Or it is because judges are supposed to defer to the politically accountable branches. And, while the President is, of course, politically accountable, all but the greatest adherents to the unitary executive theory would likely agree that congressional oversight serves an important function in keeping agencies politically accountable. Either way, the separation-of-powers justification

---

132. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

133. 297 U.S. 288 (1936).

134. The Supreme Court's pre-*Chevron* decision in the so-called "benzene" case provides an interesting proto-example. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, the Court struck down an OSHA rule prohibiting workplace exposure to traces of benzene, promulgated under a statute requiring OSHA to ensure a "safe or healthful" workplace. 448 U.S. 607 (1980). Four Justices thought the agency had failed adequately to weigh costs and benefits. *Id.* at 611–62. But Justice Rehnquist's fifth vote was predicated on a conclusion that the breadth of Congress' delegation exceeded constitutional limits. *Id.* at 671–72 (Rehnquist, J., concurring in judgment). Professors Eskridge and Frickey cite the case as an example of the Court treating nondelegation "as a canon of statutory interpretation rather than as an enforceable constitutional doctrine." Eskridge & Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 607 (1992).

135. 133 S. Ct. 2612 (2013).

136. 557 U.S. 193 (2009).

for *Chevron* deference had as an implicit premise that Congress plays some role in supervising and checking agencies.

But, if Congress is unable to oversee the Executive Branch's important acts of statutory interpretation by stepping in when Congress thinks the Executive has gone astray, then the justification starts to crumble. And congressional paralysis in recent years has rendered it a much less credible check on agencies' exercises of statutory interpretation. This may explain, at least in part, why members of the Court have felt more comfortable reconsidering that separation-of-powers justification and thus exercising greater Article III authority. Reviewing majority opinions over the past decade, one can discern—first and foremost in Justice Scalia's opinions—a level of dismay at Congress' handiwork, or lack thereof.

Even were congressional gridlock not an explanatory cause of the Court's shift, it would still have an important role, at least descriptively, in my judicial supremacy hypothesis. For example, while *Chevron* skepticism theoretically can be seen to serve political accountability because it directs power to Congress, which is more directly accountable than the vast Executive bureaucracy, in a world of congressional gridlock, Congress will not exercise this enhanced authority. In other words, the distinction between non-delegation as a constitutional matter and as a statutory matter is without a difference if Congress cannot act. And thus, the Court's explicit *Chevron* skepticism, when combined with congressional gridlock, has the practical effect of shifting power, not to Congress, but to itself.

One irony of the Court's recent *Chevron* skepticism is that it has been led by Justices and applauded by supporters who have been critical of what they deem judicial activism. Many of the principal *Chevron* skeptics—namely, the Chief Justice and Justices Scalia and Alito—spent important parts of their careers as lawyers for the Executive Branch, defending its prerogatives. No doubt their position behind the bench affords and requires a different view. But it is a view that empowers a branch of the federal government upon which they have long urged greater humility. As Justice Jackson wrote, “The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court are humbly and faithfully heeded.”<sup>137</sup>

## V. TWO CONCLUDING THOUGHTS

In concluding, let me sound two notes of concern. The first concerns ideology; the second, predictability.

First, as I alluded to before, the areas in which the Court will effectively exercise judgment independent of agency views are to be decided by the

---

137. JACKSON, *supra* note 74, at 321.

Court. And there is no doubt that ideology has some role to play in deciding what these “major questions of national significance” are.

*Chevron* reflects a “neutral principle.” If applied in neutral fashion, it matters not what the prevailing ideology of the Court is. But if the Court is going to be deciding, and deciding *when* to decide, its lights will be the majority’s own views of when an issue is sufficiently important—i.e., a consequence sufficiently awry—to command its attention. Different judges may view different agencies and different issues as ones of national significance. I have discussed today the more conservative Justices’ skepticism of the EPA. If and when the Court has a more liberal majority, such skepticism might be deployed against other agencies, as liberal Justices sometimes did during the Reagan and Bush Administrations.<sup>138</sup> *Chevron* has the salutary effect of muting the Justices’ ideological instincts and preserving the Court’s role as the “least dangerous branch.”<sup>139</sup> But if the Court claims a more muscular role in cases involving agency interpretations, one would easily predict that the majority’s ideological instincts will play a greater role. And, as Justice Jackson wrote, “the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.”<sup>140</sup>

The second, related, concern is predictability. Ideology is not the same as politics. Take Justice Kennedy, a pivotal jurist, even with eight Justices on the Court. Justice Kennedy has not written a significant *Chevron* opinion in a decade, though he did join the Chief’s *City of Arlington* dissent. Moreover, he wrote the recent Fair Housing Act opinion, but—despite the existence of notice-and-comment regulations—said not a word about deference, perhaps because he did not believe any agency deference was warranted in the shadow of constitutional concerns.<sup>141</sup> Because he did not say, however, we can only speculate. Consider that Justice Kennedy joined the more liberal Justices in striking down the Bush EPA in *Massachusetts v. EPA*<sup>142</sup> and the Bush Attorney General in *Gonzalez v. Raich*,<sup>143</sup> but also joined the more conservative Justices in striking down the Obama EPA in *Utility Air Regulatory Group*<sup>144</sup> and *Michigan*,<sup>145</sup> and in granting the stay as to

---

138. *E.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009) (Ginsburg, J., dissenting).

139. THE FEDERALIST NO. 78, at 2 (Alexander Hamilton).

140. JACKSON, *supra* note 74, at 323.

141. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

142. 549 U.S. 497 (2007).

143. 545 U.S. 1 (2005).

144. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

145. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

the Clean Power Plan.<sup>146</sup> Clearly, Justice Kennedy has an instinctive notion of when an agency has gone too far—an instinct untethered to which political party controls the Executive Branch.

As Justice Kennedy's votes reflect, it is not easy to predict when a majority of the current Court will find that an agency has gone too far. One important thing that is lost when the Court is less inclined to defer under *Chevron* is *predictability*. In his solo dissent in *Mead*, Justice Scalia wrote:

The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know *what to expect*): th' ol' 'totality of the circumstances' test.<sup>147</sup>

"What to expect" is just another way of saying predictability. As Fred Schauer wrote almost three decades ago, "The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown."<sup>148</sup> These days, when I advise a client on their chances with the Court, our discussion does not turn as much on the doctrine of *Chevron* as it should. To be sure, predictability is a balancing act; a doctrine that is more predictable may also yield less fair outcomes. But, there is some virtue to predictability, and the Court's recent shift makes prediction more difficult.

Actually, it makes prediction doubly difficult because the Court's shift to explicit *Chevron* skepticism will reverberate in the lower courts. It is often said that the Court plays two connected roles: it decides particular, often very important, cases; and it tells lower courts how to decide the mine run. The Court's longstanding implicit skepticism of *Chevron* has largely affected the former but not the latter. Explicit skepticism, however, is much more likely than implicit skepticism to embolden lower courts to defer less often to agency constructions. Thus, an additional consequence of the emergence of explicit *Chevron* skepticism is the impact of that skepticism on lower courts—an impact that likely exacerbates the predictability costs of eroding *Chevron*.

With Justice Scalia's passing, we're now at an inflection point. Judge Garland's record on *Chevron* looks much more like Justice Scalia's jurisprudence in his early days on the Court than in his latter years. With this vacancy and potentially more in the next President's Term, the Court's *Chevron* jurisprudence could very much swing. With Republican appointees, the Chief Justice could become the new median, and that may

---

146. Order Granting Stay Pending Consideration of Petitions, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016).

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

148. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

give greater force to the “Too Big To Defer” doctrine and his *City of Arlington* dissent. Even with Democratic appointees, Justice Breyer could potentially be the new median vote, with his preference for multi-factor balancing tests.<sup>149</sup> For those banking on predictability, Heaven will have to wait.

Thank you.

---

149. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J.) (*Chevron* deference depends on “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . .”).