CHEVRON'S DOMAIN AND THE RULE OF LAW

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The *Chevron* doctrine holds that courts should defer to executive agencies' reasonable interpretations of the statutes they administer.[1] Over the years, judges and commentators have criticized *Chevron* deference on a number of grounds. Some criticisms have been formalist, focusing on the Constitution[2] and section 706 of the Administrative Procedure Act.[3] Others have been based on the separation of powers, focusing on the desirability of having a judicial check on agency action.[4] This Article proposes an additional criticism of *Chevron* based on the rule of law: that courts' unfettered discretion to decide whether to follow *Chevron*'s framework results in arbitrary and unpredictable decisions about *Chevron*'s applicability.

The late Justice Antonin Scalia described the rule of law as a law of rules.[5] Rules are generalized pronouncements that dictate the outcomes of future cases, whereas standards are tests that allow judges to make case-by-case determinations based on the totality of the circumstances.[6] Justice Scalia argued that rules are preferable to standards when it comes to judge-made law, because rules ensure uniformity and predictability and reduce the influence of judges' political biases on their decisions.[7] Adopting general rules of law instead of discretion-conferring standards ensures that our government is, as John Adams put it, one "of laws and not of men."[8]

The dichotomy between rules and standards has been an essential part of the debate over *Chevron*'s domain—that is to say, the debate about which cases require the application of *Chevron*. For many years, Justice Scalia argued that *Chevron* should be read in a manner that advances the rule of law.[9] As recently as *City of*

1. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

2. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247–48 (1994).

3. *See, e.g.*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 AM. U. ADMIN. L.J. 1, 9–10 (1996); Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813, 818 (2013).

4. City of Arlington v. FCC, 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting).

5. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

6. *Id.* at 1176.

7. *Id.* at 1178–79.

8. *See* United States v. United Mine Workers, 330 U.S. 258, 307 (1947) (Frankfurter, J., concurring) (attributing this phrase in the Massachusetts Declaration of Rights to John Adams).

9. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 202–03, 205 (2006).

Arlington v. FCC,[10] Justice Scalia argued that *Chevron* should be read as creating an across-the-board presumption of *Chevron*'s applicability.[11] By contrast, Justice Stephen Breyer argued for a case-by-case approach that looks at the specific statute in question and asks whether Congress would have intended *Chevron* deference.[12] Justice Scalia argued that his across-the-board presumption served as a clear rule-based alternative to Justice Breyer's case-by-case approach.

However, as the Court's recent decision in *King v. Burwell*[13] shows, a majority of the Justices on the Court do not share Justice Scalia's rule-based vision for *Chevron*. Instead, they believe that the Court should retain wide latitude to determine whether *Chevron* applies in a given case, depending on whether the circumstances are "extraordinary."[14] Although the pendulum may have swung toward Justice Scalia's position in *City of Arlington*, it has now swung back toward Justice Breyer's case-by-case approach.

In this Article, I argue that the jurisprudence will continue to swing back and forth between these two positions, with the effect being that there will never be a definitive resolution on the question of *Chevron*'s domain. As a result, the only way to safeguard the rule of law is to abandon *Chevron* deference completely. Part I of this Article summarizes the competing approaches to understanding *Chevron*'s domain and explains how they reflect competing views about the desirability of rules and standards. Part II discusses why the debate over *Chevron*'s domain will likely never be resolved, which would effectively lead to a standard-based approach, as opposed to a rule-based approach. Part III argues that, in light of this observation, the only way to ensure a rule-based approach to judicial review of agencies' statutory interpretations is to abandon *Chevron* deference completely.

I. COMPETING VIEWS OF *CHEVRON*

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[15] the Supreme Court announced a two-step approach to reviewing agency interpretations of law without providing a clear sense of the

10. 133 S. Ct. 1863 (2013).
11. *Id.* at 1874.
12. *See* Sunstein, *supra* note 9, at 202–03.
13. 135 S. Ct. 2480 (2015).
14. *Id.* at 2488–89.
15. 467 U.S. 837 (1984).

theory that justified it.[16] Although *Chevron* suggested a number of possible rationales, such as political accountability and technical expertise, it was unclear which of these rationales formed the basis of the Court's decision.[17] As Professor Cass Sunstein once put it, *Chevron* consisted of "two steps in search of a rationale."[18]

Over time, the Court settled on an understanding of *Chevron* as rooted in congressional intent to delegate law-interpreting authority to the agency.[19] Under this theory, "[c]ourts defer to agency interpretations of law when, and because, Congress has told them to do so."[20] As scholars have noted, one difficulty with this theory is that courts give *Chevron* deference even when the statute in question does not explicitly call for such deference.[21] The Court's response to this concern has been to characterize statutory ambiguity as "an implicit delegation from Congress to the agency to fill in the statutory gaps."[22] This implied-delegation theory represents the Court's modern understanding of *Chevron* deference.

But even as the Court settled on the implied-delegation theory, disputes arose over what kinds of statutes and what kinds of agency actions triggered *Chevron* deference.[23] In particular, two major positions, one associated with Justice Breyer, and the other with Justice Scalia, emerged in the debate over *Chevron*'s domain. These two positions reflect the Justices' differing views about the relative merits of discretion-conferring standards and clear rules of general applicability.

A. Justice Breyer's Position

The first position, articulated and advocated by Justice Breyer, argues that *Chevron*'s applicability in a given case depends on whether Congress intended the particular legal question to be resolved by the agency, rather than by the courts. Justice Breyer

16. *See* Sunstein, *supra* note 9, at 195–98.
17. 467 U.S. at 844, 865–66.
18. Sunstein, *supra* note 9, at 195.
19. *Id.* at 197–98.
20. *Id.* at 198.
21. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001) ("[*Chevron*] posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.").
22. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
23. *See* Merrill & Hickman, *supra* note 21, at 835.

described this highly particularized case-by-case approach when he served as a judge on the First Circuit in *Mayburg v. Secretary of Health and Human Services*, a case that was decided just months after *Chevron*:

> [C]ourts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[24]

In a subsequent law review article, then-Judge Breyer expanded on his arguments and suggested that courts should engage in "stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert."[25] This approach is based on the idea that the stringency of judicial review should be tailored to the "institutional capacities and strengths" of the judiciary.[26]

Thus, to summarize Justice Breyer's approach to *Chevron*, when courts are deciding whether to defer to an agency in a case, they should look not only at whether Congress intended the agency to interpret the statute, but also at whether Congress intended the agency to resolve the specific question before the court. In addition, the degree of deference given by the court also depends on Congress's intent. These examinations of congressional intent can and should be informed by the court's assessment of its own institutional competencies.

Justice Breyer's approach draws from the premises of "imaginative reconstruction," an interpretive technique that purports to discern what Congress would have intended if it had

24. 740 F.2d 100, 106 (1st Cir. 1984) (citations omitted).

25. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397 (1986).

26. *Id.* at 398.

spoken on the precise issue before the court.[27] Under Justice Breyer's interpretation of *Chevron*, courts answer the question of whether Congress impliedly delegated interpretive authority to the agency by reconstructing Congress's policy goals and imagining whether—and to what degree—Congress would have wanted judicial deference. This case-by-case approach reflects Justice Breyer's preference for standards that allow judges to make individualized decisions in cases based on consequentialist reasoning.

B. Justice Scalia's Position

The second major position on *Chevron* deference, articulated by Justice Scalia, agrees with Justice Breyer in approving the implied-delegation theory. However, as a proponent of rules over standards, Justice Scalia argued that *Chevron* should be read as replacing "statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[28] This presumption would operate as "a background rule of law against which Congress can legislate," meaning that Congress could always abrogate the presumption through express statutory language.[29]

Acknowledging that an across-the-board presumption of *Chevron*'s applicability was "not a 100% accurate estimation of modern congressional intent," Justice Scalia argued that "the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modern dockets made it less and less possible for the Supreme Court to police application of an ineffable rule."[30] Drawing on his textualist instincts, Justice Scalia noted that "the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway" because in the "vast majority of cases . . . Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all."[31] According to Justice Scalia, an across-the-board presumption "more accurately reflects the reality

27. *See* John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1161, 1164 (2007).

28. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

29. *Id.* at 517.

30. *Id.*

31. *Id.*

of government, and thus more adequately serves its needs."[32]

Justice Breyer disagreed, believing that an across-the-board presumption would be overly simplistic because it could not adequately address "many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures."[33] In his view, the "attractive simplicity" of an across-the-board presumption would likely prove ineffective at addressing the complex needs of the administrative state.[34] But in Justice Scalia's view, simplicity was the greatest virtue of such an approach. A simple rule of presumed deference is "easier to follow and thus easier to predict,"[35] avoiding the "font of uncertainty and litigation"[36] that would arise under Justice Breyer's case-by-case approach.

Thus, although Justice Breyer and Justice Scalia both accepted the theory of implied delegation, they had very different views about how judges should implement that theory. That disagreement was rooted in their differing views about the relative merits of rules and standards. Whereas Justice Breyer favored discretion-conferring standards because he wanted judges to address the complexity of each case on an individual level, Justice Scalia believed that a clear rule was needed to prevent confusion and eliminate unpredictability. For several decades, these differences about the proper scope of *Chevron*'s domain would be debated at the Supreme Court, with the Court swinging back and forth like a pendulum between the positions of Justice Breyer and Justice Scalia.

II. NO RESOLUTION IN SIGHT

A. Early History

In the history of the debate between Justice Breyer and Justice Scalia, the *Chevron* decision initially seemed to favor Justice Scalia's position. *Chevron* did not engage in the sort of nuanced, case-by-case analysis envisioned by Justice Breyer, but instead followed a two-step framework that appeared to be premised on an across-the-

32. *Id.* at 521.
33. Breyer, *supra* note 25, at 373.
34. *Id.* at 373.
35. Scalia, *supra* note 28, at 521.
36. *Id.* at 516.

board presumption of congressional intent to delegate law-interpreting authority. As the Court stated in *Chevron*:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[37]

Recognizing that this passage seemed to call for an across-the-board presumption, Justice Breyer referred to the tension between his view and the Court's approach in *Chevron* as "The Problem of the *Chevron* Case."[38] In response to this problem, Justice Breyer argued that his case-by-case approach was compatible with a "less literal"[39] and "less far-reaching"[40] interpretation of *Chevron* that better met the complex needs of the administrative state.

Although *Chevron* initially supported Justice Scalia's position, a trilogy of cases from the early 2000s involving *Chevron*'s domain brought Justice Breyer's vision of *Chevron* to the forefront. In *Christensen v. Harris County*,[41] the Court held that *Chevron*'s two-step framework did not apply in its review of a legal interpretation by the Department of Labor set forth in an opinion letter.[42] The Court reasoned that the opinion letter was not entitled to *Chevron* deference because it was not the product of "formal adjudication or notice-and-comment rulemaking" and "lack[ed] the force of law."[43] Justice Scalia disagreed, arguing that *Chevron* should apply to any interpretation that "represents the authoritative view of the Department of Labor," even if it appears in an opinion letter or amicus brief.[44] *Christensen* established the existence of boundaries to the scope of *Chevron*'s domain and opened the door to future litigation over the applicability of *Chevron*.

One year later, the Court delivered a huge victory to Justice

37. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
38. Breyer, *supra* note 25, at 372; *see* Sunstein, *supra* note 9, at 201.
39. Breyer, *supra* note 25, at 379.
40. *Id.* at 380.
41. 529 U.S. 576 (2000).
42. *Id.* at 586–88.
43. *Id.* at 587.
44. *Id.* at 591 (Scalia, J., concurring in part and concurring in the judgment).

Breyer's position in *United States v. Mead Corp.*,[45] which held that tariff classification rulings by the United States Customs Service were not entitled to review under the *Chevron* framework.[46] Hearkening to the language of then-Judge Breyer's *Mayburg* decision and his 1986 law review article, the Court stated that the "fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."[47] Based on an analysis of those factors, courts should follow *Chevron* when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[48] After examining the particularities of the Harmonized Tariff Schedule of the United States—such as the legislative history and the fact that 10,000 to 15,000 tariff classification rulings are issued each year[49]—the Court concluded that the Customs Service's tariff classification was "beyond the *Chevron* pale."[50]

Justice Scalia dissented, arguing that "[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed [by the Court] to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary."[51] The Court "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."[52] Drawing on his preference for clear rules over broad standards, Justice Scalia predicted that the "grab bag" of factors considered by the Court would lead to "protracted confusion,"[53] "uncertainty," "unpredictability," and "endless litigation."[54] *Mead* represented a significant setback for Justice Scalia's reading of *Chevron* as establishing an "across-the-board

45. 533 U.S. 218 (2001).
46. *Id.* at 221.
47. *Id.* at 228 (footnotes omitted).
48. *Id.* at 226–27.
49. *Id.* at 233–34, 238 n.19.
50. *Id.* at 234.
51. *Id.* at 239 (Scalia, J., dissenting).
52. *Id.* at 241.
53. *Id.* at 245.
54. *Id.* at 250.

presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion."[55]

Justice Breyer's case-by-case approach to *Chevron* came to full fruition in *Barnhart v. Walton*.[56] In that case, the Court considered the legality of the Social Security Administration's interpretation of a regulation interpreting the statutory definition of a "disability."[57] Walton argued that *Chevron* was inapplicable because the agency's interpretation existed prior to its promulgation of the regulation and therefore was not achieved through notice-and-comment rulemaking.[58] Writing for the Court, Justice Breyer rejected this argument and applied the *Chevron* framework because:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[59]

Once again, the Court drew from the language of then-Judge Breyer's decision in *Mayburg* and his 1986 law review article, applying a totality-of-the-circumstances analysis to determine *Chevron*'s applicability.

Barnhart's multifactor inquiry would have been totally unnecessary under Justice Scalia's interpretation of *Chevron*, as Justice Scalia noted in a separate concurrence.[60] The question of *Chevron*'s applicability would have depended simply on whether the interpretation represented the authoritative view of the agency.[61] In Justice Scalia's view, Justice Breyer's reliance on a complex multifactor inquiry was an attempt to resurrect "an anachronism—a relic of the pre-*Chevron* days."[62]

Mead and *Barnhart* did not represent a full implementation of the view that Justice Breyer espoused in his 1986 law review article, which would have used a totality-of-the-circumstances test as the

55. *Id.* at 257.
56. 535 U.S. 212 (2002).
57. *Id.* at 217.
58. *Id.* at 221.
59. *Id.* at 222.
60. *Id.* at 226 (Scalia, J., concurring).
61. *See id.* at 226 –27.
62. *Id.*

definitive inquiry for whether courts defer to agencies.[63] Instead, *Barnhart* accepted the *Chevron* two-step framework, but used a totality-of-the-circumstances test for the threshold inquiry of whether *Chevron* applies—also known as the question of *Chevron*'s domain or *Chevron* Step Zero.[64] Although Justice Breyer was not able to fully implement his vision for agency deference, *Barnhart* nonetheless represented a significant victory for his case-by-case approach. As Justice Scalia lamented in *Mead*, this development transformed "a general presumption of authority in agencies to resolve ambiguity . . . to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary."[65]

B. Modern Cases

In 2013, however, the Court swung back to Justice Scalia's position in *City of Arlington v. FCC*.[66] In that case, the FCC issued a declaratory ruling interpreting a provision of the Telecommunications Act of 1996 that required state and local governments to act on wireless siting applications "within a reasonable period of time."[67] The declaratory ruling stated that "a reasonable period of time" to process a collocation application (an application to place a new antenna on an existing tower) was presumptively 90 days, but was 150 days for all other applications.[68] The petitioners challenged the FCC's jurisdiction to issue such an interpretation and argued that the *Chevron* framework did not apply to the question because it was jurisdictional.[69]

Writing for the majority, Justice Scalia rejected this argument, calling the distinction between jurisdictional and nonjurisdictional interpretations "a mirage," because "[n]o matter how it is framed, the question a court faces . . . is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[70] In the primary discussion in his opinion, Justice Scalia conspicuously declined to mention *Mead* or *Barnhart*. Only in his rebuttal to the dissent did Justice Scalia briefly discuss the impact of *Mead*:

63. Breyer, *supra* note 25, at 380–81.
64. *Barnhart*, 535 U.S. at 217–18.
65. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).
66. 133 S. Ct. 1863 (2013).
67. *Id.* at 1866.
68. *Id.* at 1867.
69. *Id.* at 1867–68.
70. *Id.* at 1868.

> The dissent is correct that *United States v. Mead Corp.* requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.[71]

As Patrick Smith has argued, this passage rewrote the holding of *Mead*.[72] By describing *Mead* as denying *Chevron* deference "to action, by an agency with rulemaking authority, that was not rulemaking," Justice Scalia made it appear as though the applicability of *Chevron* turned on the mere fact that the agency action in *Mead* was not rulemaking.[73] That ignores *Mead*'s discussion of how, even though the agency action was not the product of notice-and-comment rulemaking, that fact alone was not enough to determine whether *Chevron* applied: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case."[74]

Justice Scalia explicitly rooted his marginalization of *Mead* in his concern for rule-of-law ideals. If "*every* agency rule must be subjected to a *de novo* determination of whether *the particular issue* was committed to agency discretion," courts would engage in an "open-ended hunt for congressional intent."[75] The result would be "[t]hirteen Courts of Appeals applying a totality-of-the-circumstances test," which would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."[76] Echoing his dissent in *Mead*, Justice Scalia argued that an across-the-board presumption of *Chevron*'s applicability would promote the rule of law by eliminating the need for "some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent."[77]

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71. *Id.* at 1874 (citation omitted).
72. Patrick J. Smith, Chevron *Step Zero After* City of Arlington, 140 TAX NOTES 713, 714–15 (2013).
73. *City of Arlington*, 133 S. Ct. at 1874.
74. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001).
75. *City of Arlington*, 133 S. Ct. at 1874.
76. *Id.*
77. *Id.*

Sensing Justice Scalia's attempt to undercut his case-by-case approach, Justice Breyer wrote a separate concurrence emphasizing the "context-specific" factors that were considered in *Mead* and *Barnhart*.[78] In addition, Chief Justice John Roberts wrote a dissenting opinion, joined by Justices Anthony Kennedy and Samuel Alito.[79] Invoking *Mead*, Chief Justice Roberts argued that "whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."[80] Unlike Justice Breyer, Chief Justice Roberts based his critique of Justice Scalia's approach on concerns about the extent to which the modern administrative state "wields vast power and touches almost every aspect of daily life."[81] Chief Justice Roberts argued that "the danger posed by the growing power of the administrative state cannot be dismissed."[82] Nonetheless, despite these contrary opinions from Justice Breyer and Chief Justice Roberts, Justice Scalia's majority opinion in *City of Arlington* received the votes of four other Justices, appearing to signal a revival of his rule-based interpretation of *Chevron*.

Just two years after *City of Arlington*, however, the pendulum swung back in the direction of Justice Breyer's position. In *King v. Burwell*,[83] the Court considered an IRS regulation interpreting the Affordable Care Act's provision of tax credits to those who buy health insurance on an "Exchange established by the State."[84] At issue was whether the IRS could interpret "Exchange established by the State" to include federally created exchanges in addition to state-created exchanges.[85] The Fourth Circuit followed the *Chevron* framework and upheld the regulation as a reasonable interpretation of the statute,[86] but the Supreme Court took a different approach.

Writing for the majority, Chief Justice Roberts affirmed the judgment of the Fourth Circuit, but disagreed with the Fourth

78. *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment).
79. *Id.* at 1877 (Roberts, C.J., dissenting).
80. *Id.* at 1881.
81. *Id.* at 1878 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).
82. *Id.* at 1879.
83. 135 S. Ct. 2480 (2015).
84. *Id.* at 2487.
85. *Id.* at 2488.
86. *Id.*

Circuit's application of *Chevron*.[87] Chief Justice Roberts noted that although the Court "often" followed *Chevron* in cases involving agency interpretations of statutes, in "extraordinary cases" there "may be reason to hesitate" about whether Congress intended an implicit delegation of interpretive authority to the agency.[88] In the case at hand, Chief Justice Roberts observed that the Affordable Care Act's tax credits were "among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."[89] Therefore, the availability of those credits on federal exchanges implicated a question of "deep economic and political significance" that was "central to the statutory scheme."[90] In addition, the Chief Justice noted that the IRS "has no expertise in crafting health insurance policy."[91] Based on those circumstances, Chief Justice Roberts concluded that it was "especially unlikely that Congress would have delegated this decision to the IRS."[92]

Although *King*'s discussion of *Chevron* occupied just a few paragraphs of a lengthy opinion,[93] that discussion was significant. If Chief Justice Roberts had wanted to affirm the Fourth Circuit's ruling in the least controversial way, he could have simply followed the *Chevron* framework. Given that Chief Justice Roberts expressly concluded that the statute was ambiguous,[94] he could have affirmed the regulation as a reasonable interpretation of the statute under *Chevron*. Instead, Chief Justice Roberts went out of his way to ignore *Chevron* and engage in an independent analysis of the statute's meaning.

In explaining his decision to bypass *Chevron*, Chief Justice Roberts quoted *FDA v. Brown & Williamson Tobacco Corp.*[95] and *Utility Air Regulatory Group v. EPA*.[96] Those cases differ from *King* because they purported to follow the *Chevron* framework while examining the magnitude of the statute's policy implications.[97] By contrast, *King* addressed the separate question of whether *Chevron*

87. *Id.* at 2489.
88. *Id.* at 2488–89.
89. *Id.* at 2489.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2488–89.
94. *Id.* at 2492.
95. 529 U.S. 120, 147 (2000).
96. 134 S. Ct. 2427, 2444 (2014).
97. *Id.* at 2439; *Brown & Williamson*, 529 U.S. at 125–26.

even applied in the first place—the question of *Chevron*'s domain or *Chevron* Step Zero.[98] In analyzing the applicability of *Chevron* in *King*, Chief Justice Roberts employed a multifactor analysis of the sort used in *Mead* and *Barnhart*.[99] He looked at "the related expertise of the Agency" and the "importance of the question to administration of the statute," two factors used by Justice Breyer in *Barnhart*.[100] Thus, in *King v. Burwell*, Chief Justice Roberts seems to have picked up where he left off in *City of Arlington*, conducting what Justice Scalia referred to as a "massive revision of our *Chevron* jurisprudence."[101]

C. Exceptions That Swallow the Rule

The foregoing history, spanning multiple decades, demonstrates that the back-and-forth debate over *Chevron*'s domain has no end in sight. When Justice Scalia wrote his 1989 law review article, his dissenting opinion in *Mead*, and his majority opinion in *City of Arlington*, he dreamed of establishing an across-the-board presumption of *Chevron*'s applicability. Justice Scalia hoped that such a presumption would serve as an alternative to Justice Breyer's multifactor totality-of-the-circumstances approach and promote the virtues of the rule of law—predictability, uniformity, and ease of administrability—in the complicated field of administrative law.

Unfortunately, Justice Scalia's efforts appear not to have been successful. The exceptions to *Chevron* have begun to swallow the rule. In addition to the Court's recent undermining of *Chevron* in *King*, there have been a number of smaller skirmishes over the scope of *Chevron*'s domain with respect to particular areas of law. Each of these potential exceptions to the applicability of *Chevron* threatens to undermine Justice Scalia's vision of an across-the-board presumption and bring *Chevron* even further toward a case-by-case approach of the sort envisioned by Justice Breyer.

One of the most recent examples of an effort to create a new exception to *Chevron* involves the question of whether courts should follow the *Chevron* framework when evaluating an agency's interpretation of a "hybrid statute" that has both civil and criminal applications. In *Esquivel-Quintana v. Lynch*,[102] the Sixth Circuit was

98. *King*, 135 S. Ct. at 2488–89.
99. *Id.*
100. Barnhart v. Walton, 535 U.S. 212, 222 (2002).
101. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).
102. 810 F.3d 1019 (6th Cir. 2016).

confronted with this question. Juan Esquivel-Quintana was a Mexican national who pleaded guilty to statutory rape in California and then moved to Michigan.[103] After the move, the government sought to deport him from the country on the ground that he had been convicted of "sexual abuse of a minor," which is an aggravated felony under the Immigration and Nationality Act.[104] Esquivel-Quintana argued that his conviction for a consensual sex act was not "sexual abuse of a minor," but the Board of Immigration Appeals disagreed and ordered him removed from the country.[105] At issue in the case was whether the *Chevron* framework applied to the Board's decision to interpret "sexual abuse of a minor" as including Esquivel-Quintana's conviction.[106]

Although it is well established that precedential decisions of the Board of Immigration Appeals receive *Chevron* deference,[107] Esquivel-Quintana argued that there should be an exception for cases involving statutes with both civil and criminal applications.[108] The statute in his case, 8 U.S.C. § 1101(a)(43)(A), defines "sexual abuse of a minor" as an aggravated felony. Although a conviction for an aggravated felony can serve as a ground for removal under 8 U.S.C. § 1227(a)(2)(A)(iii), it can also result in an enhanced sentence for those who are convicted of illegal reentry under 8 U.S.C. § 1227(a)(2)(A)(iii). In addition, 8 U.S.C. § 1327 makes it a crime to assist an alien convicted of an aggravated felony with illegally entering the United States. Thus, the meaning of "sexual abuse of a minor" has both civil and criminal applications.

In the criminal context, the rule of lenity requires ambiguities to be resolved in favor of the defendant.[109] This ensures that the public has adequate notice of what conduct is criminalized, and preserves the separation of powers by ensuring that criminal laws are written by the legislature and not executive agencies.[110] But in the civil context, *Chevron* requires courts to resolve ambiguities in favor of the government by deferring to agencies' reasonable statutory interpretations. Because the same statute cannot have different meanings in different cases—"a statute is not a

103. *Id.* at 1021.
104. *Id.*
105. *Id.*
106. *Id.* at 1021–24.
107. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).
108. *Esquivel-Quintana*, 810 F.3d at 1023.
109. *See, e.g.*, Moskal v. United States, 498 U.S. 103, 108 (1990).
110. *Esquivel-Quintana*, 810 F.3d at 1023.

chameleon"[111]—Esquivel-Quintana argued that the court could not apply *Chevron* in his civil immigration case and was required to apply the rule of lenity instead.[112]

Writing for the majority, Judge Boggs acknowledged that "deference to agency interpretations of laws with criminal applications threatens a complete undermining of the Constitution's separation of powers."[113] Nevertheless, Judge Boggs held that, under the Supreme Court's precedent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[114] the court was bound to follow *Chevron*.[115] Applying the *Chevron* framework, Judge Boggs deferred to the Board's reasonable interpretation of "sexual abuse of a minor" as including Esquivel-Quintana's conviction.[116]

Judge Sutton dissented,[117] drawing extensively from his earlier concurrence in *Carter v. Welles-Bowen Realty, Inc.*,[118] which laid much of the intellectual groundwork for Esquivel-Quintana's argument. Judge Sutton would have held that "*Chevron* has no role to play in construing hybrid statutes."[119] In explaining his rationale for allowing this exception to *Chevron*, Judge Sutton noted a number of situations in which the Supreme Court has declined to follow *Chevron*:

> An exception to *Chevron* for dual-role statutes would not be the least bit unusual. Deference under that rule is categorically unavailable, the Supreme Court has held, in many settings: (1) agency interpretations of statutes the agency is not "charged with administering," *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997); (2) agency interpretations of "the scope of the judicial power vested by [a] statute," such as the availability of a private right of action, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990); *see Alexander v. Sandoval*, 532 U.S. 275, 288–91 (2001); (3) agency interpretations that result from procedures that were not "in the exercise" of the agency's authority "to make rules carrying the force of law," *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); (4) agency interpretations with respect to "extraordinary

111. *Id.* (quoting Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring)).
112. *Id.* at 1022–23.
113. *Id.* at 1023–24.
114. 515 U.S. 687, 704 n.18 (1995).
115. *Esquivel-Quintana*, 810 F.3d at 1024.
116. *Id.* at 1025.
117. *Id.* at 1027–1032 (Sutton, J., concurring in part and dissenting in part).
118. 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring).
119. *Esquivel-Quintana*, 810 F.3d at 1031 (Sutton, J., concurring in part and dissenting in part).

> cases" where it is unlikely Congress "intended . . . an implicit delegation" to the agency, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); and (5) agency interpretations of criminal statutes, *Abramski*, 134 S. Ct. at 2274.[120]

By providing this lengthy list of exceptions to *Chevron*, Judge Sutton made it clear that, in his view, hoping for an across-the-board presumption of *Chevron*'s applicability is a pipe dream. The battle to prevent case-by-case incursions on *Chevron*'s domain has already been lost, Judge Sutton argued, and with so many exceptions to *Chevron* already, we might as well add another exception when there are compelling reasons for doing so.

Another example of a skirmish over *Chevron*'s domain deals with patent law. Courts do not currently give *Chevron* deference to the United States Patent and Trademark Office when it examines patents, but a number of scholars have begun to challenge this thinking. In a 2007 law review article, Professors Stuart Benjamin and Arti Rai argued that "the analysis in *Mead* suggests that *Chevron* may be the appropriate standard for patent denials."[121] More recently, Professor Melissa Wasserman set forth a highly detailed argument for why the Leahy-Smith America Invents Act, passed in 2011, evinces a congressional intent for courts to follow *Chevron* when reviewing the Patent and Trademark Office's decisions.[122] On the other hand, Professor Orin Kerr has argued strongly against the application of *Chevron* because patent law predates the modern administrative state and operates using different mechanisms.[123] The Federal Circuit—which has near-exclusive jurisdiction over patent appeals[124]—has yet to apply *Chevron* in the context of patent law. Nevertheless, the vigorous debate between these professors provides another example of how the malleable, case-by-case inquiry set forth in *Mead*, *Barnhart*, and *King* can result in increased litigation and uncertainty over the scope of *Chevron*'s domain.

Today, the attack on *Chevron* is relentless. Several Justices have openly encouraged litigants to challenge the scope of *Chevron*'s domain. In *Whitman v. United States,* Justices Scalia and Thomas

120. *Id.* at 1031–32.

121. Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 318 (2007).

122. Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1977–2005 (2013).

123. Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 162 (2000).

124. *See* Wasserman, *supra* note 122, at 1963.

endorsed the hybrid-statute argument espoused by Judge Sutton in *Carter* and *Esquivel-Quintana*.[125] In *Perez v. Mortgage Bankers Ass'n*,[126] Justices Scalia, Thomas, and Alito signaled their willingness to eliminate deference to agencies' interpretations of their own regulations,[127] a position which Justice Thomas reiterated in *United Student Aid Funds, Inc. v. Bible*.[128] And in *Michigan v. EPA*, Justice Thomas called for a total abolition of *Chevron* deference.[129] These anti-*Chevron* positions may not gain the support of a majority of the Justices in the near future, but they do indicate a shift in thinking among the conservative Justices about the desirability of broad *Chevron* deference. Justice Scalia—who once championed an across-the-board presumption of *Chevron*'s applicability to promote the rule of law—appears to have reconsidered his support for deference in his final years on the Court. Despite his vigorous denunciation of Chief Justice Roberts's dissent in *City of Arlington*, it may well be that Justice Scalia came to be persuaded of "the danger posed by the growing power of the administrative state."[130]

As the conservative Justices have become increasingly hostile to *Chevron* deference, none of the liberal Justices have taken to championing Justice Scalia's across-the-board presumption. In light of Justice Breyer's totality-of-the-circumstances approach in *Barnhart* and Chief Justice Roberts's adoption of that approach in *King*, it now seems that support on the Court for an across-the-board presumption is at an all-time low.

In the early years of Justice Scalia's career, he envisioned a rule-based approach to *Chevron* deference. But that vision can only be realized if courts consistently and uniformly adopt his approach. That scenario is unlikely ever to occur. Because *Chevron* is a judge-made doctrine, judges will always decide the scope of *Chevron*'s domain. As history has shown, those judges will inevitably have differing opinions, oftentimes based on policy judgments. As a result, there will always be uncertainty and unpredictability about which cases are "beyond the *Chevron* pale."[131] Despite Justice Scalia's best efforts, *Chevron* has become a doctrine that

125. 135 S. Ct. 352, 352–54 (2014) (Scalia, J., statement respecting denial of certiorari).
126. 135 S. Ct. 1199 (2015).
127. *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).
128. 136 S. Ct. 1607 (2016) (Thomas, J., statement respecting denial of certiorari).
129. Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).
130. City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013).
131. United States v. Mead Corp., 533 U.S. 218, 234 (2001).

undermines the rule of law.

III. ABANDONING *CHEVRON* TO PRESERVE THE RULE OF LAW

A. Earlier Arguments

In light of how far *Chevron* doctrine has deviated from rule-of-law ideals, the Supreme Court should abandon the *Chevron* framework. Although I am not the first person to call for the abandonment of *Chevron*, most critics who have done so have focused on formalist arguments and arguments based on the separation of powers.

The most prominent of the formalist arguments contends that *Chevron* violates the United States Constitution. In *Michigan v. EPA*,[132] for example, Justice Thomas wrote in a concurrence that he had "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[133] In his view:

> [*Chevron* deference] wrests from Courts the ultimate interpretative authority to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and hands it over to the Executive. . . . Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.[134]

In addition to raising Article III concerns, Justice Thomas also argued that *Chevron* "runs headlong" into Article I, "which vests '[a]ll legislative Powers herein granted' in Congress."[135] According to Justice Thomas, "if we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power."[136] Justice Thomas's strongly worded concurrence in *Michigan v. EPA* was the first time a Supreme Court Justice called for the overturning of *Chevron* on constitutional grounds, echoing concerns that commentators had been making for quite some time.[137]

Another formalist argument contends that *Chevron* violates the

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132. 135 S. Ct. 2699 (2015).
133. *Id.* at 2712 (Thomas, J., concurring).
134. *Id.*
135. *Id.* at 2713 (quoting U.S. CONST. art. I, § 1).
136. *Id.* (citation omitted) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
137. *See, e.g.*, Lawson, *supra* note 2, at 1247–48.

Administrative Procedure Act, the quasi-constitutional statute that governs the administrative state. Section 706 of the Act provides for judicial review of agency actions and states that "the reviewing court *shall* decide all relevant questions of law, [and] interpret . . . statutory provisions."[138] Patrick Smith has argued that this mandatory language in the Act cannot be reconciled with *Chevron*'s statement that "a reviewing court must accept an agency's 'permissible construction of the statute' even if the agency interpretation is not 'the reading the court would have reached if the question initially had arisen in a judicial proceeding.'"[139] As Professor Robert Anthony put it, "[o]n the face of this statute, it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively give controlling effect to a not-inconsistent agency position."[140] Because *Chevron* expressly requires courts to defer to interpretations with which they do not agree, *Chevron* arguably violates section 706 of the Administrative Procedure Act.

These formalist arguments, based on the texts of the Constitution and the Administrative Procedure Act, raise important questions about *Chevron*'s legitimacy. However, many would contend that decades of post-*Chevron* precedent and practice undercut these arguments.[141] The Supreme Court rarely overturns longstanding precedents without a compelling reason for doing so, and the Court will often sanction a practice if it is supported by historical tradition, even if that practice lacks a clear basis in constitutional or statutory text.

In constitutional law, questions about the Privileges or Immunities Clause,[142] the nondelegation doctrine,[143] and the

138. 5 U.S.C. § 706 (2012) (emphasis added).

139. Smith, *supra* note 3, at 818 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.11 (1984)).

140. Anthony, *supra* note 3, at 9.

141. *Cf.* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 400 (2015) (invoking precedent to criticize libertarian administrative-law decisions from the D.C. Circuit); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)) (invoking precedent to criticize constitutional arguments against the legality of the administrative state).

142. *See* McDonald v. City of Chicago, 561 U.S. 742, 808–09 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing the Court's "marginalization" of the Privileges or Immunities Clause).

143. *See* Whitman v. Am. Trucking Assoc., 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . .").

Recess Appointments Clause[144] have all been decided based on longstanding precedent. In *McDonald v. City of Chicago*, Justice Alito noted that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation" of the Privileges or Immunities Clause.[145] Nevertheless, he and the other Justices in the plurality saw "no need to reconsider that interpretation" and "therefore decline[d] to disturb the *Slaughter-House* holding."[146] The Court has also found historical practice to be especially important in cases involving the separation of powers. As the Court stated in the Recess Appointments Clause case, *NLRB v. Noel Canning*, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President."[147]

Precedent and practice are even more important in cases involving statutory interpretation.[148] In that context, stare decisis has "special force."[149] If Congress disagrees with the Supreme Court's interpretation of a statute, it can amend that statute to reflect the disagreement. Therefore, when an interpretation of a statute has persisted for a long time without amendment, Congress is presumed to have acquiesced to the Court's interpretation and the Court is unlikely to disturb that interpretation.[150]

Given that *Chevron* has endured for over thirty years, becoming one of the most widely cited Supreme Court cases of all time, formalist evaluations of *Chevron* alone are unlikely to persuade the Court to change its mind about *Chevron* deference. With the exception of Justice Thomas, most of the Justices are not inclined to disturb longstanding precedents.[151] Thus, any serious attempt to reevaluate *Chevron*'s legitimacy must also engage in a functional discussion of *Chevron*'s costs and benefits.

144. NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).
145. 561 U.S. at 756.
146. *Id.* at 758.
147. 134 S. Ct. at 2559 (quoting Pocket Veto Case, 279 U.S. 655, 689 (1929)).
148. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317–18 (2005).
149. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).
150. Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one.").
151. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); McDonald v. City of Chicago, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part and concurring in the judgment); United States v. Lopez, 514 U.S. 549, 602 (1995) (Thomas, J., concurring); *see generally* RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION (2014).

The most common functional argument against *Chevron* is based on the separation of powers. Specifically, critics argue that it is desirable to have courts provide a strong and independent check on agency power. Chief Justice Roberts spent several paragraphs of his dissent in *City of Arlington* discussing these concerns, beginning with a quotation from James Madison:

> One of the principal authors of the Constitution famously wrote that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, . . . executive power, . . . and judicial power . . . . The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.[152]

Turning his attention to *Chevron* deference, Chief Justice Roberts argued: "When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. . . . It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."[153] Thus, in Chief Justice Roberts's view, when courts apply *Chevron* deference, they abnegate their important role as a check on agency power.

This argument based on the separation of powers is not a critique of *Chevron* deference specifically. Rather, it is based on broader concerns about the size and scope of government. In Chief Justice Roberts's view, the battle over *Chevron*'s domain is just one front in a broader war against the "danger posed by the growing power of the administrative state."[154]

Although this argument naturally appeals to small-government conservatives and libertarians who are skeptical of government power, it is unlikely to speak to the concerns of those who want *better* government, rather than *less* government. Most jurists are not interested in unraveling the administrative state. Even so, there is still an important reason for those jurists to reexamine *Chevron* based on concerns about the rule of law—the need for a clear,

152. City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).
153. *Id.* at 1879.
154. *Id.*

predictable approach to judicial review of agencies' legal interpretations.

B. Rule of Law

That *Chevron* undermines the rule of law provides a powerful functional argument for abandoning it that appeals to jurists from across the ideological spectrum. With the Supreme Court's recent reaffirmation of the "extraordinary cases" exception in *King v. Burwell*, it is impossible to predict whether *Chevron* will apply to the next big case involving agency decision making. New debates over the applicability of *Chevron* to specific laws—such as hybrid statutes and patent laws—are emerging all the time, with no end in sight. Because *Chevron* is a judge-made doctrine, courts will inevitably have substantial discretion in deciding whether to apply *Chevron* in a given case. Such broad discretion leads to unpredictability, excessive litigation, disparate treatment of similarly situated parties, and decisions that are influenced by judges' personal policy preferences—in short, it undermines the rule of law, as discussed by Justice Scalia in his article on the rule of law as a law of rules[155] and his dissent in *Mead*.[156]

Abandoning *Chevron* would eliminate "unpredictab[ility]" and curtail judges' discretion to make "ad hoc judgment[s] regarding congressional intent"—concerns that Justice Scalia raised in *City of Arlington* in a majority opinion that was joined by three liberal Justices.[157] Litigants could have their day in court on the actual merits of their legal claims, without having to wonder whether the judges will choose to avoid the question by deferring to the agency. By abandoning *Chevron*, the Court would restore the rule of law in cases involving judicial review of the lawfulness of agency actions.

An abandonment of *Chevron* would be in line with the Supreme Court's recent trend, in a number of areas of law, of curtailing judicial discretion to avoid a decision on the legal merits of a claim. In *Zivotofsky ex rel. Zivotofsky v. Clinton*,[158] for example, the Court revamped the political-question doctrine in a way that minimized courts' discretion to consider prudential factors. Prior to *Zivotofsky*, the Court looked at six factors set forth in *Baker v. Carr*[159] to

155. Scalia, *supra* note 5.
156. United States v. Mead Corp., 533 U.S. 218, 245 (2001) (Scalia, J., dissenting).
157. 133 S. Ct. 1863, 1874 (2013).
158. 132 S. Ct. 1421 (2012).
159. 369 U.S. 186 (1962).

determine whether a case presented a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[160]

In *Zivotofsky*, the Court was asked to decide whether the political-question doctrine barred courts from considering the constitutionality of a statute requiring the State Department to print passports with "Israel" as the place of birth for Americans born in Jerusalem who wished to have that designation on their passport.[161]

Writing for a majority of the Court that included Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan, Chief Justice Roberts held that there was no political question, but mentioned only the first two factors from *Baker*.[162] The first factor did not apply because "there is, of course, no exclusive [textual] commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority . . . ."[163] The second factor did not apply because cases involving "familiar principles of constitutional interpretation" do not "turn on standards that defy judicial application."[164] After discussing these two factors, without mentioning any of the factors from *Baker*, the Court held that the political-question doctrine did not bar the Court from considering the statute's constitutionality.[165]

By ignoring the last four *Baker* factors, which sound in prudential considerations, the Court expressed its dissatisfaction with multifactor tests that give judges broad discretion to avoid a

160. *Id.* at 217.
161. *Zivotofsky*, 132 S. Ct. at 1424.
162. *Id.* at 1427.
163. *Id.* at 1428.
164. *Id.* at 1430 (*Baker*, 369 U.S. at 211).
165. *Id.* at 1430–31.

decision on the legal merits of a claim. When judges can decline to consider an argument based on prudential factors—such as the "respect due coordinate branches" or the "potentiality for embarrassment"—the outcomes of cases will be unpredictable, depending largely on the judge's views about the merits of the claim and the judge's predictions about the consequences of a merits ruling. By focusing the inquiry on the first two *Baker* factors—textual commitment and the lack of a discoverable and manageable standard—the Court sought to limit the arbitrariness of decisions involving the political-question doctrine.

Standing doctrine is another area in which the Court has reduced judges' discretion to avoid a decision on the legal merits of a claim. In *Lexmark International, Inc. v. Static Control Components, Inc.*,[166] the Court unanimously eliminated the doctrine of prudential standing. Before *Lexmark*, the Court had held that there were three requirements of prudential standing: (1) the zone-of-interest test; (2) the bar on generalized grievances; and (3) and the prohibition of third-party standing.[167] *Lexmark* eliminated two of the prudential standing requirements by recharacterizing the zone-of-interest test as a question of "statutory interpretation"[168] and the bar on generalized grievances as a requirement of Article III standing.[169] Although the Court left the fate of the prohibition on third-party standing for "another day," [170] the Court made clear that it could not survive as a prudential consideration. Using scare quotes around the words "prudential standing," the Court described prudential standing as a "misleading" label[171] and stated that the consideration of prudential factors is "in some tension" with "the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[172]

A third area of law in which the Court has reduced judges' discretion to avoid deciding the legal merits of a claim is the ripeness doctrine. In *Susan B. Anthony List v. Driehaus*,[173] the Court unanimously disapproved of the prudential ripeness doctrine by suggesting that it was in tension with *Lexmark*'s holding about the

166. 134 S. Ct. 1377 (2014).
167. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004).
168. *Lexmark*, 134 S. Ct. at 1387.
169. *Id.* at 1387 n.3.
170. *Id.*
171. *Id.* at 1386.
172. *Id.* (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).
173. 134 S. Ct. 2334 (2014).

"virtually unflagging" duty of courts to "hear and decide cases within [their] jurisdiction."[174] Although the Court decided that it "need not resolve the continuing vitality of the prudential ripeness doctrine"[175] in that case, the Court's analysis left little doubt about the future of the doctrine.

Zivotofsky, *Lexmark*, and *Susan B. Anthony List* reveal a concerted effort by several Justices with differing ideologies to eliminate broad standards and follow clear rules. From the political-question doctrine to the doctrines of standing and ripeness, the Court has sought to minimize judges' discretion to avoid a decision on the legal merits of a claim. In so doing, the Court has brought those doctrines in line with the ideals of the rule of law.

Eliminating the *Chevron* framework would have a similar effect on administrative law. When a court gives an agency *Chevron* deference on a question of law, it effectively avoids a decision on the legal merits of the claim. Under *Chevron*, the reviewing court must uphold an agency's action as long as it is "based on a permissible construction of the statute," even if the agency's interpretation is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."[176] The court "does not simply impose its own construction on the statute."[177] Furthermore, courts have substantial discretion to determine the applicability of the *Chevron* framework under *Mead*, *Barnhart*, and *King*. Giving courts such great discretion to decide whether to rule on the merits of a claim is in "tension" with the Court's "recent reaffirmation" in *Lexmark* and *Susan B. Anthony List* of the "principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[178] Following in the footsteps of *Zivotofsky*, *Lexmark*, and *Susan B. Anthony List*, the Court should abandon the *Chevron* framework to reduce judges' discretion to avoid deciding the legal merits of claims.

Admittedly, there are some differences between the Court's decisions in *Zivotofsky*, *Lexmark*, and *Susan B. Anthony List*, and my proposed abolition of *Chevron*. Those cases involved doctrines governing courts' jurisdiction to hear cases, whereas *Chevron* deals

174. *Id.* at 2347 (quoting *Lexmark*, 134 S. Ct. at 1386).
175. *Id.*
176. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 & n.11 (1984).
177. *Id.* at 843.
178. *Susan B. Anthony List*, 134 S. Ct. at 2347 (quoting *Lexmark*, 134 S. Ct. at 1386).

with the applicable standard of review for questions of law. Furthermore, those cases only modified the doctrines in question, whereas I am arguing for a complete abolition of *Chevron*. But these distinctions do not weaken the argument for abolishing *Chevron*. Because the political-question doctrine and the doctrines of standing and ripeness are jurisdictional requirements that stem from the Constitution, there is no way for the Court to abolish those doctrines completely. To do so would violate the legal bases for those requirements. By contrast, the prudential aspects of the above-mentioned doctrines were invented by courts and had no basis in the text of the Constitution. Therefore, the Court was free to abolish them. *Chevron*, at its core, is a prudential, judge-made doctrine with no basis in the Constitution or the Administrative Procedure Act. Although *Chevron* purports to be based on congressional intent, that construction of Congress's intent is a legal fiction invented by judges.[179] As such, there is a strong argument that *Chevron* is in tension with courts' "virtually unflagging" obligation to "hear and decide cases within [their] jurisdiction,"[180] and should be abolished.

IV. REPLACING *CHEVRON*

If the Court does eliminate *Chevron*, there are a number of possibilities for how it can review the legality of agency actions in future cases. One possibility is to apply the standard of review that appellate courts normally use to decide questions of law—de novo review. That was the approach taken by Chief Justice Charles Evan Hughes in *Crowell v. Benson*,[181] a 1932 case that interpreted the Longshoremen's and Harbor Workers' Compensation Act before the enactment of the Administrative Procedure Act in 1946.[182] Even if the Court is unwilling to eliminate *Chevron*, Congress could enact

179. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 ("Given the difficulty of determining actual congressional intent, some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*."); Scalia, *supra* note 28, at 517 (arguing that "any rule adopted in this field represents merely a fictional, presumed intent"); Breyer, *supra* note 25, at 370 ("For the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction.").

180. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (quoting Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013)).

181. 285 U.S. 22, 49 (1932) ("The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category.").

182. *Id.* at 36–37.

legislation requiring de novo review. Because *Chevron* is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,"[183] Congress can always override *Chevron* deference.[184] Senators Orrin Hatch, Chuck Grassley, and Mike Lee recently introduced a bill in the Senate to that effect, entitled the Separation of Powers Restoration Act of 2016.[185] In addition to restoring the rule of law, applying de novo review would also eliminate the concerns about courts abdicating their duties under Article III of the Constitution and section 706 of the Administrative Procedure Act, and provide a powerful check on agency action. Although this approach might increase the workload of the federal judiciary, Congress could address that problem through the creation of new Article I and Article III judgeships.

Another possibility for replacing *Chevron* would be to review pure questions of law de novo and defer to agencies on mixed questions of law and fact. That was the approach used by the Court in its 1944 decision in *NLRB v. Hearst Publications, Inc.*[186]:

> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.[187]

The advantage of this approach is that it prevents courts from being overloaded with administrative cases but still allows them to place a check on agencies in cases involving the most important issues.[188] The drawback of this approach, however, is that it can be

183. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

184. Barron & Kagan, *supra* note 179, at 212 ("Congress indeed has the power to turn on or off *Chevron* deference.").

185. Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016) ("Section 706 of title 5, United States Code, is amended, in the matter preceding paragraph (1), by striking 'all relevant questions of law, interpret constitutional and statutory provisions' and inserting 'de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules'.").

186. 322 U.S. 111 (1944).

187. *Id.* at 130–31 (citations omitted).

188. Mike Rappaport, *Reforming Regulation: Eliminating Chevron Deference and Constraining Guidances*, LIBERTY L. BLOG (Mar. 19, 2015), http://bit.ly/1O0Gqui [perma.cc/4X22-UHBG].

difficult to draw a clear line between pure questions of law and mixed questions of law and fact. The law-fact distinction has been notoriously difficult to define,[189] and making the applicable standard of review turn on that distinction would introduce a new source of uncertainty and unpredictability. Furthermore, it is unclear whether deference on mixed questions of law and fact is any more compatible with Article III of the Constitution and section 706 of the Administrative Procedure Act than the current *Chevron* framework.

Regardless of which approach is adopted, the abolition of *Chevron* will make administrative law simpler and more predictable. Abolishing *Chevron* would eliminate judges' discretion to determine the scope of *Chevron*'s domain on a case-by-case basis, thereby preventing judges from declining to hear legal claims in contravention of their unflagging duty to decide cases. A substantial source of litigation would be eliminated, and parties would have the merits of their legal claims properly considered by a court. Only by abolishing *Chevron*—by replacing an open-ended standard with a clear rule—can the Court finally ensure that the rule of law prevails.

189. *See, e.g.*, Dobson v. Comm'r of Internal Revenue, 320 U.S. 489, 500–01 (1943) ("Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact.' This is the test Congress has directed, but its difficulties in practice are well known and have been subject of frequent comment. Its difficulty is reflected in our labeling some questions as 'mixed questions of law and fact' and in a great number of opinions distinguishing 'ultimate facts' from evidentiary facts.").