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GORSUCH V. THE ADMINISTRATIVE STATE

Heather Elliott

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GORSUCH V. THE ADMINISTRATIVE STATE

Heather Elliott*

Perhaps nowhere does Justice Gorsuch depart as far from Justice Scalia as in the context of administrative law.

Justice Scalia generally supported the administrative state. While no fan of regulation, he deferred to agency decision-making, believing that Chevron implemented the Founders' intention that the Executive, not the courts, reasonably resolve statutory ambiguities. He wrote Auer, which commands deference to agency interpretations of their own regulations (though late in his career he would argue for abandoning Auer). He wrote City of Arlington, which requires courts to defer under Chevron even when an agency interprets the boundaries of its own jurisdiction—a context in which we might expect courts to rein in agency overreaching. And he wrote Whitman v. American Trucking, which interred a late-twentieth century effort to revive the Lochner era's nondelegation doctrine.

Justice Gorsuch, by contrast, presents himself as a foe of the administrative state. While on the Tenth Circuit, he argued against Chevron and intimated that he would overrule it if he could. He endorsed strengthening the nondelegation doctrine and has even questioned the constitutionality of agencies altogether. Gorsuch undoubtedly agrees with Scalia's late rejection of Auer. And Gorsuch rejects Brand X, which requires deference to an agency's interpretation of an ambiguous statute even when a court has already adopted a different interpretation. Here Gorsuch and Scalia agree, both finding it unconstitutional for a judicial decision to be "subject to revision by a politically accountable branch of government."

What consequences will Justice Gorsuch's views have? Justices Thomas and Alito undoubtedly share his suspicions of the administrative state, and Justice Kavanaugh reportedly does as well. That's four votes for major change in administrative law doctrine.

INTRODUCTION

At his confirmation hearing to fill Justice Antonin Scalia's seat on the Supreme Court of the United States, then-Judge Neil Gorsuch described Scalia as a "legal hero[]" and a "mentor."¹ He also said that he and Justice Scalia "did not agree on everything": he specifically mentioned fly-fishing technique.² But

* Alumni, Class of '36 Professor of Law, Hugh F. Culverhouse Jr. School of Law at the University of Alabama. A small portion of the analysis in this Essay also appears in Heather Elliott, *Justice Gorsuch's Would-Be War on Chevron*, 21 GREEN BAG 2D 315 (2018). I thank the *Alabama Law Review* for the opportunity to participate in this Symposium, Kristin Hickman and Hillel Levin for helpful comments on the talk on which this Essay is based, and Stuart Rachels for eagle-eyed review of an earlier draft. Jason Connell provided helpful research assistance.

1. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 65 (2017) (statement of Judge Neil M. Gorsuch).

2. *Id.*

Justice Scalia and now-Justice Gorsuch disagree about more: they disagree profoundly about the administrative state.

Justice Scalia spent much of his pre-judicial career in the Executive Branch³ and served as a judge on the United States Court of Appeals for the District of Columbia Circuit,⁴ the dominant court in administrative law.⁵ When testifying at his Senate confirmation hearing for the Supreme Court, Scalia emphasized that courts should defer to administrative agencies, which are the agents of Congress.⁶ In doing so, Scalia was not just telling Congress what it (then) wanted to hear: as a Justice, Scalia was committed to this idea of deference.

Scalia endorsed the *Chevron* doctrine,⁷ which requires courts to defer to an administrative agency's reasonable interpretation of an ambiguous statute; Scalia believed that such deference (while possibly inconsistent with the Administrative Procedure Act) implements the Founders' intention that the Executive, not the courts, reasonably resolve statutory ambiguities.⁸ He wrote for the Court in *Auer*, which commanded strong deference to agency interpretations of their own regulations,⁹ though he later changed his mind.¹⁰ Scalia wrote for the Court in *City of Arlington*, holding that *Chevron* deference is owed even to agency determinations of the scope of their own authority¹¹—despite cogent reasons to refuse deference in these situations.¹² And he wrote the

3. See *infra* notes 37–44 and accompanying text.

4. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 80 (2009).

5. John G. Roberts, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 388–89 (2006) (“The first decision to give administrative jurisdiction to the D.C. Circuit in 1870, [and other] decisions in the early twentieth century, became prototypes for a succession of legislative grants of authority to review decisions of the FCC, the Federal Power Agency (later FERC), the EPA, the NLRB, the FTC, and the FAA. Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency’s decision is vested in the D.C. Circuit.” (footnote omitted)).

6. *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 36 (1986) (statement of Judge Antonin Scalia).

7. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *infra* notes 110–15 and accompanying text.

8. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 241–43 (2001) (Scalia, J., dissenting) (*Chevron* is “in accord with the origins of federal-court judicial review. . . . Statutory ambiguities . . . were left to reasonable resolution by the Executive?”); see also *infra* notes 120–21 and accompanying text (noting tension between *Chevron* and the Administrative Procedure Act).

9. *Auer v. Robbins*, 519 U.S. 452, 457–58 (1997); see also *infra* notes 138–40 and accompanying text.

10. See *infra* notes 140–41 and accompanying text.

11. *City of Arlington v. FCC*, 569 U.S. 290, 296–97 (2013); see also *infra* notes 147–60 and accompanying text.

12. *Id.* at 327 (Roberts, C.J., dissenting). As Chief Justice Roberts argued, *Chevron* deference is owed only when a court determines that Congress empowered the agency to regulate in the given area; if there is ambiguity about the agency’s scope of authority, then a court should determine that question de novo: only after that question is answered can it be determined whether the agency receives any deference. *Id.* Moreover, he argued, it is precisely when the boundaries of agency authority are at stake that we might worry about agency power-grabs. *Id.*; see also *infra* notes 147–60 and accompanying text.

unanimous opinion in *Whitman v. American Trucking*,¹³ which rejected a 1999 effort by the D.C. Circuit to revive the nondelegation doctrine.¹⁴

To be sure, Justice Scalia was no progressive: he advocated deregulation in his pre-judicial career;¹⁵ his strict textualism led him often to conclude that statutory language was clear and thus left no room for administrative policy-making through interpretation;¹⁶ and his narrow view of Article III standing to sue undermined Congress's efforts to permit citizen enforcement of administrative regulations.¹⁷ But he fundamentally believed that "we have probably . . . the most open and efficient system of administrative law in the world."¹⁸

Justice Gorsuch takes a very different view of the administrative state—as many have noted approvingly.¹⁹ While on the Tenth Circuit, Gorsuch wrote a lengthy concurrence arguing that *Chevron* should be abolished because judges, not agencies, should authoritatively interpret law.²⁰ He recognized that, as an intermediate appellate court judge, he was bound by *Chevron*,²¹ but of course now Justice Gorsuch is bound only by *stare decisis*. And, indeed, he has already taken steps that confirm his antipathy to the deference doctrines,²² though not every step he could have taken.²³ (*Kisor v. Wilkie*, a case just granted that asks whether *Auer* should be overturned,²⁴ should provide more evidence regarding Justice Gorsuch's views.)

If Justice Gorsuch's apparent desire to overturn *Chevron* is disturbing, then even more disturbing are his hints that he fundamentally opposes the adminis-

13. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

14. *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999), and opinion on denial of *reb'g en banc*, 195 F.3d 4 (1999), *aff'd in part & rev'd in part*, 531 U.S. 457 (2001).

15. See *infra* notes 52–54 and accompanying text.

16. *E.g.*, *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231–32 (1994).

17. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576–78 (1992).

18. *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 32–33 (2010).

19. *E.g.*, 163 CONG. REC. S562–63 (daily ed. Feb. 1, 2017); see *infra* notes 122–90 and accompanying text.

20. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring) ("For whatever the agency may be doing under *Chevron*, the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.").

21. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2016) (describing *Chevron* as arguably unconstitutional but then stating "[s]till, as . . . a court of appeals[,] *Chevron* . . . bind[s] us").

22. See *infra* notes 195–96 and accompanying text.

23. Justice Gorsuch did not join Justice Kennedy's concurrence in *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018), in which Justice Kennedy was critical of *Chevron* even though, as the case was decided by the majority, *Chevron* did not apply. Gorsuch's decision not to join Kennedy is interesting, given that Gorsuch agrees with Justice Kennedy's criticisms, see *infra* notes 67–69, 195–98 and accompanying text, and given that Gorsuch has not refrained from criticizing *Chevron* in other contexts where the *Chevron* question was not squarely raised, see Heather Elliott, *Justice Gorsuch's Would-Be War on Chevron*, 21 GREEN BAG 2D 315 (2018).

24. *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (mem.) (granting petition for certiorari as to question one).

trative state. The Court currently requires deference to Congress, even when Congress delegates extremely broad policymaking discretion to agencies.²⁵ Then-Judge Gorsuch suggested that such delegation is unconstitutional.²⁶ He has also raised questions about administrative agencies exercising judicial powers.²⁷ And Judge Gorsuch even gestured toward a belief that administrative agencies are themselves unconstitutional.²⁸

The disagreement between Justice Gorsuch and Justice Scalia is not total: they agree about *Brand X*.²⁹ That case requires deference to agency interpretations of an ambiguous statute even when a court has already adopted a different interpretation. Both Scalia and Gorsuch believe it unconstitutional to permit a judicial decision to be “subject to revision by a politically accountable branch of government.”³⁰

How revolutionary will Justice Gorsuch’s appointment be for the deference doctrines and for the administrative state? As Professor Hickman argues in this Issue,³¹ the docket of the Supreme Court is considerably different from that of the Tenth Circuit, which may lead Justice Gorsuch to temper some of his more virulent criticisms of *Chevron* and the administrative state. But Justice Gorsuch will undoubtedly treat agencies more harshly than did Justice Scalia. And that appears to be one of the reasons President Trump nominated him³²

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

26. *Gutiérrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (“Some thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as much as a protection against the [improper] delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential.”); see *infra* notes 122–34 and accompanying text.

27. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1380–86 (2018) (Gorsuch, J., dissenting) (arguing that the Patent Trial and Appeal Board is an unconstitutional delegation of Article III power to a federal agency).

28. *Gutiérrez-Brizuela*, 834 F.3d at 1155 (“Even under the most relaxed or functionalist view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government. See *The Federalist* No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”)).

29. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

30. *Gutiérrez-Brizuela*, 834 F.3d at 1150; see *Brand X*, 545 U.S. at 1017 (Scalia, J., dissenting) (“Article III courts do not sit to render decisions that can be reversed or ignored by executive officers.”); *Gutiérrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (“[T]he framers sought to ensure that judicial judgments may not lawfully be revised, overturned or refused faith and credit by the elected branches of government. . . . Yet . . . [b]y *Brand X*’s own telling, this means a judicial declaration of the law’s meaning in a case or controversy before it is not authoritative but is instead subject to revision by a politically accountable branch of government.” (internal quotation marks and citations omitted)).

31. See Kristin Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733 (2019).

32. Kevin Daley (@KevinDaleyDC), TWITTER (Feb. 22, 2018, 12:15 PM), <https://twitter.com/KevinDaleyDC/status/966738196070584325> (reporting that White House Counsel Don McGahn, speaking at CPAC 2018, “says Gorsuch’s forceful writings on administrative law issues was [sic] a decisive factor in selecting him for #SCOTUS, citing Gorsuch’s anti-Chevron concurrence in *Gutiérrez-Brizuela* [sic]. #AppellateTwitter”).

and why at least some Senators voted to confirm his appointment.³³ Moreover, several other Justices on the Court seem ready to make at least some changes to the deference doctrines.³⁴

In Part I of this Essay, I address the biographical and generational differences between Justices Scalia and Gorsuch, which strikingly correlate to their views of the administrative state. I then turn to doctrine, discussing *Chevron*, *Auer*, *City of Arlington*, *Whitman*, and *Brand X*, assessing the views of Justices Scalia and Gorsuch on each in turn. I conclude with some thoughts about the fate of the deference doctrines, and about the administrative state more generally, given the new membership of the Court.

I. DIFFERENT MEN

Justice Scalia and Justice Gorsuch have strikingly different professional biographies. Those differences arguably lead to at least some of their differences on administrative law doctrine. The two were also born into different generations, and their generational preoccupations were different: Justice Scalia worried about the “overjudicialization of the processes of self-governance,”³⁵ and Justice Gorsuch worried about the “titanic administrative state.”³⁶

A. Different Formative Experiences

1. Justice Scalia, the Administrative Lawyer

Justice Scalia’s extensive experience within the administrative state arguably framed his later judicial approach to administrative law. After several years in private practice and a four-year stint teaching law at the University of Virginia,³⁷ he joined the Nixon Administration as general counsel of the Office of Telecommunications Policy.³⁸ Nixon then appointed him to head the Admin-

33. 163 CONG. REC. S563 (daily ed. Feb. 1, 2017) (statement of Senator Mike Lee from Utah), (“[Judge Gorsuch] is a critic of an obscure but very significant legal rule known as the Chevron doctrine. . . . The problem with Chevron, as Judge Gorsuch has pointed out, is that it tends to divest the courts of their obligation to ‘say what the law is[.]’ . . . It has led to a system in which executive agencies not only make and enforce the law but also interpret the law, arrogating to themselves, in effect, some aspects of the powers allocated to all three branches of the Federal Government.”). Senator Lee appears to have overlooked that agencies may only exercise, and courts will only allow them to exercise, powers that the Congress in which he serves has given them.

34. See *infra* notes 194–98 and accompanying text (discussing votes of Chief Justice Roberts and Justices Thomas and Alito, and potential votes of Justice Kavanaugh).

35. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

36. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

37. BISKUPIC, *supra* note 4, at 37–38.

38. *Id.* at 38.

istrative Conference of the United States (ACUS), a federal agency whose mission is to improve how agencies function.³⁹ Justice Scalia would later say that ACUS had a “significant (and . . . laudable) impact” in helping federal agencies to function better.⁴⁰

After two years heading up ACUS, Scalia was appointed to lead the Office of Legal Counsel (OLC) in the Department of Justice, nominated by President Nixon but confirmed under President Ford.⁴¹ OLC advises the Executive Branch on questions of law and is frequently asked to provide opinions on administrative law matters.⁴² When Scalia was head of OLC from August 1974 to December 1976, OLC issued opinions on several administrative law issues including the constitutionality of the Federal Advisory Committee Act,⁴³ the constitutionality of regulatory reform legislation for independent agencies,⁴⁴ and a question under the Freedom of Information Act regarding access to the FBI’s COINTELPRO files.⁴⁵

Obviously, Scalia’s work in the Executive Branch was under Republican Administrations, and Scalia was a proponent of deregulation. After Jimmy Carter became president in 1977, Scalia left government service, first for the American Enterprise Institute (AEI), where he edited *Regulation* magazine.⁴⁶ He continued to edit *Regulation* even after leaving AEI to become a law professor at the University of Chicago.⁴⁷

In 1982, President Reagan nominated Scalia to the D.C. Circuit. Scalia had turned down Reagan’s suggestion of a seat on the Seventh Circuit: “[H]e preferred [the D.C. Circuit], which specialized in regulatory matters and would mean a return to the Washington area.”⁴⁸ Viewed by many as the second-most

39. *Id.* at 34.

40. Antonin Scalia & Stephen G. Breyer, *Reflections on the Administrative Conference*, 83 GEO. WASH. L. REV. 1205, 1210 (2015).

41. BISKUPIC, *supra* note 4, at 40.

42. *See, e.g.*, Designating an Acting Att’y Gen., 42 Op. O.L.C. 1 (Nov. 14, 2018), <https://www.justice.gov/olc/file/1112251/download>; Auth. to Permit Part-Time Emps. to Work Regularly Scheduled Workweeks of 33 to 39 Hours, 39 Op. O.L.C. 1 (Dec. 31, 2015), <https://www.justice.gov/opinion/file/880836/download>.

43. Constitutionality of the Fed. Advisory Comm. Act, 1 Op. O.L.C. Supp. 502 (1974), <https://www.justice.gov/file/20921/download>.

44. Constitutionality of Regulatory Reform Legislation for Indep. Agencies, 1 Op. O.L.C. Supp. 397 (1976), <https://www.justice.gov/file/20881/download>.

45. FOIA Appeal from Denial of Access to FBI COINTELPRO Files Regarding Professor Morris Starsky, 1 Op. O.L.C. Supp. 373 (1974), <https://www.justice.gov/file/20861/download>. COINTELPRO was J. Edgar Hoover’s notorious FBI program of surveilling and infiltrating American political organizations and actors, including the Communist Party of the USA; anti-Vietnam War organizations; the Southern Christian Leadership Conference; Martin Luther King, Jr.; Students for a Democratic Society; the American Indian Movement; and supporters of Irish Republicanism. *See* S. REP. NO. 94-755, at 9–29 (1976).

46. BISKUPIC, *supra* note 4, at 65–67.

47. *Id.*

48. *Id.* at 80.

important federal court after the Supreme Court,⁴⁹ the D.C. Circuit is the dominant court in administrative law.⁵⁰ Scalia served on the D.C. Circuit for four years.

Reagan then nominated Scalia as Associate Justice on the Supreme Court.⁵¹ At his Senate confirmation hearing, Scalia repeatedly emphasized his view that courts should defer to Congress and, accordingly, to the agencies that Congress establishes.⁵² Indeed, he stated, a regulation “can be reasonably wrong headed, and we will approve it.”⁵³ He also emphasized his fidelity to legislation and precedent over his own political preferences:

[A]s I mentioned earlier, I was editor of Regulation magazine. And one of my policy preferences in those days was deregulation. But an examination of my opinions will show that I have fully enforced actions by agencies that go in precisely the opposite direction; and indeed, I have stopped agencies from going in a deregulatory direction when it seemed to me . . . the statute simply did not let them do it.

...

The Constitution gives those [policy] calls to [Congress] who, by definition, know better, because they are democratically elected.⁵⁴

Scalia was also asked specifically about his views on Congress’s delegation of policymaking authority to agencies. In his testimony, he urged Congress to be more specific in its delegations but asserted that it was almost impossible for courts to find delegation unconstitutionally broad: “[I]t is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think . . . the courts are just going to have to leave that constitutional issue to be resolved by the Congress.”⁵⁵ None of this was simply spin to obtain Senators’ votes. As I will discuss in Part II, Justice Scalia followed through on his commitments to deference and delegation.

49. Julia Turner, *What's So Important About the Washington, D.C., Circuit Court of Appeals?*, SLATE (Feb. 7, 2003, 5:46 PM), <https://slate.com/news-and-politics/2003/02/the-second-highest-court-in-the-land.html>.

50. Roberts, *supra* note 5, at 388–89 (“The first decision to give administrative jurisdiction to the D.C. Circuit in 1870, [and other] decisions in the early twentieth century, became prototypes for a succession of legislative grants of authority to review decisions of the FCC, the Federal Power Agency (later FERC), the EPA, the NLRB, the FTC, and the FAA. Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency’s decision is vested in the D.C. Circuit.” (footnote omitted)).

51. BISKUPIC, *supra* note 4, at 109.

52. *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 35 (1986) (statement of Judge Antonin Scalia) (“The fine call is for the agency. And the courts look it over to see that it has not been so unreasonable as to be arbitrary or capricious. As far as I know, it seems to have worked pretty well.”).

53. *Id.* at 65.

54. *Id.* at 54–55.

55. *Id.* at 40.

2. Justice Gorsuch, the Litigator and Law Clerk

Unlike Justice Scalia, Justice Gorsuch has spent little time in the Executive Branch. He did serve one year in the George W. Bush Administration's Justice Department, but primarily in a national security litigation role.⁵⁶ Justice Gorsuch's primary legal experience before becoming a judge was as a private litigator with the elite Kellogg Huber firm,⁵⁷ where he spent ten years (eight as a partner) focusing on trial practice.⁵⁸ Now known as Kellogg Hansen, the firm's primary practice areas include telecommunications, intellectual property, white collar and government investigation defense, and commercial litigation.⁵⁹

One of Gorsuch's exposures to the administrative state came from his mother's time as head of the Reagan Administration's EPA. Ann Gorsuch Burford was the first female head of the EPA⁶⁰ and the 1980s version of President Trump's now-former EPA head Scott Pruitt.⁶¹ She cut the EPA's budget by nearly a quarter, staffed her office with pro-business decisionmakers, and was accused by "Republicans and Democrats alike . . . of dismantling her agency rather than directing it to aggressively protect the environment."⁶² She lasted fewer than two years, "forced to resign after she was cited for contempt of Congress for refusing to turn over Superfund records" on the ground of executive privilege.⁶³ It is not hard to imagine these events shaping the teenage Neil Gorsuch's views of the Executive Branch.

Another notable difference between Scalia and Gorsuch is that Scalia

56. Charlie Savage, *Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/neil-gorsuch-torture-guantanamo-bay.html>.

57. Kellogg Huber is known for its high standards, high compensation, and high billable-hours requirements. See David Lat, *Associate Bonus Watch: A Tale of Two Litigation Powerhouses*, ABOVE THE LAW (Jan. 13, 2015, 3:47 PM), <https://abovethelaw.com/2015/01/associate-bonus-watch-a-tale-of-two-litigation-powerhouses/> ("If you have [stellar] credentials and are willing to work like a dog very hard, Kellogg Huber might be for you.").

58. *Trump Nominates Judge Neil Gorsuch for Supreme Court Vacancy*, ARIZ. DAILY STAR (Jan. 31, 2017), https://tucson.com/news/trump-nominates-judge-neil-gorsuch-for-supreme-court-vacancy/article_1078e1dc-e81a-11e6-8034-ebc4a066f235.html.

59. *Practices*, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., www.kellogghansen.com/practices.html.

60. Kimberly Kindy et al., *Simply Stated, Gorsuch is Steadfast and Surprising*, WASH. POST (Feb. 19, 2017), <https://www.washingtonpost.com/graphics/politics/gorsuch-profile/>.

61. Chris Mooney, *Pruitt Is Bringing Back Memories of the EPA's Most Tumultuous Era. But There's a Key Difference Now*, WASH. POST (Apr. 4, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/04/04/scott-pruitt-is-bringing-back-memories-of-the-epas-most-controversial-leader-but-theres-a-key-difference/?noredirect=on&utm_term=.9025763b76a2 ("The parallels between Pruitt and Gorsuch have been noted from the beginning – and they're growing in ways Pruitt is unlikely to enjoy.").

62. Patricia Sullivan, *Anne Gorsuch Burford, 62, Dies; Reagan EPA Director*, WASH. POST (July 22, 2004), https://www.washingtonpost.com/archive/local/2004/07/22/anne-gorsuch-burford-62-dies/78b89129-728a-404e-8550-7b5617d5f291/?utm_term=.7eaf474a2a2f ("Ms. Burford cut her agency's budget by 22 percent . . . Virtually all of her subordinates at the EPA came from the ranks of the industries they were charged with overseeing.").

63. *Id.*

never served as a law clerk. Gorsuch, on the other hand, clerked for three eminent federal judges: David Sentelle of the D.C. Circuit⁶⁴ and Byron White and Anthony Kennedy of the U.S. Supreme Court.⁶⁵ It is difficult to tease out the influences, if at all, of Justices White and Kennedy—White was already retired when Gorsuch worked for him, and so Gorsuch worked in both chambers simultaneously.⁶⁶ In the one decision written by Kennedy in the 1993 Term involving deference to administrative agencies, Kennedy gives strong deference to a decision by the Secretary of Health and Human Services regarding Medicare.⁶⁷ There is little to see in the 1993 Term that echoes now-Justice Gorsuch's preoccupations.⁶⁸ (Justice Kennedy has, however, in at least one recent case, expressed doubts about some of *Chevron's* progeny.⁶⁹ Interestingly, Justice Gorsuch did not join Justice Kennedy's opinion in that case.)

Judge Sentelle may well have had an influence. He is a formalist and an originalist, dissenting from modern doctrine in a number of cases on the D.C. Circuit.⁷⁰ Judge Sentelle has participated in Federalist Society panels on the need to amend the Constitution to limit the federal government's power.⁷¹ Judge Sentelle has, however, regularly applied *Chevron* and the other deference doctrines and has not, as far as I can discover, ever criticized those doctrines.⁷²

64. Jim Morrill, *Supreme Court Pick Gives Shout-Out to a Former Charlotte Mentor*, CHARLOTTE OBSERVER (Feb. 1, 2017), <https://www.charlotteobserver.com/news/politics-government/article130043809.html>.

65. Adam Liptak & Nicholas Fandos, *How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/politics/neil-gorsuch-anthony-kennedy-supreme-court.html>.

66. *Id.*

67. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). Interestingly, in that case Justice Thomas dissents, joined by Justices Stevens, O'Connor, and Ginsburg, *id.* at 518 (Thomas, J., dissenting); the grounds for dissent would, I expect, resonate with now-Justice Gorsuch.

68. *Cf.* Liptak & Fandos, *supra* note 65 ("Judge Gorsuch's term at the court was not without notable decisions; the court issued significant rulings on discrimination in jury selection, protests outside abortion clinics, voting rights, religious schools and copyright infringement for song parodies. But none qualified as a blockbuster.").

69. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("This separate writing is to note my concern with the way in which the Court's opinion in *Chevron* has come to be understood and applied." (citation omitted)).

70. *Noel Canning v. NLRB*, 705 F.3d 490, 493, 498–99 (D.C. Cir. 2013); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting) (arguing that Congress lacks authority under the Commerce Clause to regulate a species that lives entirely within one state). He was not, however, on the panel that briefly revived the nondelegation doctrine. *See Am. Trucking Ass'ns, Inc. v. U.S. E.P.A.*, 175 F.3d 1027, 1037–38 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

71. Judge David B. Sentelle, U.S. Court of Appeals for the D.C. Circuit, *Introductory Remarks*, (Nov. 18, 2006), *in* 102 Nw. U. L. REV. 455, 455 (2008) (adapting remarks from the 2006 Federalist Society National Lawyers Convention Panel, Showcase Panel III: Are Constitutional Changes Necessary to Limit Government?).

72. He has been accused of "emasculat[ing]" *Chevron* in at least one opinion, but the complaint is more about Sentelle as a textualist than any action Sentelle took against *Chevron* itself. *See* David A. Schle-

B. *Generational Differences*

Antonin Scalia grew up in a country being reshaped by federal judges. He was born in 1936,⁷³ about a year before the Supreme Court issued its first landmark ruling upholding FDR's New Deal legislation⁷⁴ and ending the economics rights focus of the *Lochner* Court.⁷⁵ Throughout his childhood and youth, the Supreme Court issued decision after decision that worked sweeping changes in American life.⁷⁶ By the time he joined the Nixon Administration in 1971, the Warren Court had transformed the constitutional landscape.⁷⁷ The federal judiciary would continue to issue such far-reaching decisions for several more years.⁷⁸ As Professor Strauss wrote, "[i]n the first half of the twentieth century, courts were . . . perceived as hostile to efforts to bring about equality and social justice; after the Warren Court, the courts came to be seen by many as the natural place for people to turn to achieve these objectives."⁷⁹ And, presumably not coincidentally, by the time Scalia joined the D.C. Circuit, he was warning of "an overjudicialization of the processes of self-governance," something that had occurred "during the past few decades."⁸⁰

As a Scalia biographer puts it, "Scalia had long believed that judges were wrongly using their own personal values to decide legal issues."⁸¹ While a law professor at the University of Chicago in 1978, Scalia argued for the role of

singer, Note, *Chevron Unlabeled: The Inapplicability of the Canon Noscitur a Sociis Under Prong One of the Chevron Framework*, 5 N.Y.U. ENVTL. L.J. 638, 689 (1996).

73. BISKUPIC, *supra* note 4, at 11.

74. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

75. *E.g.*, Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 684–85 (2005).

76. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (binding states to Supreme Court precedent); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (incorporating freedom of association against the states); *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958) (establishing right to travel); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (requiring racial integration of public schools).

77. *See generally* THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996) (discussing transformations of doctrine during Warren Court in areas of equal protection, freedom of speech, freedom of press, freedom of religion, and criminal justice).

78. *See generally* *United States v. Nixon*, 418 U.S. 683 (1974) (requiring President Nixon to turn over tapes made secretly in the Oval Office); *Miller v. California*, 413 U.S. 15, 24 (1973) (deeming work to be obscene only if it lacks "serious literary, artistic, political, or scientific value"); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (establishing gender as a suspect class); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing women's right to choose abortion); *Furman v. Georgia*, 408 U.S. 238 (1972) (abolishing the death penalty when applied in an arbitrary and capricious way); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (allowing publication of Pentagon Papers).

79. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847 (2007) (footnote omitted).

80. Scalia, *supra* note 35, at 881.

81. BISKUPIC, *supra* note 4, at 66 (describing Scalia's participation in an AEI symposium, *An Imperial Judiciary: Fact or Myth?*, AM. ENTER. INST. (1978), http://www.aei.org/wp-content/uploads/2016/02/AEI-Forum_An-Imperial-Judiciary.pdf).

procedure in constraining judicial power.⁸² After he joined the Supreme Court, much of his jurisprudence sought to establish barriers to the activism of the Warren Court and its ilk. He established the strict tripartite standing test, which limits federal courts' subject-matter jurisdiction;⁸³ he was instrumental in the Rehnquist Court's revival of state sovereign immunity;⁸⁴ and he worked to limit Congress's authority to send more cases to the courts.⁸⁵

Neil Gorsuch, by contrast, grew up in a United States where Congress was remaking the legal landscape with dozens of new regulatory statutes. Gorsuch was born in 1967, shortly after Congress had enacted landmark civil rights legislation (the Civil Rights Act of 1964⁸⁶ and the Voting Rights Act⁸⁷) and a vast array of other statutes.⁸⁸ In the decade following Gorsuch's birth, Congress enacted dozens of civil rights, environmental, workplace safety, and consumer-protection statutes.⁸⁹ Congress also significantly overhauled the Clean Air Act⁹⁰ and the Clean Water Act,⁹¹ turning them into major legislation

82. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S. CT. REV. 345, 405 (“[O]ne of the functions of procedure is to limit power—not just the power to be unfair, but the power to act in a political mode, or the power to act at all. . . . Is not the procedural limitation [that courts proceed in an on-the-record adjudicatory mode rather than a notice-and-comment regulatory mode] principally a restriction upon the power of the courts, impairing (however crudely) their ability and thus their inclination to make social policy?”).

83. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). See generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

84. Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 14 (2004).

85. See Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 169–70, 175–76, 202 (2011).

86. Pub. L. No. 88-352, 78 Stat. 241 (1964). Congress also acted to prevent age discrimination in 1967. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

87. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314).

88. See Robert Dallek, *LBJ and the Great Society: Preludes to the Obama Presidency and Obamacare*, 62 DRAKE L. REV. 919, 921 (2014) (asserting that Lyndon B. Johnson signed 208 reform measures into law during his presidency, including “civil rights; voting rights; Medicare and Medicaid; federal aid to elementary, secondary, and higher education; the 1965 immigration statute . . . [; a] host of environmental and consumer protections[;] child safety, traffic safety[;] national public radio, public television, [and] the Freedom of Information Act”).

89. E.g., Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795; Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2003 (1976); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829; Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884; Domestic Volunteer Service Act of 1973, Pub. L. No. 93-113, 87 Stat. 394; Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972); Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027; Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 373, 373–75 (1972); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590; Controlled Substances Act, tit. II, Pub. L. No. 91-513, §§ 100–709, 84 Stat. 1236, 1242–85; Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (1970); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970). By the time Gorsuch was graduating from law school in 1991, Congress had also enacted the Superfund statute (formally, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), Pub. L. No. 96-510, 94 Stat. 2767 (1980), and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

90. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

that touched every corner of the United States.

At the same time, the judiciary—far from being the activist Warren Court—was being remade by judges like Antonin Scalia and William Rehnquist.⁹² No wonder, then, that Neil Gorsuch has perceived the enemy as, not the courts, but “an already titanic administrative state”⁹³ influenced by “perfumed lawyers and lobbyists.”⁹⁴

II. SCALIA V. GORSUCH ON THE DEFERENCE DOCTRINES

As Part I demonstrated, there are biographical and generational reasons to think that Justice Gorsuch will approach administrative law much differently than Justice Scalia did. Those differences are confirmed by then-Judge Gorsuch’s writings on the Tenth Circuit, in which he made clear his opposition to *Chevron*. Though Gorsuch did not specifically address the other primary deference cases, such as *Auer* and *City of Arlington*, his views on *Chevron* suggest that he would vote to overrule those cases as well. What’s more, his views appear to extend to broader criticisms of the administrative state: he has cited approvingly *Lochner*-era cases on the nondelegation doctrine, while Justice Scalia wrote for a unanimous court in *Whitman*, rejecting that doctrine. Only on *Brand X* do Justices Scalia and Gorsuch agree. I discuss *Chevron*, *Auer*, *City of Arlington*, *Whitman*, and *Brand X* in turn.

A. Chevron

Chevron U.S.A. Inc. v. Natural Resources Defense Council involved the calculation of emissions from power plants.⁹⁵ Carter Administration regulations required each smokestack at a given plant to meet Clean Air Act emissions requirements.⁹⁶ The Reagan Administration instead proposed to treat multiple smokestacks at a plant under one “bubble,”⁹⁷ thus allowing new, efficient smokestacks to offset the emissions of older, less-efficient smokestacks.⁹⁸ The Reagan rule permitted more aggregate pollution than the Carter rule. Environmentalists thus sued, arguing that the Clean Air Act forbade the bubble rule.

91. Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

92. See Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 934–35 (2008) (“[T]he Rehnquist Court’s conservatism was targeted against a different liberal philosophy than New Deal progressivism. Instead, it was aimed at retrenching the Warren Court’s liberal rights-driven jurisprudence.”).

93. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

94. *Id.* at 1152.

95. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839–40 (1984).

96. *Id.*

97. *Id.*

98. See *id.*

The Act defined “stationary source” as “any building, structure, facility, or installation” which emits air pollution.⁹⁹ The Court found this language susceptible of multiple reasonable interpretations.¹⁰⁰ Under existing law, the meaning of the Clean Air Act could have been decided by the Court *de novo*.¹⁰¹ The Court instead took a different tack,¹⁰² holding that the agency charged with implementing a statute should resolve any ambiguities, and a reasonable resolution should receive judicial deference.¹⁰³ The Court’s role, once ambiguity is found, is solely to guard against unreasonable interpretations.¹⁰⁴

Chevron initially imposed a two-step test: first, is there a statutory ambiguity, or has Congress spoken directly to the question at issue? If it is the latter, there is no room for agency discretion, and the inquiry concludes. But if the statute is ambiguous, the court proceeds to Step Two: has the agency adopted a reasonable interpretation? If so, the court must defer to it.

Later cases added what has come to be known as *Chevron* Step Zero (which, as the numbering applies, occurs before Step One): did Congress empower the agency to take on the interpretive role?¹⁰⁵ Step Zero results in less deference, because courts may conclude at Step Zero that Congress did not endow the agency with interpretive authority, even when the statute is ambiguous.¹⁰⁶ If the agency loses at Step Zero, the Court does not apply *Chevron* deference but instead uses *Skidmore/Mead* deference¹⁰⁷ or interprets the statute *de novo*.

The Court has also limited the circumstances in which *Chevron* applies in

99. 42 U.S.C. § 7411 (2012); see *Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev’d sub nom. Chevron*, 467 U.S. 837.

100. *Chevron*, 467 U.S. at 859–60.

101. See 5 U.S.C. § 706; see also Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 5 n.15 (2017).

102. *Chevron* has been called revolutionary. E.g., Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1259 n.78 (2002); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1062 (1995); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986). But see William N. Eskridge Jr. & Lauren E. Bacr, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1120–21 (2008) (“Although the ‘revolutionary’ nature of *Chevron* seems accepted by lawyers, lower court judges, and academics, at the level of Supreme Court practice, and even doctrine, *Chevron*’s status strikes us as something short of that.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (“It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law.”).

103. *Chevron*, 467 U.S. at 865.

104. *Id.* at 866.

105. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

106. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005); see, e.g., *Pension Benefit Guar. Corp. v. Wilson N. Jones Mem’l Hosp.*, 374 F.3d 362, 369 (5th Cir. 2004).

107. The Court has stated that, under *Skidmore*, deference is due to the extent that the agency interpretation has the power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

other ways. In *King v. Burwell*, for example, the Court declined to interpret statutory ambiguity as an *implicit* delegation of interpretive authority to the agency, holding that when a major rule is at issue, Congress should confer power on the agency explicitly.¹⁰⁸ As the Court put it, the statutory ambiguity in the Affordable Care Act raised 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.”¹⁰⁹

1. *Scalia’s Approach to Chevron*

When Scalia joined the Court, he endorsed the *Chevron* two-step:

[*Chevron*] was in accord with the origins of federal-court judicial review. Judicial control of federal executive officers was principally exercised through the prerogative writ of mandamus. That writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority. . . . Statutory ambiguities, in other words, were left to reasonable resolution by the Executive.¹¹⁰

At that point in his career, Scalia suggested that courts should resolve no ambiguities at Step One—not even by using “traditional tools of statutory construction”—but should instead apply *Chevron* deference “full force.”¹¹¹ “If *Chevron* is to have any meaning, . . . congressional intent must be regarded as ‘ambiguous’ not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.”¹¹²

Justice Scalia’s textualism would lead him, however, to resolve any number of *Chevron* issues without deferring to the agency interpretation. Scalia himself acknowledged that his strict textualism would lead him to find statutes clear at Step One, “thereby find[ing] less often . . . the triggering requirement for *Chevron* deference.”¹¹³ And, indeed, this was the case: an empirical examination of *Chevron* decisions from 1989 to 2006 found that “Justice Scalia, the

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

109. *Id.*

110. *Mead Corp.*, 533 U.S. at 241–43 (Scalia, J., dissenting) (citation omitted).

111. Scalia, *supra* note 102, at 512 & n.6 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). Justice Scalia cites his own concurrence in *Cardoza-Fonseca*, where he argued: “The Court . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever, ‘[e]mploying traditional tools of statutory construction,’ they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.” *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring) (alteration in original) (citation omitted).

112. Scalia, *supra* note 102, at 520.

113. *Id.* at 521.

Court's most vocal *Chevron* enthusiast, is the least deferential."¹¹⁴ Justice Scalia was thus regularly criticized for not giving agencies sufficient freedom of decision under *Chevron*.¹¹⁵

Nonetheless, Scalia's support for the *idea* of *Chevron* was strong, even when it seemed to run against his originalist commitments. He noted, for example, the apparent inconsistency of *Chevron* with *Marbury*: if "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹¹⁶ then it is "seemingly, a striking abdication of judicial responsibility" to give "binding" deference to agency interpretations.¹¹⁷ But, Scalia wrote, courts had long accepted executive interpretations of law on a case-by-case basis, discerning whether Congress had intended the courts to defer to executive interpretations. *Chevron's* genius, for Scalia, was to apply "an across-the-board presumption that, in the case of ambiguity, [Congress intended] agency discretion."¹¹⁸

Accordingly, Justice Scalia despised *Chevron* Step Zero, which he viewed as arrogating too much power to the Judicial Branch at the expense of the Legislative and Executive Branches. For Justice Scalia, the very fact that Congress had written an ambiguous statute was enough: that meant the agency was the one to resolve the ambiguity (as long as it did so reasonably). *Mead's* creation of Step Zero had "largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."¹¹⁹

Near the end of his time on the Court, Justice Scalia hinted at disenchantment with some of *Chevron's* progeny.¹²⁰ But he continued to believe that "the rule of *Chevron*, if it did not comport with the [Administrative Procedure Act (APA)], at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive."¹²¹

114. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) (footnote omitted).

115. Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 404–06 & nn.69–87 (1996) (collecting sources critical of Justice Scalia's use of *Chevron*).

116. Scalia, *supra* note 102, at 513 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

117. *Id.* at 513–14.

118. *Id.* at 516.

119. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

120. *E.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring in the judgment) (arguing that *Auer* had led to "a balance between power and procedure quite different from the one Congress chose when it enacted the APA" and suggesting that *Chevron* might need to be "uprooted[] with respect to interpretive rules setting forth agency interpretation of statutes"); *see infra* notes 140–41, 147–55, 189 and accompanying text.

121. *Id.* at 1212 (alterations in original) (quoting *Mead Corp.*, 533 U.S. at 243 (Scalia, J., dissenting)).

2. Gorsuch's Approach to Chevron

Justice Gorsuch differs dramatically from Justice Scalia on *Chevron* deference. While on the Tenth Circuit, then-Judge Gorsuch wrote a lengthy concurrence in a case called *Gutierrez-Brizuela* that lays out his position quite clearly: “[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”¹²²

First, then-Judge Gorsuch adopted the *Marbury*-focused position that judges, not agencies, should authoritatively interpret law.¹²³ He expressly adopts the view that Justice Scalia had rejected decades earlier: “*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”¹²⁴ “[W]hatever the agency may be doing under *Chevron*, the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.”¹²⁵ And, he argues, this abdication has serious separation-of-powers consequences because “[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.”¹²⁶

Second, Judge Gorsuch noted that the APA, which governs the agency rulemaking process, places the responsibility of interpreting statutory provisions, and the power to overturn regulations inconsistent with those interpretations, with the court.¹²⁷ *Chevron* is at odds with that mandate. In Gorsuch’s view, the APA’s assignment of responsibility to courts rather than to agencies is not just a legislative choice, but may be constitutionally compelled to maintain the separation of powers.¹²⁸ And, indeed, he describes *Chevron* as a threat to the constitutional structure:

After all, *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set

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

123. *Id.* at 1151.

124. *Id.* at 1152.

125. *Id.* at 1152–53 (emphasis omitted).

126. *Id.* at 1152.

127. 5 U.S.C. § 706 (2012). Justice Scalia acknowledged that *Chevron* had overlooked the APA but found that mistake forgivable. See *United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) (“There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review.” (footnote omitted)).

128. *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring).

and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies “wield[] vast power” and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix. Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today’s administrative agencies would have warranted less deference from other branches, not more.¹²⁹

In another Tenth Circuit case, he said that “one might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct.”¹³⁰

Then-Judge Gorsuch recognized that, as an intermediate appellate court judge, he was bound by *Chevron*, but now-Justice Gorsuch is constrained only by *stare decisis*.¹³¹ He has however thus far found no vehicle for executing his anti-*Chevron* mission since he joined the Court in April 2017 (though in December 2018 the Court granted certiorari in a case challenging *Auer* deference¹³²). So far he has discussed *Chevron* most expansively in a recent statement regarding the denial of certiorari, which invited petitions in later cases that might be more suitable to his mission.¹³³ Notably, Justice Gorsuch did *not* join Justice Kennedy’s concurrence in *Pereira v. Sessions*, where Justice Kennedy criticized lower courts’ use of *Chevron* deference in immigration cases.¹³⁴

B. *Auer*

In 1997, the Court established an even stronger category of deference to agency interpretations, with Justice Scalia writing the opinion for a unanimous Court.¹³⁵ *Auer v. Robbins* held that agencies were due strong deference in their interpretations of their own regulations: such interpretations were “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”¹³⁶ Justice Scalia made clear that “the Secretary . . . is free to write the regulations as broadly as

129. *Id.* at 1155 (citation and footnote omitted).

130. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

131. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (“[T]he rule of *stare decisis* is not an ‘inexorable command . . .’”).

132. *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (mem.) (granting petition for certiorari as to question one).

133. *See Scenic Am. Inc. v. Dep’t of Transp.*, 138 S. Ct. 2, 2–3 (2017) (statement of Gorsuch, J., joined by Roberts, C.J. and Alito, J., respecting the denial of certiorari). *Scenic America* actually provided a strikingly unsuitable case for the question, and I have elsewhere described Justice Gorsuch’s use of the case as tendentious and misleading. *See Elliott, supra* note 23.

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

135. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

136. *Id.* (internal quotation marks omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

he wishes, subject only to the limits imposed by the statute.”¹³⁷

This permitted a particular kind of strategic action by agencies. An agency faces a fairly onerous procedural path when promulgating notice-and-comment regulations under the Administrative Procedure Act.¹³⁸ But, the APA imposes no such requirements on interpretative rules.¹³⁹ And *Auer* says that such interpretive rules receive controlling deference. Thus, given *Auer*, an agency has the incentive to write a vague, relatively uncontroversial notice-and-comment rule, deal with the innocuous comments that it receives, and then do all the controversial work in the interpretations (which do not have to go through notice and comment and will nevertheless receive strong deference from the Court).

Justice Scalia later came to reject *Auer* for these incentives to strategic behavior on the part of agencies. “To expand [its notice-and-comment-free] domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment.”¹⁴⁰ He thus argued—without acknowledging that he had written *Auer* in the first place—that it was rotten and needed to be overruled: “[T]here are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means.”¹⁴¹

As a judge on the Tenth Circuit, Neil Gorsuch did not say much about *Auer*, though he did describe the deference it required as “obsequious.”¹⁴² Since joining the Court, however, Justice Gorsuch has joined in a dissent from deni-

137. *Id.* at 463.

138. In part because courts recognize the expertise of agencies in the subject matter of their work, courts instead check agency action through procedural requirements. *E.g.*, Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 758 (2006). When conducting “notice-and-comment rulemaking,” an agency must produce a draft regulation, publish it in the Federal Register, receive public comments, and then issue the final rule with an explanation of how all of the comments were addressed. 5 U.S.C. § 553 (2012). Any choice that is not cogently explained will likely be reversed. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56–57 (1983). Likewise, courts will reverse when the agency fails to address significant arguments made in the comments, *see United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252–53 (2d Cir. 1977), and when the agency does not make public the underlying data used in drafting the rule, *see Chamber of Commerce of the U.S. v. S.E.C.*, 443 F.3d 890, 894 (D.C. Cir. 2006). And if the final rule departs significantly from the draft rule, the agency will likely be required to conduct a new round of notice and comment. *See Chocolate Mfrs. Ass’n of the U.S. v. Block*, 755 F.2d 1098, 1106–07 (4th Cir. 1985). All of these requirements come from judicial glosses on the simple language of 5 U.S.C. § 553.

139. 5 U.S.C. § 553(b)(A).

140. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

141. *Id.* at 1212–13 (citation omitted); *see also id.* at 1213 (“I would therefore restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.”).

142. *El Encanto, Inc. v. Hatch Chile Co., Inc.*, 825 F.3d 1161, 1165 (10th Cir. 2016).

al of certiorari in a case that would have allowed the overruling of *Auer*.¹⁴³ In that dissent, Justice Thomas wrote:

[*Auer*] deference is constitutionally suspect. It transfers “the judge’s exercise of interpretive judgment to the agency,” which is “not properly constituted to exercise the judicial power.” It also undermines “the judicial ‘check’ on the political branches” by ceding the courts’ authority to independently interpret and apply legal texts. And it results in an “accumulation of governmental powers” by allowing the same agency that promulgated a regulation to “change the meaning” of that regulation “at [its] discretion.” This Court has never “put forward a persuasive justification” for [*Auer*] deference.

. . . . Even the author of *Auer* came to doubt its correctness.¹⁴⁴

And, certainly, if then-Judge Gorsuch thought that *Chevron* “[t]ransferr[ed] the job of saying what the law is from the judiciary to the executive[.] . . . invit[ing] the very sort of due process . . . and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions,”¹⁴⁵ Justice Gorsuch would presumably feel the same about *Auer*. We should discover his views on *Auer* when the Court decides *Kisor v. Wilkie*, a case in which the Court just granted certiorari that asks whether *Auer* should be overturned.¹⁴⁶

C. City of Arlington

Justice Scalia confirmed the breadth of deference to agency interpretations in *City of Arlington*.¹⁴⁷ There, the statutory provision at issue affected the scope of the agency’s authority. If the statute was interpreted one way, then the agency had power over the decision; if it was interpreted another way, then the agency lacked power. The question was whether *Chevron* deference applied to the agency’s interpretation, or whether the jurisdictional nature of the question counseled against deference.

Justice Scalia, writing for the majority, found that *Chevron* deference applied. Unlike courts, for whom important differences exist between “jurisdictional” and “merits” questions, Justice Scalia wrote, agencies’ “power to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdic-

143. *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

144. *Id.* at 1052–53 (second alteration in original) (citations omitted).

145. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

146. *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (mem.) (granting petition for certiorari as to question one).

147. *See generally* *City of Arlington v. FCC*, 569 U.S. 290 (2013) (Scalia, writing for the court, held that courts must, when there is ambiguity, defer to an agency interpretation of its own authority).

tion, what they do is ultra vires.”¹⁴⁸ He called the “distinction between ‘jurisdictional’ and ‘nonjurisdictional’ interpretations . . . a mirage,”¹⁴⁹ resting on the false premise that “[s]ome interpretations—the big, important ones, presumably—define the agency’s ‘jurisdiction.’ Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has.”¹⁵⁰ The majority rejected that distinction, however: “[n]o matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”¹⁵¹

As ample precedent demonstrates, Justice Scalia wrote, the Court has always recognized that *Chevron* applies to all of these questions,¹⁵² even “where concerns about agency self-aggrandizement are at their apogee: in cases where an agency’s expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme.”¹⁵³ And Justice Scalia believed that much more was at stake if the Court took the opposite view: “[t]he false dichotomy between ‘jurisdictional’ and ‘nonjurisdictional’ agency interpretations may be no more than a bogeyman, but it is dangerous all the same. . . . Make no mistake—the ultimate target here is *Chevron* itself.”¹⁵⁴ The result of adopting the dissent’s approach, he wrote, “would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.”¹⁵⁵

Chief Justice Roberts (joined by Justices Thomas and Alito) dissented: courts must “ensur[e] that the Legislative Branch has in fact delegated law-making power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is.”¹⁵⁶ After all, the whole point of deference is to implement *Congress’s* decision to delegate power to administrative agencies. If a court doesn’t first determine what Congress’s intent was—i.e., what range of authority Congress thought it was giving the agency—then deferring to the agency may in fact *depart* from what Congress intended. Moreover, Roberts argued,

That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished,

148. *Id.* at 297.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 301–03.

153. *Id.* at 303.

154. *Id.* at 304.

155. *Id.*

156. *Id.* at 327 (Roberts, C.J., dissenting).

by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.¹⁵⁷

Here, Chief Justice Roberts echoes Justice Gorsuch's concerns expressed above about the "titanic administrative state."¹⁵⁸ Then-Judge Gorsuch cited the Roberts dissent approvingly in his *Gutierrez-Brizuela* concurrence, believing that the Roberts opinion stood for the principle that *Chevron* and its progeny "appear[] . . . to qualify as a violation of the separation of powers."¹⁵⁹ He goes on to say: "[I]f an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington*'s application of *Chevron* says it can), you might well wonder: where are the promised 'clearly delineated boundaries' of agency authority?"¹⁶⁰ One might expect, then, that now-Justice Gorsuch would be happy to overrule *City of Arlington*.

D. Whitman

Administrative agencies raise constitutional questions, because they appear to make law (exercising legislative power), as well as enforcing that law (executive power) and adjudicating disputes under that law (judicial power).¹⁶¹ Concerns about the delegation of legislative power to administrative agencies came to a head in the mid-1930s, when Franklin Delano Roosevelt's New Deal sought to implement federal regulation of the economy on a scale never seen before in the United States.¹⁶²

The Supreme Court initially rejected key New Deal legislation, some on the ground that it exceeded Congress's authority to permit administrative agencies to take action that looked like legislation. In *Panama Refining Co. v. Ryan*, the Court struck down a provision of the National Industrial Recovery Act (NIRA) as an impermissible delegation of legislative authority.¹⁶³ And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the heart of the NIRA, finding that it gave essentially standardless authority to the Executive Branch to regulate the economy.¹⁶⁴ As Justice Cardozo wrote in his

157. *Id.*

158. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring). See *supra* notes 73–94 and accompanying text.

159. *Gutierrez-Brizuela*, 834 F.3d at 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

160. *Id.* at 1154–55 (citing *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989)).

161. See *supra* notes 128–30 and accompanying text; see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–54 (1994).

162. E.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1248 (1986) (claiming that New Deal programs reveal "a belief that comprehensive government intervention was not only a useful corrective but an essential ingredient for maintaining a general state of equilibrium in the economy").

163. 293 U.S. 388, 432–33 (1935).

164. 295 U.S. 495, 541–42 (1935).

concurrence, “[t]his is delegation running riot. No such plenitude of power is susceptible of transfer.”¹⁶⁵ And indeed he did not overstate: NIRA not only delegated broad powers to the Executive Branch, but it also delegated authority to private industry trade groups to develop codes of fair competition for the President to approve.¹⁶⁶

Schechter’s nondelegation doctrine was essentially moribund within a couple of years,¹⁶⁷ as the Court issued the opinions that would establish the broad Commerce Clause power that characterizes modern federal legislation.¹⁶⁸ In the succeeding decades, the Court upheld statute after statute that gave agencies broad authority to regulate, so long as it could discern an “intelligible principle” laid down by Congress to constrain agency discretion.¹⁶⁹ An effort to revive the nondelegation doctrine in the late twentieth century was rejected by a unanimous Court in *Whitman v. American Trucking Associations, Inc.*¹⁷⁰ Justice Scalia wrote for the Court:

In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.” We have, on the other hand, . . . found an “intelligible principle” in various statutes authorizing regulation in the “public interest.” In short, we have “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”¹⁷¹

165. *Id.* at 553.

166. See Rabin, *supra* note 162, at 1243–44 (“Section 3 of the NIRA granted authority to the President to approve ‘codes of fair competition’ submitted by industry trade groups. The codes were to be promulgated by industry groups that were ‘truly representative’ and were not to ‘promote monopolies.’ But beyond these cautionary terms, the statute contained virtually no limiting language. . . . [T]he Act left the content of the codes purposely vague. . . . With so little substantive constraint, the codes could address a vast range of business practices, including price levels, wage and hour provisions, price discrimination, advertising practices, and output restrictions.” (footnote omitted)).

167. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1401 (2000) (pointing out that, after *Schechter*, “[t]he Court never again expressly applied the nondelegation doctrine to invalidate a statute”). Of course, Congress has never again tried to delegate the authority to regulate the economy to private industry trade groups; presumably that would not fly even in the modern administrative state. See Rabin, *supra* note 162, at 1257 (“*Schechter* arguably retains its authority as a statement of the outer limits of federal regulatory power. Even today, a congressional act which set up a business regulatory commission with plenary power to establish ‘fair competitive practices’ enumerated by industry trade groups would be of doubtful validity. In *Schechter*, the nondelegation doctrine found its home as a residual check on wholesale amalgamation of public and private spheres of activity.”).

168. See *Wickard v. Filburn*, 317 U.S. 111, 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 548 (1937); *NLRB v. Jones-Laughlin Steel Corp.*, 301 U.S. 1, 1 (1937).

169. Bressman, *supra* note 167, at 1404–05.

170. 531 U.S. 457, 476 (2001).

171. *Id.* at 474–75 (citations omitted).

Justice Scalia wrote for a unanimous Court in rejecting the D.C. Circuit's effort to revive *Shechter* and *Panama Refining*. And his opinion on the matter had been clear from his confirmation hearing for the Supreme Court: "it is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress."¹⁷²

Justice Gorsuch would apparently take a different approach. In his *Gutierrez-Brizuela* concurrence, he revealed a largely nineteenth century perspective on the administrative state. He indicated that, in his view, Congress can empower agencies to do the following: "Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive (so, for example, forfeiture of assets might be required if the executive finds a foreign country behaved in a specified manner),"¹⁷³ and "Congress may allow the executive to resolve 'details' (like, say, the design of an appropriate tax stamp)."¹⁷⁴ This view, based on cases from 1813 and 1897, would rule out almost all regulatory agencies and their organic acts.¹⁷⁵ Making factual findings and designing tax stamps are a far cry from regulating "in the public interest," as many twentieth century statutes authorize,¹⁷⁶ or setting national ambient air quality standards at a level "requisite to protect the public health."¹⁷⁷

Indeed, Judge Gorsuch seems to be staking out a pre-New Deal view of the delegation of legislative power. Elsewhere he refers to "so-called 'delegated' legislative authority."¹⁷⁸ In *Gutierrez-Brizuela*, he cites *Schechter*¹⁷⁹ and states, "Some thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as . . . a license for [the improper delegation of legislative authority], undermining the separation between the legis-

172. *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 36 (1986) (statement of Judge Antonin Scalia).

173. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (citing *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813)).

174. *Id.* (citing *In re Kollock*, 165 U.S. 526, 533 (1897)).

175. Though the Interstate Commerce Commission (described as the first modern federal regulatory agency, see generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987)) was created in 1887, and the Sherman Antitrust Act in 1890, the bulk of federal regulatory statutes were enacted in the twentieth century. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (1973).

176. See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 224–25 (1943) (upholding Federal Communications Commission's power to regulate airwaves to serve the "public interest, convenience or necessity"); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (upholding Interstate Commerce Commission's power to approve railroad consolidations if in the "public interest").

177. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001) (upholding Clean Air Act's delegation of authority to EPA to set national ambient air quality standards).

178. *Caring Hearts Pers. Home Servs. v. Burwell*, 824 F.3d 968, 969 (10th Cir. 2016) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984)).

179. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–42 (1935).

lative and executive powers that the founders thought essential.”¹⁸⁰ To be sure, Gorsuch’s argument is against *Chevron* and its progeny, not for a reestablishment of the nondelegation doctrine.¹⁸¹ But his argument does carry the seeds of a broader argument against the administrative state. Here is how he put it while on the Tenth Circuit:

[C]an Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies? The Supreme Court has long recognized that under the Constitution “congress cannot delegate legislative power to the president” and that this “principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.” Yet on this account of *Chevron* we’re examining, its whole point and purpose seems to be exactly that—to delegate legislative power to the executive branch.¹⁸²

E. Brand X

*Brand X*¹⁸³ incurred Justice Scalia’s ire from the start, and Justice Gorsuch shares that ire. The question presented in the case arose from a timing problem that can arise under *Chevron*.

Remember that, under *Chevron* Step Two, a court is to defer to an agency’s reasonable resolution of statutory ambiguity. But what about statutory ambiguities that an agency has not yet resolved? In order to resolve a case involving that statute, the court must do its best to interpret the ambiguous provision. Does that interpretation then constrain the agency? After all, an agency’s reasonable interpretation would ordinarily govern under *Chevron*. Should the accident of timing govern who gets to interpret the statute?

The Supreme Court in *Brand X* said that timing should not be dispositive.¹⁸⁴ If the earlier court opinion made clear that the statute was ambiguous, then *Chevron* leaves the agency free to choose among permissible interpretations. The court’s interpretation must give way to the agency’s later decision to choose a different interpretation. Otherwise, “allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court’s interpretation to override an agency’s.”¹⁸⁵

This approach does not violate separation of powers or stare decisis, the Court held, because it recognizes *Congress’s* decision to leave the resolution of

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

181. *Id.* at 1158 (“We managed to live with the administrative state before *Chevron*. We could do it again.”).

182. *Id.* at 1153–54 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)) (citation and emphasis omitted).

183. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

184. *Id.* at 982.

185. *Id.*

ambiguities with the agency. “[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.”¹⁸⁶ Because Congress has made the agency the authoritative interpreter of the statute, the court decision “has not been ‘reversed’ by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been ‘reversed’ by a state court that adopts a conflicting (yet authoritative) interpretation of state law.”¹⁸⁷ If the earlier court decision held the statute unambiguous, however, the agency has no ambiguities to interpret, and the earlier court decision is binding.¹⁸⁸

Justice Scalia was having none of it. He accused the Court of “inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers. . . . This is not only bizarre. It is probably unconstitutional. . . . Article III courts do not sit to render decisions that can be reversed or ignored by executive officers.”¹⁸⁹

Justice Gorsuch agrees. He wrote while on the Tenth Circuit:

Brand X still risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law’s meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes. A form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people.¹⁹⁰

Thus one might expect Justice Gorsuch to welcome the opportunity to overrule *Brand X*.

As demonstrated in this Part, Justice Scalia and Justice Gorsuch differ markedly in their views of the administrative state. One might have expected them to agree on more; indeed, Justice Scalia’s administrative law decision-making is not what one would have expected from the famous originalist. But Justice Scalia described himself in 1989 as a faint-hearted originalist: one for whom stare decisis could trump originalist commitments.¹⁹¹ Justice Gorsuch has said, “Originalism has regained its place at the table with the Constitution[al] interpretation and textualism in the reading of statutes . . . and neither one is going anywhere on my watch.”¹⁹²

186. *Id.* at 983.

187. *Id.* at 983–84.

188. *Id.* at 984.

189. *Id.* at 1016–17 (Scalia, J., dissenting).

190. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

191. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

192. Rachel del Guidice, *Gorsuch Touts Originalism, Textualism in Address to Conservative Legal Society*, DAILY SIGNAL (Nov. 17, 2017), <https://www.dailysignal.com/2017/11/17/gorsuch-touts-originalism-textualism-in-address-to-conservative-legal-society/>.

III. PROSPECTS FOR CHANGES TO THE DEFERENCE DOCTRINES

In concurrence in *Pereira v. Sessions*, one of his last opinions on the Court, Justice Anthony Kennedy stated that he was troubled by the amount of deference given to some agency decisions: “The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”¹⁹³ He cited evidence that Justices Thomas, Roberts, and Gorsuch may be ready to roll back at least some forms of *Chevron* deference.¹⁹⁴ On Kennedy’s view, then, only one more vote was needed to work significant change in administrative law doctrine.

Justice Kennedy was correct to cite Justice Gorsuch as an ally in this fight, as I have argued above. Even though he did not join Justice Kennedy’s concurrence in *Pereira*,¹⁹⁵ Justice Gorsuch has already taken other steps in conformity with his Tenth-Circuit anti-*Chevron* agenda. He has written a statement on denial of certiorari, suggesting that *Skidmore* deference was inappropriate for agency litigation positions.¹⁹⁶ He joined in a dissent from denial of certiorari in a case that would have allowed the overruling of *Auer*.¹⁹⁷ And he wrote a statement on denial of certiorari in *Scenic America*, which sought to ask whether *Chevron* deference was due to agency contract interpretations.¹⁹⁸

Justice Thomas is also a reliable vote against *Chevron*, *Auer*, and the others. He agrees with Justice Gorsuch that *Chevron*, *Auer*, and the others raise potential constitutional problems.¹⁹⁹ And, indeed, he would go further to limit the

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

194. *Id.*; see also *City of Arlington v. FCC*, 569 U.S. 290, 312–28 (Roberts, C.J., dissenting); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *Gutiérrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring).

195. This is presumably because Justice Gorsuch agreed with the majority that the *Chevron* question was not presented, given the clarity of the statute. See *Pereira*, 138 S. Ct. at 2114 (“The statutory text alone is enough to resolve this case.”). See also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (“No party to these cases has asked us to reconsider *Chevron* deference.”); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (declining an invitation to overrule *Chevron* because the clarity of the statute prevented the question of deference from arising).

196. See *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018) (statement of Gorsuch, J., joined by Roberts, C.J., and Thomas, J., respecting the denial of certiorari) (addressing whether agencies should receive *Skidmore* deference for litigation positions).

197. *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

198. *Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 138 S. Ct. 2 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting the denial of certiorari); as I have argued elsewhere, Justice Gorsuch uses the case as a springboard for his anti-*Chevron* views, even though the case has little to do with *Chevron*. See Elliott, *supra* note 23.

199. *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); see also *id.* at 2714 (“[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”).

authority that Congress can confer on administrative agencies.²⁰⁰

Justice Kennedy did not cite Justice Alito as a potential vote to address problems with *Chevron* and its progeny, presumably because Justice Alito dissented in *Pereira*. He would have found the statute ambiguous and *Chevron* applicable: “[U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.”²⁰¹ However, Justice Alito has expressed concern about some of the administrative deference doctrines. In *Christopher v. SmithKline Beecham*, for example, Justice Alito wrote an opinion for the Court that echoed Justice Scalia’s worries about *Auer*.²⁰² “Our practice of deferring to an agency’s interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’”²⁰³

Justice Kennedy has now been replaced by Justice Kavanaugh. He has not yet taken any actions on the Court to suggest one way or the other how he might vote²⁰⁴ (and, while on the D.C. Circuit, he was not as outspoken as then-Judge Gorsuch²⁰⁵). Commentators, however, have suggested that Kavanaugh is likely to vote to change the deference doctrines.²⁰⁶

That makes Justices Thomas, Alito, Gorsuch, and Kavanaugh all possible votes to alter at least some of the deference doctrines. Only one more Justice would be needed to work significant change in administrative law. Does Chief Justice Roberts still count as a reliable vote to change *Chevron* doctrines, as Justice Kennedy believed?

Roberts certainly has rejected some of *Chevron*’s progeny, most notably dissenting in *City of Arlington*.²⁰⁷ He has also limited *Chevron*’s application,

200. *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’ . . . On a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”).

201. *Pereira*, 138 S. Ct. at 2129 (Alito, J., dissenting).

202. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

203. *Id.* at 158 (alternation in original) (footnote omitted) (citation omitted).

204. As of February 27, 2019, Justice Kavanaugh had authored only one opinion of any kind, an opinion for a unanimous Court on an arbitrability issue. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

205. Compare generally Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, THE REGULATORY REVIEW (Sep. 3, 2018), www.theregview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/, with *supra* Section II.A.2.

206. E.g., Barnett et al., *supra* note 205 (citing Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014))).

207. *See supra* notes 156–57 and accompanying text.

developing the “major questions” doctrine in *King v. Burwell*.²⁰⁸ And, as noted immediately above, he has joined in some of the dissents from denial of certiorari and statements upon denial of certiorari that involve *Auer*, *Skidmore*, and some applications of *Chevron*.

At the same time, Chief Justice Roberts seems alive to the downsides of major doctrinal shifts in the wake of President Trump’s controversial appointments to the Court. Even before Justice Kavanaugh joined the Court, Linda Greenhouse noted the “superheated language” that Justice Gorsuch used in a dissent²⁰⁹ and the Chief Justice’s reaction to it, stating that “[m]y sense is that the Chief Justice reads this heavily freighted political moment as a time to avoid spending the Supreme Court’s limited capital needlessly, in contrast to his junior colleague’s evident desire to make as much noise as he can.”²¹⁰

The Chief has also taken other steps perceived as trying to maintain the institutional legitimacy of the Court, given President Trump’s attacks on the rule of law. So, for example, when Trump tweeted about “Obama judges,” Chief Justice Roberts issued a statement through the Supreme Court’s public-information office, stating that, as quoted by the Washington Post, “[the federal judiciary] do[es] not have Obama judges or Trump judges, Bush judges or Clinton judges.’ . . . ‘What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.’”²¹¹ Similarly, the Chief Justice spoke in October to reinforce the Court’s independence from the political branches, apparently prompted by the contentious Kavanaugh confirmation process.²¹²

Changes in administrative deference doctrines, however, may not cause the kind of political turmoil that changes in marriage equality and abortion law would cause. Indeed, it is possible that a challenge to a *Trump* Administration action would present the perfect opportunity for Chief Justice Roberts to alter *Chevron* or related doctrines while simultaneously ensuring that the Court does not look like it is rubber-stamping Trump policies. Many of the Trump Administration’s efforts to roll back Obama-era policies involve adopting different internal interpretations of regulations, implicating *Auer* deference,²¹³ or

208. 135 S. Ct. 2480 (2015).

209. Linda Greenhouse, *The Chief Justice, Searching for Middle Ground*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/opinion/chief-justice-roberts-middle.html> (citing *Artis v. District of Columbia*, 138 S. Ct. 594, 617 (2018) (Gorsuch, J., dissenting) (“[W]e’ve wandered so far from the idea of a federal government of limited and enumerated powers that we’ve begun to lose sight of what it looked like in the first place.”)).

210. *Id.*

211. Robert Barnes, *Rebuking Trump’s Criticism of ‘Obama Judge,’ Chief Justice Roberts Defends Judiciary as Independent*, WASH. POST (Nov. 21, 2018) (statement of Chief Justice Roberts).

212. Robert Barnes, *Roberts Assures Audience Supreme Court Will Serve ‘One Nation,’ Not One Party or Interest*, WASH. POST (Oct. 16, 2018).

213. E.g., Carlos Romo, *A Year for the Birds: ESA Developments and a New Interpretation of the MBTA in 2017*, 49 ABA TRENDS, no. 4, Mar.–Apr. 2018, at 9 (noting that the Department of the Interior had used

promulgating rules that take different interpretations of ambiguous statutory language, implicating *Chevron* deference.²¹⁴ Were the Court to reject the Trump interpretations by altering *Chevron* or *Auer*, the Court could eat its cake and have it, too.

CONCLUSION

Trying to predict outcomes in the Supreme Court is, of course, difficult and perhaps foolhardy. What is certain is that the Court has now granted review in *Kisor v. Wilkie*, which asks whether *Auer* should be overruled.²¹⁵ That case should give us a good sense of the direction the Court is heading—and what role Justice Gorsuch will play in taking it there.

internal guidance documents to change the interpretation of when a bird is “taken” under the Migratory Bird Treaty Act).

214. EPA is currently receiving comments on a rule proposed to replace the Obama Administration’s Waters of the United States policy under the Clean Water Act. See EPA, *Waters of the United States (WOTUS) Rulemaking*, <https://www.epa.gov/wotus-rule> (last visited Feb. 28, 2019).

215. *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (mem.) (granting petition for certiorari as to question one).