

Fall 2016

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Recommended Citation

Jeffrey A. Pojanowski, *Without Deference*, 81 Mo. L. REV. (2016)

Available at: <https://scholarship.law.missouri.edu/mlr/vol81/iss4/12>

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Without Deference

Jeffrey A. Pojanowski*

I. INTRODUCTION

This administrative state is here, and, absent radical and unlikely changes in the scope of federal power, it is not going away. The shape of the administrative state and its distribution of powers, however, may be less inevitable. This Symposium, *A Future Without the Administrative State?*, is therefore wise to consider the more modest question of whether there are reasonable alternatives to the *Chevron* doctrine.

The *Chevron* doctrine requires courts to defer to administrative agencies' reasonable conclusions on questions of law.¹ Even as the case approaches middle age, it remains controversial. Many jurists and scholars see it as a salutary and natural outgrowth of administrative legal doctrine that recognizes the necessity of agencies' technical expertise and political accountability.² On the other hand, those of a more legalist bent – including those who accept, embrace, or reject the current scope of the regulatory state – blanch at the judiciary's abasement at the feet of administrators: Even if a dynamic and complex world requires policymaking more nimble than traditional legislatures can provide, it need not follow that challenging legal questions should go from the courts to administrators.³ The prospect of rejecting *Chevron* is therefore more plausible than abandoning the administrative state as we know it. Accordingly, this contribution to the Symposium explores the implications of the doctrine's abandonment.

* Professor of Law, Notre Dame Law School. I am grateful to Erin Morrow Hawley and the editors of the *Missouri Law Review* for the generous invitation to the Symposium and their hospitality. I am also indebted to Amy Barrett, Aditya Bamzai, Jack Beermann, Ryan Doerfler, Jonah Gelbach, Randy Kozel, Sarah Pojanowski, Adrian Vermuele, and the Symposium participants and audience for the thoughtful questions and comments. This Article also benefited from feedback from workshop participants at George Mason University and the University of Pennsylvania Law Schools. All errors remain mine.

1. See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

2. See, e.g., Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 943–44 (2006) (citing scholars who favor *Chevron* deference because of agency expertise, political accountability, and Congress's implicit delegation of power of interpretation to agencies); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 862 (2001) (“[F]ederal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them.”).

3. See *infra* Part II.

To make the thought experiment most stark in contrast, I will imagine a future in which courts undertake *de novo* review of agency conclusions on questions of law.⁴ To be clear, abandoning *Chevron* is not the same thing as abolishing deference. Deference of a different kind existed before *Chevron*,⁵ and if the Court were to abandon *Chevron* tomorrow, the Court may revert to something like that preexisting, milder form of deference.⁶ Nevertheless, imagining a regime without *any* deference clarifies the stakes of reforming judicial review of agencies' legal conclusions. Thus, for present purposes, and *present purposes only*, I equate abandoning *Chevron* with abandoning judicial deference on agencies' legal interpretations.

I argue that such an alternative regime has appealing features but may not bring as much practical change as casual critiques or defenses of *Chevron* contemplate, at least immediately. The more immediate change would arise at the level of theory and rhetoric, which, in turn, may lead to greater practical changes in the longer run. The theoretical presuppositions underwriting a regime of non-deferential review are far more classical in cast than the moderate legal realism underwriting *Chevron*. Rejecting deference, therefore, would change how courts *talk* about the difference between law and policy in the administrative state. The resurrection of the classical distinction between interpreting and making law might therefore alter the way courts *think* about that relationship. If that is the case, rejecting deference could lead to a more robust judicial role on close questions of interpretation.

Alternatively, some courts may already be quite aggressive on questions of interpretation, usually through a vigorous application of Step One. This is often the case, for example, at the Supreme Court. To the extent this is so, abandoning deference would bring the courts' skeptical rhetoric about the law/policy divide in line with their practice on the ground. This would reveal that interpreters are less skeptical about the line between law and policy than their rhetoric suggests. In short, it would show we are not, in fact, all legal realists now, at least with respect to problems amenable to the lawyers' traditional toolkit. Either way, the more traditional character of the theoretical orientation underwriting the case against deference may also shed light on the rise and (partial) fall of *Chevron* in administrative legal thought.

II. *CHEVRON* DEFERENCE AND ITS DISCONTENTS

Judicial review of agencies' legal conclusions is one of the most vexing questions in administrative law. At the center of that storm is the Supreme

4. It may be that this less-deferential future is impossible, or impossible to sustain. For an argument that the logic of administrative law leads to an eternal return to judicial deference to agencies, see ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016).

5. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

6. For such a proposal, see 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, 845–50 (2010).

Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷ In *Chevron*, the Court offered a now-famous two-step process for reviewing agency conclusions of law.⁸ First, the reviewing court uses the ordinary tools of statutory construction to determine on a *de novo* basis whether Congress has spoken clearly to the question at issue.⁹ If the court finds a clear answer to the question, that interpretation governs, irrespective of the agency's judgment.¹⁰ If, however, the statute is unclear, the reviewing court must defer to an agency's interpretation that is reasonable, even if the court would have arrived at a different interpretation on its own.¹¹

The *Chevron* framework offers numerous puzzles: How clear is "clear" at Step One?¹² What tools of interpretation should a court use to find clarity?¹³ What does it mean for an interpretation to be "reasonable" at Step Two?¹⁴ How many steps does the *Chevron* two-step actually have?¹⁵ To what kinds of legal interpretations does *Chevron* apply?¹⁶ What standard of review applies when *Chevron* is not in play?¹⁷ Should an agency get strong deference when it reverses its interpretation?¹⁸ The Court's subsequent elaborations and applications of the doctrine only add further complexity.¹⁹ Thus,

7. 467 U.S. 837 (1984).

8. *Id.* at 842.

9. *Id.* at 842–43, 843 n.9.

10. *Id.* at 842–43.

11. *Id.* at 843–44.

12. *See, e.g.*, Note, "How Clear is Clear" in *Chevron's Step One?*, 118 HARV. L. REV. 1687 (2005).

13. *Compare, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 105–06 (Stevens, J., concurring) (finding agency's interpretation clearly supported by legislative history), *with id.* at 108 (Scalia, J., dissenting) (withholding *Chevron* deference because the text clearly contradicted the agency's interpretation).

14. *See, e.g.*, Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996) [hereinafter Lawson, *Outcome, Procedure and Process*] (exploring the different ways of understanding reasonableness).

15. *Compare* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009), *with* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009).

16. *See, e.g.*, Merrill & Hickman, *supra* note 2; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter Sunstein, *Chevron Step Zero*].

17. *See* *United States v. Mead Corp.*, 533 U.S. 218, 234–39 (2001) (holding that the less-deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), applies when *Chevron* does not); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that the standard of review in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), applies to agencies' interpretations of their own regulations).

18. *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011) [hereinafter Kozel & Pojanowski, *Administrative Change*] (examining this question).

19. For an argument to this effect, see Lisa Schultz Bressman, *How Mead Has Muddied Judicial Review of Agency Actions*, 58 VAND. L. REV. 1443 (2005). Confu-

Chevron is the case that launched a thousand scholarly ships. Increasingly, however, judges and academics have raised more fundamental questions about whether *Chevron* deference should exist at all.

Skepticism about *Chevron* deference is not new,²⁰ but hostile rumblings from the Supreme Court have grown in the past few Terms. Leading the charge is Justice Clarence Thomas, who last year questioned *Chevron*'s constitutionality.²¹ But he is no lone voice in the wilderness. Chief Justice Roberts voiced discomfort with judicial abnegation to an ever-growing administrative apparatus. Although his complaints about deference running amok went unheeded in *City of Arlington v. FCC*,²² he soon thereafter led a majority in *King v. Burwell* that withheld deference on questions of "deep 'economic and political significance.'"²³ In his final Terms on the Court, Justice Scalia's applications of Step Two could be so aggressive that one suspected his prior ardor for *Chevron* had begun to cool.²⁴ One such opinion, joined by the Chief Justice and Justices Alito, Kennedy, and Thomas, led one scholar to opine that Justice Scalia "may no longer be satisfied by any reasonable agency reading of ambiguous statutory language."²⁵ Finally, Justice Breyer's

sion in the wake of the Court's recent decision in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), is but a recent example. Compare Adrian Vermeule, *Encino is Banal*, YALE J. ON REG.: NOTICE & COMMENT (June 23, 2016), <http://www.yalejreg.com/blog/encino-is-banal-by-adrian-vermeule/>, with Michael Pollack & Daniel Hemel, *Chevron Step 0.5*, YALE J. ON REG.: NOTICE & COMMENT (June 24, 2016), <http://www.yalejreg.com/blog/chevron-step-0-5-by-michael-pollack-and-daniel-hemel>.

20. See generally Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

21. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring). For a recent, fulsome critique of *Chevron* deference by a prominent appellate judge, see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (raising concerns about *Chevron* and suggesting limitations to the doctrine) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

22. 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting).

23. 135 S. Ct. 2480, 2488–89 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

24. See *Michigan*, 135 S. Ct. at 2707–10; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2443–44; see also Michael Herz, *Chevron is Dead, Long Live Chevron*, 115 COLUM. L. REV. 1867, 1869 (2015) (noting Justice Scalia's rhetorical lukewarmness toward *Chevron* in *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring)). Justice Scalia also called on the Court to abandon deference to agency interpretations of their own regulations. See *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring); see also *id.* (Thomas, J., concurring) (asserting that the deference to agency interpretations of regulations raises constitutional concerns); *id.* at 1210–11 (Alito, J., concurring) (raising but not resolving doubts about such deference).

25. Amanda C. Leiter, *Utility Air Regulatory Group v. EPA: A Shot Across the Bow of the Administrative State*, 10 DUKE J. CONST. L. & PUB. POL'Y 59, 79 (2014).

contextual, multifactor approach to *Chevron* in majority opinions like *Barnhart v. Walton*, as well as in separate opinions, suggest a return to deference doctrine in line with the more searching pre-*Chevron* regime.²⁶

Scholarly voices have joined the skeptical chorus as well. Professor Philip Hamburger describes *Chevron* as “notorious” and argues that deference is an “abandonment of judicial office” that unconstitutionally biases adjudication in favor of the government.²⁷ Professor Jack Beermann, who is far less hostile to the regulatory state than Hamburger, has nailed to the door of administrative orthodoxy ten theses in support of overruling *Chevron*.²⁸ Professor Aditya Bamzai offers a new, historically-grounded argument against *Chevron*’s legal foundations.²⁹ And, more modestly, Professor Michael Herz argues that, while the strong form of *Chevron* envisioned by its champions is dead, a kinder, gentler style of *Chevron* reigns supreme.³⁰

Notwithstanding its importance, *Chevron* is unlikely a “super precedent” categorically protected from revision.³¹ Still, it is not easy to count to five votes on the Court for deference skepticism, and it is rash to conclude that a few highly salient opinions capture a deeper trend. The most likely impact of the boomlet of *Chevron* dissensus is the preservation and proliferation of doctrinal safety valves courts can use to domesticate deference. Professor Herz claims, plausibly, that this is precisely where we have arrived.³² But imagining alternative doctrinal futures is one of the tasks and luxuries of scholarship, and this Article asks what administrative law would look like if the courts explicitly disavowed deference to agency interpretations of law. If that vision is both appealing and practically workable, further pressing the envelope against deference seems worthwhile. If the cure is worse than the

26. See 535 U.S. 212, 217–20 (2002); *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring) (stating that “ambiguity is a sign – but not always a conclusive sign – that Congress intends” deference).

27. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 46, 316 (2014) [hereinafter HAMBURGER, UNLAWFUL]; Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1249 (2016) [hereinafter Hamburger, *Chevron Bias*].

28. See Beermann, *supra* note 6, at 782–83 (“*Chevron* should be overruled for the following overlapping sets of [ten] reasons: . . .”).

29. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2649445; see also Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1065 (2016) (arguing that “*Marbury* does involve a form of ‘deference’ to executive interpretation of statutory text, but the executive interpretation mattered because it was evidence of a customary practice under the statutory scheme”).

30. See generally Herz, *supra* note 24.

31. See Beermann, *supra* note 6, at 841–43 (arguing that overruling *Chevron* satisfies the criteria for departing from *stare decisis*). But see Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1325 (2008) (stating that “the decision’s pluralist vision sets it apart as a distinctly postmodern super-precedent”).

32. See Herz, *supra* note 24, at 1870.

disease, however, perhaps, in the words of Professor Gary Lawson, we “should just shut up about *Chevron*.”³³

III. CONTINUITY

Before discussing what about administrative law would change should the Court trade *Chevron* deference for *de novo* review of legal questions, we should first identify what would likely stay the same. Abandoning *Chevron* may not, in fact, change the frequency and extent of judicial deference as much as *Chevron*'s critics hope or its supporters fear.

First, and most obviously, review of legal interpretations that are not eligible for *Chevron* deference today would remain the same. Whether it is because the agency does not administer the statute in question or because its interpretation fails to get deference under *Mead*'s multifactor test, many agency interpretations of statutes already receive *de novo* or less deferential review under *Skidmore*'s standard.³⁴

Second, and more importantly, the impact of abandoning *Chevron* depends on how rigorously courts apply Step One today. Often, courts will use all the usual interpretive tools at their disposal and consider not only the provision at issue, but also the broader text and structure of the act and perhaps even other related or similar legislation.³⁵ Once a judge completes such a searching review and reaches a firm conclusion that one interpretation is stronger than other plausible ones, it may be hard to walk back and defer to an agency reading that is colorable but not “the best.” Indeed, interpretations that first appeared plausible may come to seem deeply flawed after a thoroughgoing inquiry. At that point, deference kicks in only when the judge is nearly at a loss about which of the competing interpretations is best. Practically, if not theoretically, such a rigorous inquiry would make *Chevron* “a doctrine of desperation,” in the words of Justice Scalia.³⁶

Of course Justice Scalia, while a tireless advocate for the broad application of *Chevron* doctrine, would be rigorous in his review of agency interpretations.³⁷ This is not paradoxical, as he himself once explained. When one,

33. Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1384 (1997) [hereinafter Lawson, *Reconceptualizing Chevron and Discretion*].

34. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (laying out the multifactor test).

35. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act, 21 U.S.C.A. §§ 387–387u (West 2016).

36. *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring).

37. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707–10 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442–44 (2014); *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 109–12 (2007) (Scalia, J., dissenting); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1015–20 (2005) (Scalia,

like Justice Scalia, is more likely to find “that the meaning of a statute is apparent from its text and from its relationship with other laws,” that interpreter “thereby finds less often that the triggering requirement for *Chevron* deference exists.”³⁸ If standard deference practice within *Chevron*’s domain is closer to Justice Scalia’s approach, the set of cases that would come out differently after *Chevron* shrinks accordingly.

The strength of Step One, and its consequent effect on the stakes of a deference regime, is an empirical question and one that might be impossible to answer with certainty. Recent research by Professors Kent Barnett and Christopher Walker indicates that the courts of appeals are more deferential than the Supreme Court.³⁹ If so, a Supreme Court instruction to abandon deference could have a significant impact at the court of appeals level. In fact, the impression that abandoning *Chevron* would make little difference might be a product of excessive focus on the Supreme Court’s practice. The courts of appeals, by contrast, may not have the institutional capacity or interest in following an instruction to abandon deference. Lacking the Supreme Court’s luxurious docket, staffing, and sense of interpretive confidence, informal deference would be more likely to sneak in at the courts of appeals, at least in close or complicated cases. This does not mean interpretive regime change would have no effect at the courts of appeals; a panel with the taste and time for rigorous review could do so in the open and with the encouragement of blackletter doctrine. Whether for theoretical or practical reasons, however, there are reasons to believe that abandoning *Chevron* may have a smaller impact than a textbook acquaintance with the doctrine suggests.

IV. PRACTICAL CHANGES

Irrespective of the intensity with which courts assess the reasonableness of agency interpretations, jettisoning *Chevron* would simplify litigation. The import of one certain, new complication – disuniformity in regulatory regimes – would depend on how rigorous courts are today in applying *Chevron*.

First, the simplifications. By abandoning deference, the Court would eliminate a wide swath of satellite litigation *Chevron* spawns in its current form – and the closer the Court moves to *de novo* review of legal questions, the more collateral questions it sloughs off. Foremost, there would be no disputation about whether *Chevron* applies. Byzantine “Step Zero” disputes about whether the agency action had the requisite level of formality – whether it was reasonable to infer a delegation of lawmaking authority with respect to

J., dissenting). For a thoughtful exploration of what deference doctrine may look like after Justice Scalia’s passing, see Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1097 (2016).

38. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (emphasis omitted).

39. See generally Kent Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848.

a particular provision of a statute and the like – would simply disappear.⁴⁰ (Of course, a universal application of deference would also simplify matters just as much.)

Similarly, abolishing deference would erase complications about the doctrine in *Brand X*, which holds that an agency interpretation of a statute trumps a preexisting judicial interpretation, unless the preexisting judicial decision found the statute to be clear.⁴¹ No longer would courts have to inquire whether a previous judicial interpretation – including pre-*Chevron* interpretations – concluded that its reading was the *only* permissible interpretation or merely the *best* among plausible options.⁴² Also gone would be the most recent complexity piled atop *Brand X*, which now requires reviewing courts *also* to decide whether that previous, contrary judicial opinion reached a Step-Zero-style conclusion that Congress had “delegated gap-filling power to the agency.”⁴³

Abandoning *Chevron* might also purge collateral Step One litigation. Courts and litigants would not have to address whether the set of interpretive tools at Step One is coextensive with the tools courts use in *de novo* review, or whether certain interpretive sources, canons, or methods should be jettisoned in that posture. The closer courts move to *de novo* review, the less pressure on lurking questions about how hard courts ought to work before deciding whether a statute is clear. Should Step One be “hard” in that courts exert full effort to decide the question on their own before concluding the statute, in fact, is unclear? Under such an approach, a court can resolve a complex question of statutory interpretation for itself if it is certain the sources point strongly toward one answer.⁴⁴ On the other hand, a “soft” Step One would withhold deference only if the statutory provision at issue were obviously clear.⁴⁵ As Lawson has explained, “[C]ourts seem blissfully unaware that there are [these] different conceptions of the nature of [S]tep [O]ne from which they logically must be choosing.”⁴⁶ In a world without *Chevron*,

40. See Beermann, *supra* note 6, at 823–29.

41. *Brand X Internet Servs.*, 545 U.S. at 984.

42. See *id.* at 1018 (Scalia, J., dissenting).

43. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1844 (2012).

44. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act, 21 U.S.C.A. §§ 387–387u (West 2016); *Pauley v. Bethenergy Mines*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) (no deference when the “disputed regulatory language is complex, but it is not ambiguous”).

45. See *Pauley*, 501 U.S. at 697 (deference appropriate when legislation “has produced a complex and highly technical regulatory program”); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 43 (1990) (White, J., dissenting) (“The Court’s opinion today requires more than 10 pages, including a review of numerous statutory provisions and legislative history, to conclude that the [Act] is clear and unambiguous . . .”).

46. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 672 (7th ed. 2016).

we would just have our usual disputes about what a statute means, not the meta-debate about what it means to decide whether the statute really, really means something.

The common theme here is that second-order debates about statutory interpretation and implied delegation⁴⁷ would disappear from administrative law litigation. These meta-questions *Chevron* tees up are among the most confounding for courts and litigators. They are also the most fascinating for administrative law scholars who, like myself, swarm to such abstract, intricate puzzles like bees to honey – or moths to a flame.⁴⁸ My research agenda notwithstanding, dissolving those problems surely goes on the positive side of the ledger.

But abolishing *Chevron* deference could also lead to complications. One most commonly mentioned in administrative law scholarship is a potential decrease in uniform administration of statutes across the country. Regulatory uniformity is one of *Chevron* deference's most celebrated benefits and justifications.⁴⁹ With deference, the EPA can decide what the Clean Air Act means in all fifty states. Without it, critical provisions can mean different things in states covered by, say, the Ninth and Fifth Circuits. Absent Supreme Court intervention, the argument goes, regulatory chaos would reign.⁵⁰ Yet such intervention would be unlikely, with the Supreme Court taking fewer cases every year.⁵¹ Given the contentious nature of statutory interpretation debates and the complexity of regulatory statutes, non-deferential courts would be more likely to confound the smooth administration of regulatory regimes. That said, this oft-voiced worry may be overblown. It is unlikely that more than two or three contested interpretations of any given statutory provision would arise in the courts of appeals. Even without Supreme Court intervention, the challenges agencies and regulated parties would face are not much different than those that parties already confront when they operate in multiple jurisdictions in the United States or around the globe. To note legal pluralism's costs is not the same as establishing that they are prohibitive.

47. This in itself implicates a different (third-order?) question of statutory interpretation under the shadow of constitutional law concerns about separation of powers.

48. See, e.g., Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799 (2010).

49. See, e.g., Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118–21 (1987) (the *Chevron* rule “enhances the probability of uniform national administration of the laws”).

50. On the other hand, as currently understood, *Chevron* can increase legal inconsistency over time. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (stating that “[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework”).

51. See generally, Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221 (2016) (discussing the small number of cases the Supreme Court accepts for review).

The extent of additional disuniformity we would purchase by abandoning *Chevron* depends, again, on how much courts actually defer today. If courts often approach statutes with an aggressive Step One, the disuniformity we fear in theory is already here in practice. People may also differ on whether this disuniformity is a feature or a bug. This uniformity question sheds light on whether *Chevron* deference has a regulatory or deregulatory bias.⁵² On its face, *Chevron* is neutral on this question, since an administration can receive just as much deference while dismantling a regulatory regime as when constructing one. But to the extent deference increases uniformity, one sees a slight pro-regulatory valence in the doctrine. Conflicting interpretations of organic statutes are sand in the gears of an expanding and smoothly functioning regulatory regime. Irregularity frustrates the aspirations of central planners and the important repeat players in the regulatory community who influence them. A deregulatory regime, by contrast, acts less and therefore does not have to defend its interpretations as often, particularly if it simply ceases to enforce regulatory mandates. Notwithstanding cases like *Massachusetts v. EPA*,⁵³ reviewability doctrines often insulate agency inaction from judicial review.⁵⁴ Accordingly, decentralizing and deregulatory regimes are less likely to find themselves called to account for their interpretations than those that seek to expand the federal government's reach.

In this respect, undoing deference may do more than create the small-c conservative effect of slowing down centralized change in either a pro- or deregulatory direction. It may also have the large-c conservative effect of resisting centralization of power in the hands of a rationalized, imperial bureaucracy. Little surprise, then, that those who cheer federalism as a check on national government are often the same people who would fret little over an interpretive regime that gums up that national government's administrative apparatus. Now, it is not obvious that anyone should cheer for an interpretive patchwork. For all we know, a misfiring, partially effective centralized bureaucracy, supplemented by judicial decision-making, may be the worst of all possible worlds. Nevertheless, the prospect that abandoning interpretive def-

52. This question is different than Hamburger's charge that *Chevron* systematically biases adjudication in favor of agencies. See Hamburger, *Chevron Bias*, *supra* note 27, at 1211–13.

53. 549 U.S. 497 (2007) (forcing the EPA to decide whether to regulate greenhouse cases as pollutants under the Clean Air Act).

54. See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (stating that denial of administrative enforcement is presumptively non-reviewable); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011) (stating that review for denial of petitions for rulemaking is very deferential). The elephant in the room here is review of the Obama Administration's decision to "defer prosecution" with respect to categories of non-documented immigrants. See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). Ironically, had the Obama Administration won in *Texas*, that victory could have given subsequent administrations wider latitude to unravel congressionally mandated regulatory schemes favored by Obama's political allies.

erence would hamstring the rise of the administrative state is less likely to worry recent *Chevron* critics on the political right. If you cannot “starve the beast,” you can at least make it run uphill.⁵⁵

V. DISAGGREGATING STEP TWO – AND “INTERPRETATION”

The biggest change that would come from abandoning *Chevron*, by definition, pertains to cases that proceed beyond Step One. Some of those cases would turn out the same irrespective of *Chevron* deference, on the grounds that the agency would lose at Step Two. Although there has been a slight uptick in Step Two reversals at the Supreme Court,⁵⁶ agencies usually win at that stage, so it pays to ask how abandoning *Chevron* would affect those cases. Answering that question requires disaggregating Step Two questions in a way that *Chevron* rejects, namely by distinguishing questions of law and policy. The re-entrenchment of this distinction would be the largest theoretical change in judicial review of administrative action, but its immediate practical effects are unclear. Either way, abandoning *Chevron* would dissolve longstanding questions about Step Two.

To say *Chevron*’s Step Two is undertheorized slights excellent work about the question.⁵⁷ Yet important questions remain open, particularly regarding the relationship between Step Two and arbitrary-and-capricious review. Part of *Chevron*’s justification is that resolving statutory uncertainty implicates policy choices.⁵⁸ Because agencies are comparatively more expert and politically accountable than courts, the argument goes, courts should allow agencies to select among the reasonable interpretations.⁵⁹ At the same time, the standard for judicial review of agency policymaking is the arbitrary-

55. See Bruce Bartlett, “Starve the Beast”: *Origins and Development of a Budgetary Metaphor*, 12 INDEP. REV. 5 (2007).

56. See, e.g., *Massachusetts*, 549 U.S. at 532–35. Justice Scalia’s aggressive review of the EPA’s interpretation in *UARG v. EPA* avoids the two-step framework, simply finding the agency’s interpretation unreasonable. See Richard M. Re, *What Happened to Chevron Step One?*, RE’S JUDICATA (June 23, 2014, 11:21 PM), <https://richardresjudicata.wordpress.com/2014/06/23/what-happened-to-chevron-step-one> (describing *UARG*’s elision of the two-step framework). For present purposes, *UARG*’s holding is akin to a Step Two rejection of the agency’s interpretation.

57. See Lawson, *Reconceptualizing Chevron and Discretion*, *supra* note 33; Lawson, *Outcome, Procedure and Process*, *supra* note 14; Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605 (2014); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretation of Statutes*, 73 TEX. L. REV. 83 (1994).

58. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“When a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency’s policy . . . the challenge must fail.”).

59. See *id.*; Criddle, *supra* note 31, at 1286 (“Administrative agencies’ superior experience and expertise in particular regulatory fields offers a . . . justification for *Chevron* deference.”).

and-capricious review the Court adopted in *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*⁶⁰ Under this standard, courts consider the adequacy and rationality of the agency's decision-making process, not just the reasonableness of its policy choice.⁶¹

Chevron concerns statutory interpretation, and *State Farm* concerns agency policymaking, but respect for agency policymaking justifies *Chevron* deference toward agency interpretations.⁶² Unsurprisingly, then, courts discuss the "overlap" between the two standards of review.⁶³ For this reason, commentators have argued that an agency at *Chevron* Step Two should have to do more than pick among the menu of reasonable interpretative choices.⁶⁴ Just as in arbitrary-and-capricious review, an agency must also give a reason connecting its chosen interpretation with the statute's underlying purposes and policies.⁶⁵ Under traditional *Chevron* theory, this makes sense – deference to politically accountable experts loses its luster if agencies choose between reasonable interpretations by throwing darts or awarding the highest bidder. Given general disagreement about what counts as a good statutory argument, however, superimposing a reasoned decision-making requirement on Step Two may be a recipe for further confusion.⁶⁶

Getting rid of *Chevron*, however, would pull apart the overlap between review of interpretation and policymaking. We can think of two (arguably) different types of questions covered by Step Two under current doctrine. First, there are questions of statutory interpretation that, from the perspective of traditional lawyerly argument, are unclear: arguments from statutory text, structure, interpretive canons, background purpose, legislative history, and the like have purchase on the interpretive question but do not clearly point in one direction. Multiple conclusions based on these arguments are reasonable, even if a given interpreter thinks one is stronger than the other. Second, there are questions where standard lawyerly argument does not get you far, if anywhere at all. Think of the statute in *State Farm*, which instructed regulators to adopt safety standards that are "reasonable, practicable and appropriate."⁶⁷

60. 463 U.S. 29, 34 (1983).

61. *See id.* at 41–43 (laying out criteria).

62. *Compare Chevron*, 467 U.S. at 840, with *id.* at 41–43.

63. *See, e.g., Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) ("We recognize that, in some respects, *Chevron* review and arbitrary and capricious review overlap at the margins.").

64. *See generally* Seidenfeld, *supra* note 57; Levin, *supra* note 57.

65. *See* Seidenfeld, *supra* note 57, at 129.

66. *See* Lawson, *Reconceptualizing Chevron and Discretion*, *supra* note 33, at 1384 ("Perhaps it would be good for the legal system to bring these issues out into the open. Maybe we need some explicit judicial articulation of the rules of evidence for proving statutory meaning. Then again, considering the likely outcome of such a process, maybe the whole matter is best left buried, and . . . I should just shut up about *Chevron*.").

67. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., Co.*, 463 U.S. 29, 33 (1983) (quoting 15 U.S.C. § 1392(f)(3) (repealed 1994)).

Identifying and applying those legal standards will turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities and likely outcomes.

In part because *Chevron* elides law and policy,⁶⁸ these two kinds of questions often march together under the banner of “interpretation” in administrative law.⁶⁹ Abolishing *Chevron* would reestablish and put pressure on this distinction. Courts would independently resolve the first type of “interpretive” questions by deciding which of the plausible options was strongest on the legal merits, just like they do in other kinds of traditional hard cases.⁷⁰ The second type of “interpretive” questions would (rightly) no longer be interpretive at all – courts would treat them as questions of policy judgment subject to standard arbitrary-and-capricious review.

Recognizing this distinction in practice would not be as jarring for courts as the *Chevron* literature suggests. Reviewing courts continue to apply something like the distinction outside of *Chevron*. Take the tests appellate courts use to identify whether an agency’s interpretive rule is an invalidly promulgated substantive legislative rule. Like a disaggregated Step Two, that distinction “turns on how tightly the agency’s interpretation is drawn linguistically from the actual language of the statute.”⁷¹ If there is too large a linguistic leap from the “interpreted” text to the rule itself, a reviewing court

68. See Laurence H. Silberman, *Chevron – The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (stating that the choice between “two or more plausible interpretations . . . implicates and sometimes squarely involves policymaking”).

69. See Kozel & Pojanowski, *Administrative Change*, *supra* note 18, at 141–43 (identifying this distinction as one between “expository reasoning” and “prescriptive reasoning,” respectively).

70. To be sure, some informal type of deference would creep in, as a court would likely give weight to considered judgment of an agency with long experience and close involvement with the statute. The agency here would be a persuasive, epistemic authority – an optional source of good advice. Under *Chevron*, however, the agency has *legal* authority over uncertain questions of interpretation: their opinions become law simply because they say so, not because the court perceives them as one (of perhaps many) sources of insight. See *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

71. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (quoting *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997), *abrogated on other grounds by Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015)); see also *Paralyzed Veterans*, 117 F.3d at 588 (“If the statute or rule to be interpreted is itself very general, using terms like ‘equitable’ or ‘fair,’ and the ‘interpretation’ really provides all the guidance, then the latter will more likely be a substantive regulation.”); *Hocort v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (distinguishing between “what might be called normal or routine interpretation” and making “rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation”).

will find that the agency *made* law rather than interpreted it.⁷² Administrative law also recognizes a similar distinction when separating interpretive rules from policy statements, which are non-binding announcements about how the agency will exercise its enforcement discretion.⁷³ This distinction between interpretation and policymaking is not always crisp, and courts applying it in the context of interpretive rules often note underlying tension with *Chevron's* collapse of these categories.⁷⁴ Abandoning *Chevron*, then, would expand the domain of questions where courts have to patrol this line.

The extent to which abolishing *Chevron* would change judicial review therefore depends on how many Step Two cases are closer to (truly) interpretive questions. If courts take a soft approach to *Chevron* and defer at early signs of complexity, the universe of actual interpretive questions beyond Step One expands, as does the impact of abandoning *Chevron*. But if, as noted above, courts are often aggressive in using the traditional tools of statutory interpretation at Step One, there will be few cases in which courts cede core lawyers' disputes to the agencies. In fact, the high win rate for agencies at Step Two is consistent with a strong Step One today.⁷⁵ If courts leave interpretive questions to agencies only when the law is truly silent – as opposed to contested – a Step Two victory is practically baked in once we get beyond Step One. Accordingly, we should not be surprised to see those courts checking the Step Two box and swiftly moving on to arbitrary-and-capricious analysis, since such cases are really about reasonable policymaking, not reasoned legal interpretation.⁷⁶

72. See, e.g., *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 496 (D.C. Cir. 2010) (“[T]here is no way an interpretation of ‘reasonable costs’ can produce the sort of detailed – and rigid – investment code set forth in § 2162.2.A.4.”); see generally *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (1993) (providing test for identifying cases where agency action entails lawmaking rather than interpretation).

73. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1326–27 (1992) (“If the document goes beyond a fair interpretation of existing legislation, it is not an interpretive rule. Because it was not promulgated legislatively, it cannot be a legislative rule; it therefore is a policy statement.”).

74. See *Catholic Health Initiatives*, 617 F.3d at 494 n.4 (noting that the EPA regulations at issue in *Chevron* “interpreted the term ‘stationary source’ in the Clean Air Act (and did a good deal more)”).

75. Cf. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 838 n.26 (2006) (“More than 90 percent of invalidations under *Chevron* occurred under Step One.”). I say only “consistent” because parties are also less likely to challenge plainly reasonable agency interpretations of unclear statutes. Cf. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (arguing that it is error to assume litigated cases are representative of disputes settled before litigation).

76. Cf. *Michigan v. EPA*, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring) (“In reality[,] . . . agencies ‘interpreting’ ambiguous statutes typically are not engaged in acts of interpretation at all.”); Lawson, *Reconceptualizing Chevron and*

To continue the theme identified in Part IV, abolishing *Chevron* might take relatively few statutory interpretations away from agencies, at least judged by a baseline of aggressive statutory interpretation by courts. Again, a world without *Chevron* could look a lot like *Chevron* as applied by Justice Scalia, who often took away at Step One (or Two) what he gave to the doctrine at Step Zero.⁷⁷ The segment of Step Two cases that are policy questions cloaked in interpretive garb would go to *State Farm* analysis as they usually do anyway, but without a *pro forma* run through the interpretive wringer. In this light, dissolving confusion about Step Two without an appreciable difference in outcomes may be another benefit of abandoning *Chevron*. Those whose skepticism of *Chevron* is rooted in distrust of administrative power and not Ockham's razor might be disappointed in the muted practical effects of this doctrinal change.⁷⁸ Yet the practical alignment of a post-*Chevron* universe with our own would reflect the extent to which courts are *already* exercising their judicial duty to say what the law is.⁷⁹

Whatever the practical effects, this expanded judicial role would be a significant change at the level of administrative legal theory, where the received wisdom rejects that interpretation/policymaking distinction as incoherent or at least judicially unmanageable.⁸⁰ It would be a triumph of classical, pre-legal realist thought that, while aware of the blurriness in the lines

Discretion, *supra* note 33, at 1382 (arguing that “step two and traditional arbitrary or capricious review therefore merge only when there is a ‘false *Chevron*’ issue: that is, where at first glance the statute seems to say something meaningful about the problem, but on further inquiry, the problem turns out to be one of pure policymaking”).

77. See Miles & Sunstein, *supra* note 75, at 826 (finding that “Justice Scalia, the Court’s most vocal *Chevron* enthusiast, is the least deferential”).

78. A more aggressive approach would strike down on nondelegation grounds statutory provisions that give little more than vague standards for administrative discretion. See *Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) (arguing that giving “‘force of law’ to agency pronouncements on matters . . . as to which ‘Congress did not actually have an intent,’ . . . permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power” (quoting *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1251–52 (2015) (Thomas, J., concurring))); *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 676, 686 (1980) (Rehnquist, J., concurring) (finding a “standardless delegation” unconstitutional).

79. And not merely in the attenuated sense that the law says Congress “intends” courts to defer to agencies. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (offering this thinner legalist justification for deference).

80. See, e.g., Silberman, *supra* note 68, at 823 (*Chevron* is premised on the collapse of the distinction); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (arguing that *Chevron*, like *Erie Railroad Co. v. Tompkins*, represents “an institutional shift in interpretive power brought about by a realistic understanding of what interpretation involves”); cf. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 924 (2004) (“In view of the intellectual developments associated with [*Chevron*], . . . the present framework for distinguishing interpretative from legislative rules reduces to an unmanageable question of degree.”).

between making, executing, and interpreting law, nevertheless insists that the division of these activities was coherent in theory and estimable in practice. The great administrative legal theorist John Dickinson would concur with Hamburger that today's calls for *de novo* review of agency decisions echoes Lord Coke's bid to place the Crown under the supremacy of law.⁸¹ Dickinson also argued, however, that this doctrine of the supremacy of law relies on notions of legal custom, reason, and even "the transcendental" that can appear "foreign" to today's more realist and functionalist patterns of legal thought.⁸² It is therefore no wonder that Hamburger, one of today's leading critics of administrative power, also wrote an extended historical meditation on judicial duty, one which excludes the will from legal judgment and "segregate[s] judicial duty from lawmaking power."⁸³

Relatedly, and more speculatively, patrolling the distinction between interpretation and policymaking may presuppose and further bolster more formal approaches to legal interpretation. The more dynamic and pragmatic one's approach to statutory interpretation, the more interpretive problems resemble the policy questions a post-*Chevron* framework would steer toward arbitrary-and-capricious review. Put another way, the distinction between interpretation and policymaking presupposes substantial autonomy of legal text and method from policy choices. This premise may be correct, but it is certainly not neutral in its understanding of what legal interpretation is. In this respect, as in many others, Professor Thomas Merrill was prescient in identifying a tension between sophisticated textualism and meaningful *Chevron* deference.⁸⁴

VI. CONCLUSION

The Court is unlikely to overrule *Chevron*, at least directly.⁸⁵ One lesson of this thought experiment, however, is that the practical stakes for abandoning *Chevron* may not be as high as advertised. The combination of aggressive Steps Zero and One, as well as the growing recognition that many

81. See JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 75, 76–104 (1927) (tracing the English historical roots of "the demand that the determination of rights should in the last analysis be a matter for the courts").

82. *Id.* at 84; see also *id.* at 84 n.23 (quoting Justice Holmes's skepticism of law as "brooding omnipresence in the sky" in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917)).

83. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 609 (2008).

84. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

85. The Supreme Court's recent refusal to consider the even-more-beleaguered doctrine of *Auer* deference to agencies' interpretation of their own regulations might further indicate that reconsideration of *Chevron* is quite unlikely. See *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607 (2016) (Thomas, J., dissenting from the denial of certiorari).

Step Two cases are not *really* about interpretation, suggest that the challenge *Chevron* presents to the judiciary's power to say what the law is *today* is not as woeful as the doctrine's detractors imagine. Nor is *Chevron*, so domesticated, as revolutionary as some of its champions hope. The shift from deference to *de novo* may be a marginal one measured against the actual amount of interpretive deference occurring today.

That does not mean the question of abandoning *Chevron* is idle. Most of the withheld deference that critics hope for and that champions bemoan comes with the cost of confusing and time-consuming satellite litigation about *Chevron*'s domain, structure, and strength.⁸⁶ Even if the current regime gets us roughly the right amount of (non-)deference, going straight to *de novo* review sheds this doctrinal deadweight loss. Furthermore, even if (and it is a big "if") courts are already blunting *Chevron*'s force through domesticating doctrine, there is no guarantee that it will always stay that way. So much of the domestication comes from practices that are rarely litigated or even litigate-able, such as the intensity of Step One review.⁸⁷ Accordingly, the *Chevron* law on the ground could shift underneath our feet toward deference with hardly a judicial pronouncement. An explicit judicial embrace of *de novo* review on questions of law might be a brace against such tectonic realignment.

Other potential changes illuminate the politics of administrative law. Much of the recent criticism of *Chevron* deference comes from the jurisprudential "right," for lack of a better term.⁸⁸ One easy explanation for this development could be conservative frustration with eight years of a Democratic administration, contrasted with enthusiasm for the doctrine at its outset in the Reagan years.⁸⁹ A more complete explanation, however, looks deeper. As

86. See Beermann, *supra* note 6, at 785 (finding "cases may become more complicated to litigate and decide. This would lead to increased costs and might give some litigants more hope of prevailing than they might otherwise have had, which would encourage litigation").

87. Courts often also ignore Step Zero questions. See, e.g., Sunstein, *Chevron Step Zero*, *supra* note 16, at 208 (claiming that various courts have failed to give consideration to Step Zero). Consider the Court's opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, which affirmed an agency's claim that the Fair Housing Act allows disparate-impact claims. 135 S. Ct. 2507, 2525–26 (2015). The Court did not rely on *Chevron*, even though that framework had been used previously. Compare *id.*, with *Meyer v. Holley*, 537 U.S. 280, 287–88 (2013) ("[T]he Department of Housing and Urban Development . . . has specified that ordinary vicarious liability rules apply in this area. And we ordinarily defer to an administering agency's reasonable interpretation of a statute."). Neither dissent mentioned *Chevron*. See *Tex. Dep't of Housing & Cmty. Affairs*, 135 S. Ct. at 2526–2551.

88. See Miles & Sunstein, *supra* note 75, at 823 ("On the Supreme Court, conservative justices vote to validate agency decisions less often than liberal justices.").

89. And, in turn, one could point out that early resistance to *Chevron* did not come from the right, while some of its most strident defenders today support the current administration's regulatory agenda. See *id.* ("[T]he most conservative members

discussed above, abandoning deference may interrupt the smooth working of the administrative state by introducing conflicting interpretations of regulatory statutes. Further, interpretation after *Chevron* points toward a classical vision of the separation of powers, the autonomy of legal reasoning, and a more formalist approach to reading law.⁹⁰ These concomitant pressures toward decentralized, checked government – paired with an understanding of judicial role that is craft-oriented, restrained, and yet non-delegable – resound with a classical conservative vision that champions locally ordered liberty and fears a homogenizing, leveling bureaucracy. Whether in the form offered by James Madison, Edmund Burke, Russell Kirk, or even Friedrich Hayek, such a vision of law and the state confounds at nearly every point the plans of New Deal architects like James Landis.⁹¹

This relationship between conservative political thought and *Chevron* skepticism also helps explain defenses of deference by thinkers associated with the jurisprudential right. Although classical common lawyers and contemporary thinkers like Hamburger may see wisdom, reason, and workable determinacy in the exercise of the judicial duty, other conservatives see uncertainty that opens the way to inept governance or judicial usurpation of politics.⁹² In fact, textualism rose among legal conservatives in part from doubt about the autonomy, knowability, and determinacy of law in challenging cases – a moderate legal realist skepticism reinforced by the disenchant-

of the Supreme Court show significantly increased validation of agency interpretations after President Bush succeeded President Clinton, and the least conservative members of the court show significantly decreased validation rates in the same period. In a similar vein, the most conservative members of the Court are less likely to validate liberal agency interpretations than conservative ones, and the least conservative members of the Court show the opposite pattern.”).

90. One could argue that deference is consistent with the court’s duty to say what the law is if the law, in fact, tells the judge to defer. See Monaghan, *supra* note 79, at 27–28. On my dissatisfaction with that (ingenious) explanation, see Jeffrey Pojanowski, *A Socratic Dialogue Inspired by “Marbury and the Administrative State,”* YALE J. ON REG.: NOTICE & COMMENT (May 26, 2016), <http://www.yalejreg.com/blog/a-socratic-dialogue-inspired-by-marbury-and-the-administrative-state-by>.

91. Compare THE FEDERALIST NO. 51 (James Madison); Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 390 (2007) (“Burke believed in what eighteenth century British statesmen called ‘mixed government’ and we today call ‘separation of powers.’ Thus, Burke . . . opposed too much power residing in one branch of government . . .”), with JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938) (“The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance.”).

92. Compare, e.g., HAMBURGER, UNLAWFUL, *supra* note 27, with ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

ing teachings of public choice theory.⁹³ For Professor Hamburger, Coke; for Professor Manning, Radin.⁹⁴ Legal conservatism is a They, not an It.⁹⁵

In this respect, the late Justice Scalia is a central figure who contains multitudes.⁹⁶ In embracing the skeptical case for textualism, he helped underwrite the argument for deference to politically accountable policymakers in hard cases.⁹⁷ In his confidence that the law's artificial reason would in fact be a true guide in many challenging cases, he acted in defiance of the nostrum that hard cases turn on politics.⁹⁸ He left with his deference jurisprudence in suspension, and the question remains whether – or how – the Court will resolve the chord.

93. See John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1290–98 (2010) (describing the relationship between public-choice theory and the rise of textualism).

94. See HAMBURGER, UNLAWFUL, *supra* note 27; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 n.81 (2004) (tracing textualists' skepticism about legislative intent back to legal realist thinker Max Radin). For a critique of the turn to classicism in administrative law, see Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41.

95. Cf. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECONS. 239 (1992).

96. See WALT WHITMAN, *SONG OF MYSELF* (1892) ("I am large, I contain multitudes.").

97. See, e.g., Scalia, *supra* note 38, at 521 ("I tend to think, however, that in the long run *Chevron* will endure and be given its full scope . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

98. Justice Scalia's account of adjudication in other contexts is emblematic of his ambivalence. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it – discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.") (emphasis omitted).

