

Zombie Chevron: A Celebration

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Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., the foundation for much of contemporary administrative law, is under siege. Several members of the Supreme Court have suggested that they would like to overrule it. Under standard principles of stare decisis, doing that would be a serious mistake. Even if Chevron was wrongly decided, overruling it would create an upheaval—a large shock to the legal system, producing a great deal of confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law. For example: What would happen to the countless regulations that have been upheld under the Chevron framework? Would they be newly vulnerable? More fundamentally, a predictable effect of overruling Chevron would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits, within lower courts, along ideological lines. There is also the question of reliance interests: For decades, Congress has legislated against the background set by Chevron, and the resulting statutes reflect an understanding that the Court’s framework will apply. Though the argument for overruling Chevron is unconvincing, its critics have legitimate concerns. Those concerns should be addressed by (1) insisting on a fully independent judicial role in deciding whether a statute is ambiguous at Step One; (2) invalidating arbitrary or unreasonable agency interpretations at Step Two; and (3) deploying canons of construction, including those that are designed to serve nondelegation functions and thus to cabin executive authority. The result would not quite be Zombie Chevron, but it would be close to that, and the most reasonable path forward.

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I. CHEVRON UNDER SIEGE

For nearly four decades, *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* has provided the organizing framework for judicial review of agency interpretations of law.¹ Numerous regulations have been adopted, and numerous regulations have been tested and upheld or struck down, with reference to that framework. But *Chevron* is now under siege. Its days might well be numbered.

Justice Clarence Thomas believes that *Chevron* is inconsistent with the Constitution.² In his view, the decision “wrests from Courts the ultimate interpretive authority to ‘say what the law is,’ and hands it over to the Executive.”³ Justice Neil Gorsuch similarly objects that *Chevron* “[t]ransfer[s] the job of saying what the law is from the judiciary to the executive.”⁴ Chief Justice John Roberts seeks ways to confine *Chevron*’s reach.⁵ As he puts it, “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.”⁶ The Chief Justice adds:

When it applies, *Chevron* is a powerful weapon in an agency’s regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing “a mood rather than a message.” By design or default, Congress often fails to speak to “the precise question” before an agency. In the absence of such an answer, an agency’s interpretation has the full force and effect of law, unless it “exceeds the bounds of the permissible.”

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.⁷

Justice Anthony Kennedy captured a widespread view in his parting shot at *Chevron*. He wrote that “reflexive deference [to agency interpretations] is

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

² See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

³ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

⁵ See *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

⁶ *Id.*

⁷ *Id.* at 314–15 (citations omitted).

troubling,” and “when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still.”⁸ Justice Kennedy suggested that “it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”⁹ Like Justice Thomas, he invoked the heavy artillery of the Constitution itself, suggesting that “[t]he proper rules [of deference] should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”¹⁰

Focusing on the question of legal foundations, Justice Brett Kavanaugh describes *Chevron* as “an atextual invention by courts” and as “nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”¹¹ More colorfully, he writes, “when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency’s legal interpretation is not the best, yet that interpretation carries the force of law. Amazing.”¹²

It is a fair question whether *Chevron* was rightly decided, and also whether it is “amazing.”¹³ Consistent with Justice Kavanaugh’s suggestion, some people think that the decision is fatally inconsistent with section 706 of the Administrative Procedure Act.¹⁴ Consistent with the views of Justices Thomas and Gorsuch, some people think that it is inconsistent with Article III.¹⁵ Suppose that we stipulate that they are right, and that *Chevron* was wrong. What follows? There are two principal possibilities. The first is to overrule it. The second is to

⁸ *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

⁹ *Id.* at 2121.

¹⁰ *Id.*

¹¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)). There is an obvious mystery in this claim. *Chevron* seems to transfer authority away from courts, not from Congress. Justice Kavanaugh’s claim makes sense only if we see *Chevron* as allowing agencies to reject the best reading of congressional instructions—which is not at all part of the *Chevron* framework, but which, on his understanding, is precisely what it does. *See id.* at 2150.

¹² *Id.* at 2151.

¹³ An influential defense is Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512, 516–17. A sustained critique is Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 976–95 (2017). Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1668–77 (2019), defends *Chevron* against various challenges.

¹⁴ *See* Bamzai, *supra* note 13, at 977 (explaining how “section 706 is best interpreted as an attempt to . . . instruct courts to review legal questions using independent judgment and the canons of construction”); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130–38 (1998) (examining the legal community’s reception of the APA when it was passed); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465–69 (1987) (criticizing *Chevron* on multiple grounds).

¹⁵ *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1209–10 (2016).

domesticate it and thus to diminish its significance. I shall be rejecting the first approach and defending the second, with an emphasis on limiting principles—old and new—that deserve contemporary entrenchment and fortification.

II. OVERRULING *CHEVRON*

Chevron was not a constitutional ruling, and the Court is more reluctant to overrule its statutory decisions, on the ground that Congress has freedom to alter them.¹⁶ But if *Chevron* really was wrong, the argument for overruling it would not be difficult to sketch. In 2018, the Court identified five “factors that should be taken into account in deciding whether to overrule a past decision.”¹⁷ These include “[1] the quality of [the decision’s] reasoning, [2] the workability of the rule it established, [3] its consistency with other related decisions, [4] developments since the decision was handed down, and [5] reliance on the decision.”¹⁸

Most people should be prepared to agree that the quality of the reasoning in *Chevron* was not high. The Court did not explain how its framework emerged from, or squared with, relevant sources of law. In the following decades, the Court has worked hard to shore up its foundations and offered a particular understanding of them.¹⁹ Whatever the strength of those efforts, skeptics continue to believe that it is inconsistent with the APA and unsupported by other sources of law. Those skeptics, including the members of the Court quoted above, certainly believe that overruling is on the table.²⁰

There is another point. Suppose we conclude, with Justice Thomas, that *Chevron* is a violation of the Constitution. If so, the decision whether to overrule it might not be much affected by the fact that it is a statutory decision, in the sense that Congress has the authority to reject it. Indeed, the Court has not explicitly said how it will treat, in terms of *stare decisis*, statutory decisions that offend a constitutional principle. On the one hand, Congress can respond; it is not constrained. On the other hand, it is no light thing to continue with a principle or project that, on reflection, is a violation of constitutional commands.

¹⁶ See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

¹⁷ *Id.* at 2478–79.

¹⁸ *Id.*

¹⁹ The principal effort is *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

²⁰ *Cf. Janus*, 138 S. Ct. at 2479–81 (finding a precedent’s poor quality of reasoning to be a factor justifying it being overruled).

With respect to workability,²¹ *Chevron* has not realized its original promise, which was to make scope of review issues clean and simple.²² It is now accompanied by a series of complexities, confusions, and epicycles. There is *Chevron* Step Zero, which determines whether the framework is applicable at all.²³ It is not easy to apply Step Zero; it is not even easy to describe it. There is also the *Mead* question, a subset of *Chevron* Step Zero, which determines whether agencies receive deference for interpretations that do not come from rulemaking or adjudication.²⁴ (The answer is: Sometimes. When? That is not clear.) There is the “major question” exception, a kind of *Chevron* carve-out for issues of great social and economic importance.²⁵ There is even “*Chevron* avoidance,” which means that when the applicability of *Chevron* is difficult to resolve, courts endeavor to avoid that question altogether.²⁶ (Amazing.) The question of workability is serious and real.

It might therefore be tempting to start afresh, beginning with a simple announcement that courts must independently review agency interpretations of law. From the standpoint of history, nothing would be exotic about that announcement; before *Chevron*, courts sometimes did exactly that.²⁷ We might think that such an announcement would introduce simplicity and clarity where there is now mess, even chaos. Perhaps that announcement could be accompanied with a recognition that when a statute uses some open-ended term,

²¹ See *id.* at 2481. Justice Breyer offered an early argument that *Chevron* would prove unworkable, or at least too simple, and there is a good argument that he has been vindicated. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986). Recall, however, that the Court believes there is a stronger argument for overruling a constitutional holding, which Congress cannot change, than for overruling a statutory holding, which Congress can change. See *Janus*, 138 S. Ct. at 2478 (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). Bills have (unsuccessfully) been introduced to overrule *Chevron*. See, e.g., Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. §§ 2(2)–(3) (2016).

²² See Scalia, *supra* note 13, at 521.

²³ See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

²⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348–49 (2003).

²⁵ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 323–24 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000).

²⁶ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–69 (2005).

²⁷ See, e.g., *Off. Emps. Int'l Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318–20 (1957); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 149–50 (1944). Indeed, the Court said the same thing *after Chevron*, in what appears to have been a failed effort to restore the status quo ante. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) (“The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. . . . The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts.”).

such as “reasonable” or “feasible,” the *Chevron* framework, or something like it, would apply.²⁸ Such a term might be best read as a delegation of policymaking authority. But whenever Congress has used a specific term, such as “diagnosis” or “pollutant” or “source,” purely legal questions would be resolved by judges.²⁹

With respect to the consistency of *Chevron* “with other related decisions,”³⁰ things are not at all clear-cut. On the one hand, the various qualifications of the essential framework, and the many epicycles, might be thought to be in fundamental tension with *Chevron*—to suggest that it has become something like “zombie *Chevron*.”³¹ The qualifications and complexities might be taken to suggest that *Chevron* is in real tension “with other related decisions.” On the other hand, in its 2019 decision in *Kisor v. Wilkie*, the Court retained (if barely) the idea of *Auer* deference, which calls for judicial deference to agency interpretations of regulations.³² The rationale in *Kisor* might be taken to cut out the legs from the attack on *Chevron*. Indeed, in retaining *Auer*, the Court made a series of arguments that could easily be taken to be point-by-point rebuttals of the attacks in *Chevron*.³³ If *Kisor* was right, it would be easy to conclude that

²⁸ See Kavanaugh, *supra* note 11, at 2153–54. It is worth underlining this suggestion. As Justice Kavanaugh notes, an ambiguity is not by itself a delegation. *See id.* at 2152. But as he also notes, a broad and open-ended phrase might reasonably be taken as exactly that. *Id.* No one would think that if a statute uses the word “unreasonable” in the context of a grant of rulemaking authority to an agency, it is meant to give *courts* the authority to decide what that word means. To be sure, courts are entitled to police the boundaries of the term. *See, e.g.,* Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015) (ruling that an agency’s interpretation “strayed far beyond [the] bounds” of reasonable interpretation).

²⁹ See Kavanaugh, *supra* note 11, at 2154.

³⁰ Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018).

³¹ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., dissenting) (urging that the version of *Auer* deference that the Court approved was a kind of “zombified” *Auer*).

³² *See id.* at 2418 (majority opinion).

³³ *See id.* at 2419–22. For example:

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in “determin[ing] the meaning” of an ambiguous rule. One possibility, as *Kisor* says, is to review the issue *de novo*. But another is to review the agency’s reading for reasonableness. To see the point, assume that a regulatory (say, an employment) statute expressly instructed courts to apply *Auer* deference when reviewing an agency’s interpretations of its ambiguous rules. Nothing in that statute would conflict with Section 706. Instead, the employment law would simply make clear *how* a court is to “determine the meaning” of such a rule—by deferring to an agency’s reasonable reading. Of course, that is not the world we know: Most substantive statutes do not say anything about *Auer* deference, one way or the other. But for all the reasons spelled out above, we have long presumed (subject always to rebuttal) that the Congress delegating regulatory authority to an agency intends as well to give that agency considerable latitude to construe its ambiguous rules. And that presumption operates just like the

Chevron was also right, and for exactly the reasons given by the Court in that case.

It would be a stretch to suggest that the argument for overruling *Chevron* is strengthened by developments since the decision was handed down. We do not see changes in the world—in, for example, behavior, institutions, or technology—that render *Chevron* obsolete. To be sure, there have been many legislative enactments since 1984, and perhaps it could be said that their number and complexity weaken the argument for judicial deference to agency interpretations of law, because they increase the risk of agency abuse and self-dealing. But it could equally be said that they *strengthen* that very argument, to the extent that *Chevron* relied on the technical expertise and political accountability of agencies.³⁴ Justice Scalia’s defense of *Chevron* explicitly pointed in particular to the rise of complex, technical regulatory tasks; he urged that *Chevron* makes sense as an accommodation to current conditions. As he put it in 1989:

Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency “expertise.” If the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, 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 diverse application of an ineffable rule. And to tell the truth, the quest for the “genuine” legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that 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. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.

If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it.³⁵

If we were “awash in agency ‘expertise’” in 1989, we might be drowning in it today. If Justice Scalia’s argument was convincing in that year, it is even more convincing today.

There is also the question of reliance interests, where the analysis is a bit tricky. We might not have a great deal of concrete private reliance on *Chevron*, as can be found when private actors have arranged their affairs around a

hypothesized statute above. Because of it, once again, courts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to “determine the meaning” of a rule precisely by deferring to the agency’s reasonable reading.

Id. at 2419 (citations omitted).

³⁴ Scalia, *supra* note 13, at 516–17.

³⁵ *Id.*

longstanding judicial precedent.³⁶ But for decades, Congress has legislated against the background set by *Chevron*, and the resulting statutes reflect an understanding that the Court's framework will apply. Careful empirical analysis shows that legislative drafters have been quite aware of *Chevron*.³⁷ In short, Congress has legislated with that ruling in mind,³⁸ and some of its decisions with respect to drafting may well reflect an understanding that *Chevron* is the law. In these circumstances, a decision to overrule *Chevron* could well be seen as an undoing of a background assumption of central importance to the national legislature. To these points it might be added that agencies have also long acted with *Chevron* in the background, and private parties have assumed the existence of *Chevron* as well.

The question, then, is whether the balance of considerations justifies overruling *Chevron*. For those who think that *Chevron* was right or close to it, the answer is self-evidently no. But even for those who think that *Chevron* was not close to right, the argument for overruling it is not terribly strong. The catalogue thus far suggests, at best, that for its strongest critics, that argument is plausible. But there are other problems, which tip any possible balance.

The most important point is that overruling *Chevron* would create an upheaval—a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law. It might seem simple to announce that legal questions must be resolved by courts, without deference to agency interpretations. But that announcement immediately raises a host of legitimate questions. For example:

1. What would happen to the countless regulations that have been upheld under the *Chevron* framework?
2. Would the overruling of *Chevron* be prospective only? What would that even mean?
3. How would *Chevron* itself, or the many cases like it, be decided?³⁹ What if agency expertise really is relevant? Might something like

³⁶ See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1382–84 (1988) (“Where private parties have over time shaped their relations around a precedent’s rule, it is considered presumptively unfair to change the precedent retroactively and courts will not do so without strong reason.”).

³⁷ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995 (2013) (finding that 82% of congressional staffers surveyed were familiar with *Chevron*). It might be responded that *Chevron* itself altered the interpretive status quo, by substituting a new framework for another (which was admittedly murky). If *Chevron* did that, why should a decision to overrule it not do the same? The best answer is that no predecessor decision established a clear framework against which Congress did its work.

³⁸ See *id.* at 996.

³⁹ That is a more difficult and more interesting question than it might seem. In *Chevron* itself, it is not obvious how to assess the plantwide definition of “source”—or, for that matter,

Chevron turn out to be inevitable?⁴⁰ If courts are dealing with a relatively minor question, and it is highly technical, might courts defer to the agency's view?

4. What about *Skidmore*?⁴¹ In a post-*Chevron* era, should courts give agency interpretations the kind of respectful attention that *Skidmore* counsels?⁴² If so, what exactly would be the difference between *Chevron* (by hypothesis abandoned) and *Skidmore* (by hypothesis affirmed)? Are angels dancing on the head of a pin?
5. What if courts really are in equipoise, or close to it?⁴³ In such cases, wouldn't interpretive principles have to be brought to bear? Might some of them be covert? Might deference to agency interpretations be among them, even if it is not explicitly articulated?

It is worthwhile underlining (1) and (2) in particular. Suppose that *Chevron* were overruled, period, so that all agency interpretations of statutes, since 1984, would be subject to review under a new framework. Some number—perhaps thousands—have been upheld, and would be newly vulnerable. Some other number—certainly thousands—were never challenged, in part because doing so would be difficult under *Chevron*; they too would be newly vulnerable. Would the many regulations upheld by some federal court, under the *Chevron* framework, be suddenly subject to invalidation? That would seem preposterous. It might be tempting, in response, to say that *Chevron* would be overruled prospectively. That would of course be highly irregular. And what would it even mean? Would regulations developed and issued in (say) 1999, 2009, and 2019,

the Carter administration's version of the Clean Air Act—without something like the *Chevron* framework. The only statutory definition of "source" did not apply to the program at issue, and it was hardly pellucid. For anyone with textualist leanings, the best approach probably would be to say that nothing in the Clean Air Act (or its predecessor) prohibited the plantwide definition, which is to say that the EPA could choose either. That approach would not, of course, be very different from what the Court actually did in *Chevron*. Indeed, a post-*Chevron* administrative law would probably end up requiring courts to do something like that in many cases, and whether or not such an approach is worse than *Chevron*, it is not a lot better. See Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 76–78.

⁴⁰ See generally Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017) (arguing that the necessities of the modern administrative state make the existence of *Chevron*-style deference inevitable).

⁴¹ See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁴² See *id.* at 139–40 (explaining that, although the agency conclusion in question was not entitled to "decisive weight," the agency's expertise and "informed judgment" was such that courts and litigants should look to the agency for guidance).

⁴³ Recall the possibility that in some cases, including *Chevron*, courts are in a "construction zone," because they do not have materials to interpret. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–72 (2013). This idea depends on the old distinction between interpretation and construction, which is no longer familiar within the legal culture, but which might prove useful in this as well as other contexts. See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

with reference to *Chevron*, be reviewed under some not-*Chevron*? Would only regulations developed and issued after the date of the decision overruling *Chevron* be subject to not-*Chevron*? That would also be highly irregular. There are no obviously good alternatives here.

To be sure, the problem might be soluble. Perhaps the issue could be settled by taking not-*Chevron* in the same way that *Chevron* itself was taken in 1984. In that year, *Chevron* was not taken to call for a reassessment of judicial rulings upholding or invalidating agency rules under the pre-*Chevron* framework. For that reason, *Chevron* was not disruptive when issued.⁴⁴ The problem is that at that time, *Chevron* was far less a break from precedent than not-*Chevron* would obviously be. Still, it might be possible for the Court to make clear that overruling *Chevron* is not meant to open up previous decisions made under the *Chevron* framework. But the question could turn out to be messy.

More fundamentally, conflicts among the courts of appeals would undoubtedly proliferate.⁴⁵ In this regard, a longstanding defense of *Chevron*, and one that might particularly resonate in the modern era, is that it reduces the effect of policy preferences on the part of *judges*. Suppose that judicial judgments about the meaning of statutes are affected by such preferences; if so, the argument for *Chevron* would be strengthened. Consider these words from the decision itself: “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices”⁴⁶

A great deal of evidence demonstrates that *Chevron* is indeed reducing the effects of judicial policy preferences. In a comprehensive study, Kent Barnett, Christina L. Boyd, and Christopher J. Walker found that *Chevron* “significantly curbs” demonstrably partisan rulings.⁴⁷ When the most liberal judicial panels review conservative agency interpretations, they strike them down 82% of the time when they do not use *Chevron*, but just 49% of the time when they do.⁴⁸ When the most conservative judges review liberal agency interpretations, they strike them down 82% of the time when they do not use *Chevron*, but just 34% of the time when they do.⁴⁹

Unsurprisingly, liberal panels are more likely than conservative panels to agree with liberal agency interpretations, and conservative panels are more

⁴⁴ See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 276 (2014) (“Although there were 19 argued cases in the . . . term [immediately after *Chevron*] that presented some kind of question about whether the Court should defer to an agency interpretation of statutory law, *Chevron* was cited in only one of those cases.”).

⁴⁵ See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105–07 (1987).

⁴⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

⁴⁷ Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018).

⁴⁸ See *id.*

⁴⁹ See *id.*

likely than liberal panels to agree with conservative agency interpretations.⁵⁰ But in *Chevron* cases, the difference between the two is greatly compressed.⁵¹ In these circumstances, a predictable effect of overruling *Chevron* would be to ensure a far greater role for judicial policy preferences in statutory interpretation and far more common splits along ideological lines.⁵²

To *Chevron*'s critics, these various problems might not be decisive if there were no other means of responding to their objections. If *Chevron* is unconstitutional, perhaps it must be overruled, even if doing so produces serious practical problems, and if *Chevron* is inconsistent with the APA and starting to fall of its own weight, overruling it might be the appropriate course, notwithstanding those practical problems. But as we shall now see, *Chevron* might be domesticated without being overruled. Indeed, the Court has been taking significant steps toward domesticating it; the process is well underway.⁵³ The only question is whether existing steps should be formalized and entrenched in some further way, perhaps in response to objections from Justice Kennedy and others, with greater clarity from the Court about the limits of judicial deference to agency interpretations of law.⁵⁴ That is essentially the approach taken by the Court with respect to the various attacks on *Auer* deference,⁵⁵ and it is the appropriate approach with respect to *Chevron* as well.

III. LEASHING *CHEVRON*

A. Step One

The most important way to domesticate *Chevron* is to ensure that Step One is taken very seriously—that is, that judges proceed to Step Two only if the statutory provision is genuinely ambiguous.⁵⁶ Textualists will enthusiastically embrace this idea, and it should appeal to non-textualists as well. Recall Justice Kennedy's concern that deference is sometimes “reflexive,” which means that lower courts proceed to Step Two whenever a statute is susceptible to more than

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² On the continuing role of political disagreements, see generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

⁵³ *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) (explaining that *Chevron* does not allow an agency to “keep[] parts of statutory context it likes while throwing away parts it does not”); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (noting the “major questions” exception and emphasizing that *Chevron* does not permit an agency suddenly to discover new economically and politically significant power in a long-existing statute).

⁵⁴ State practice is illuminating here, if only because it shows a variety of approaches. Notably, most state courts have not embraced the *Chevron* approach, though many have. *See Aaron Saiger, Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558–60 (2014).

⁵⁵ *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019).

⁵⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

one interpretation, even if one conclusion is clearly superior.⁵⁷ Recall that Justice Kavanaugh’s spirited word—“amazing”—was reserved for deference to an agency’s interpretation even though all judges agreed that a different interpretation was best.⁵⁸ Recall finally Justice Scalia’s words from 1989:

In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a “strict constructionist” of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a “plain meaning” rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of “reasonable” interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.⁵⁹

We could easily imagine a vigorous pronouncement from the Court, emphasizing the primacy of the judiciary in statutory interpretation, and insisting that deference to agency interpretations is justified only in the face of either an open-ended term (“reasonable” or “feasible”)⁶⁰ or something fairly close to equipoise (which plausibly helps account for *Chevron* itself). Such a pronouncement might also emphasize that deference is most appropriate in cases in which resolution of a statutory ambiguity calls for application of technical expertise (as was so, more than plausibly, in *Chevron* itself).

Such a pronouncement could express the equivalent of a “mood,”⁶¹ cautioning lower courts against seizing on potentially ambiguous terms to justify deference in cases in which one interpretation really is superior. It is true that if it is written incautiously, any such pronouncement could effectively undo *Chevron* altogether, which would not be a good idea. In some cases, purely legal competence is not enough to require a single interpretation, and the agency should be permitted to choose (reasonably). The only point is that some ambiguities are real, and others are merely apparent. They disappear on reflection.

⁵⁷ See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

⁵⁸ See Kavanaugh, *supra* note 11, at 2151.

⁵⁹ Scalia, *supra* note 13, at 521.

⁶⁰ See Kavanaugh, *supra* note 11, at 2153.

⁶¹ *Cf.* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (describing a congressional “mood”).

B. Step Two

The second way to domesticate *Chevron* is to emphasize the immense importance of Step Two. As noted, the basic idea is that agency interpretations must not be unreasonable or arbitrary.⁶² This idea is different from general arbitrariness review under the APA, which calls for invalidation of arbitrariness in fact-finding or pure policymaking.⁶³ For example, it would be arbitrary to declare a chemical to be carcinogenic when essentially all of the science says otherwise; it would also be arbitrary to eliminate a regulation that is preventing hundreds of premature deaths in order to save \$500. In the leading decision on arbitrariness review, there was no dispute about the meaning of the organic statute.⁶⁴ The only question was whether the agency had made reasonable judgments of fact and policy.⁶⁵

Under Step Two of *Chevron*, by contrast, the question is whether an agency has chosen *an unreasonable interpretation of a statutory term*.⁶⁶ One example, on which the Court was unanimous, is an agency's decision to interpret a provision of law so as to make costs irrelevant.⁶⁷ That decision is simply unreasonable. To be sure, reasonable people can differ about how to value costs or how to weigh them against benefits. But it is hard to defend the proposition that in deciding what to do, agencies should not consider costs *at all*. It is unreasonable to interpret a statute so as to foreclose consideration of costs.

The example is merely illustrative. Suppose that an agency chooses a narrow interpretation of various provisions of the Endangered Species Act; suppose too the statute is ambiguous under Step One. Under Step Two, it is necessary for the agency to explain why its narrow interpretation is reasonable. If the interpretation would put members of endangered species at risk without significantly reducing burdens and costs, it would be difficult to defend. The broader point is that arbitrary decision-making is unlawful, and that principle is explicitly recognized in Step Two.⁶⁸ Courts should be willing to enforce it.

⁶² For valuable discussion of the foundations of this idea, see Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 *CARDOZO L. REV.* 2241, 2243–44 (2011).

⁶³ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41, 43 (1983).

⁶⁴ See *id.* at 41.

⁶⁵ See *id.* at 51–52.

⁶⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

⁶⁷ See *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08, 2714 (2015). The Justices sharply disagreed on the decisive issue in the case, but all agreed that if an agency ignores costs when it has the authority to consider them, it is violating Step Two. See *id.* at 2714 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

⁶⁸ See JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 116–21 (2018).

C. *Canons of Construction*

The third way to domesticate *Chevron* involves canons of construction. The semantic canons are designed to elicit meaning, and although some of them are not particularly reliable, others have an important place.⁶⁹ For present purposes, substantive canons are of particular interest. Some of them operate as a kind of Step One brake on agency interpretations, though they may have nothing to do with legislative instructions. They are effectively *nondelegation canons*, designed to forbid agency action unless it is explicitly authorized by the national legislature.⁷⁰ Consider, for example, the presumption against retroactivity. The basic idea is that if agencies are to apply their rules retroactively, it must be because Congress has expressly permitted them to do exactly that.⁷¹ Or consider the presumption against extraterritoriality, which means that agencies may not apply statutes outside of the territorial boundaries of the United States without clear congressional authorization.⁷²

The most important nondelegation canon, for present purposes, is the avoidance canon, which means that statutes will be construed so as to stay away from the terrain of constitutional doubt.⁷³ In the modern history of administrative law, the exemplary case is *Kent v. Dulles*, in which the Court invoked the avoidance canon to forbid the Secretary of State from using an apparently open-ended grant of authority to deny a passport to a member of the Communist Party.⁷⁴ As the Court put it, “we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. . . . Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement.”⁷⁵ The idea has general importance. It suggests that the Executive Branch may not interpret an ambiguous provision in such a way as to raise serious constitutional problems. Congress must expressly authorize that.⁷⁶

⁶⁹ A valuable treatment is Kavanaugh, *supra* note 11, at 2159–62 (arguing that judges should not often use the *ejusdem generis* canon, that the anti-redundancy canon should be invoked sparingly, and that judges should be cautious in using the consistent usage canon).

⁷⁰ See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

⁷¹ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have a retroactive effect unless their language requires this result.”).

⁷² See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is ‘the affirmative intention of the Congress clearly expressed,’ we must presume it ‘is primarily concerned with domestic conditions.’” (citations omitted)).

⁷³ See, e.g., *Kent v. Dulles*, 357 U.S. 116, 128–29 (1958).

⁷⁴ See *id.*

⁷⁵ *Id.* at 130.

⁷⁶ See, e.g., *id.*

By requiring that authorization, the avoidance canon is directly responsive to some of the concerns of early and current critics of the administrative state.⁷⁷

A more recent canon, also with unmistakable roots in nondelegation principles, comes from the “major questions” doctrine, which is designed to deny agencies the benefit of *Chevron* deference when interpretation of statutory terms raises questions of great social or economic importance.⁷⁸ Within the Court, the doctrine has been understood in two different ways. The first suggests a kind of “carve out” from *Chevron* deference when a major question is involved. On this view, courts, not agencies, will interpret ambiguous provisions where resolution of the ambiguity raises an issue of sufficient importance.⁷⁹ The second understanding of the doctrine is stronger. It suggests that courts will not allow agencies to seize on ambiguous provisions to assert large-scale authority.⁸⁰ On the first understanding, then, the major question doctrine means that *courts will decide whether agencies can act*. On the second understanding, it means that *agencies cannot act*.

With respect to the first understanding, it will be useful to recall that in Justice Breyer’s view, the theory of *Chevron* is least contentious when an agency is resolving a legal question that appears interstitial or that cannot be answered without applying the kinds of technical expertise that agencies develop over time.⁸¹ But when an agency is interpreting a major question (the theory goes), it is hazardous to infer any such authority.⁸² In such cases, the best inference is that Congress wants courts to decide issues of law independently. The *Chevron* carve-out theory of the major questions doctrine is supported by several decisions, of which the most conspicuous involves tax subsidies under the Affordable Care Act.⁸³

⁷⁷ See, e.g., ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE* 6–7 (1942); see also *id.* at 132 (“We must bear in mind that the theories of disappearance of law go along with, have developed side by side with, absolute theories in politics. . . . The real foe of absolutism is law.”); Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 *A.B.A. J.* 133, 133 (1941) (contending that a recent veto message instructing judges to “confine the judicial process to cases ‘appropriate for its exercise’” was in line with the “Marxian idea of the disappearance of law” and “in the spirit of the absolute ideas”).

⁷⁸ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (holding that the major questions doctrine prevented deference to the IRS’s interpretation of the Affordable Care Act).

⁷⁹ See, e.g., *id.*

⁸⁰ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000).

⁸¹ See Breyer, *supra* note 21, at 379, 381–82.

⁸² See, e.g., *King*, 135 S. Ct. at 2488–89.

⁸³ See *id.* (“‘In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.’ This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress

It is important to see that the carve-out theory does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts.⁸⁴ Even so, the carve-out theory can be seen as a kind of nondelegation canon: courts will not lightly take a statutory grant of rulemaking power to be a grant of authority to resolve major questions.⁸⁵ So understood, the doctrine is a “soft” nondelegation canon. It does not say that agencies cannot produce certain substantive outcomes. Instead, it says that whether agencies can produce certain substantive outcomes will be decided by courts, not agencies.⁸⁶

With respect to the second understanding, *Brown & Williamson* can be taken as the leading statement. In that case, the FDA interpreted its governing statute to allow it to exercise authority over tobacco products.⁸⁷ The relevant provision—defining “drugs” as “articles (other than food) intended to affect the structure or any function of the body”⁸⁸—seemed to support the FDA’s view or, at worst, to be ambiguous.⁸⁹ Under *Chevron*, the FDA’s interpretation appeared to be lawful. The Court struggled mightily to explain why it was not.⁹⁰ In a key passage, it moved back from the particulars:

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no “reasonable assurance of safety,” it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history.

. . . .

. . . Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.⁹¹

The passage is not without ambiguity, but it can be read to suggest that whenever an agency asserts authority to regulate “a significant portion of the American economy,” it will run into trouble unless it can identify a clear, rather than “cryptic,” grant of authority from Congress. The key words are “a decision

wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the *IRS*.” (citations omitted).

⁸⁴ The carve-out theory does not come from anything explicit in the APA. It must be taken as a reading of implicit congressional instructions—of what a reasonable Congress would want courts to do.

⁸⁵ See, e.g., *King*, 135 S. Ct. at 2488–89.

⁸⁶ See, e.g., *id.*

⁸⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

⁸⁸ *Id.* at 126 (citing 21 U.S.C. § 321(g)(1)(C)).

⁸⁹ See *id.* at 131–32.

⁹⁰ See *id.* at 133–59.

⁹¹ *Id.* at 159–60 (citations omitted).

of such economic and political significance,” understood in the context of the “significant portion of the American economy” language. When a decision of that kind is involved, clear congressional authorization is mandatory.⁹² This, then, is a different and “harder” nondelegation canon. It does not say that courts, rather than agencies, will interpret ambiguous terms. Instead, it announces that ambiguous language cannot be invoked to allow an agency to exercise its authority in a sufficiently major and transformative way.

The Court concretized this understanding of the major questions doctrine in *Utility Air Regulatory Group v. EPA*.⁹³ The issue was the legality of the EPA’s decision to include greenhouse gases under certain permitting provisions of the Clean Air Act.⁹⁴ As in *Brown & Williamson*, the text of the statute seemed to favor the EPA’s interpretation, or at the very least to make it plausible enough to deserve *Chevron* deference.⁹⁵ But the Court nonetheless invalidated that interpretation.⁹⁶ It did not merely deny the agency deference. In the key passage, it said that the EPA’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in [the] EPA’s regulatory authority without clear congressional authorization.”⁹⁷ Speaking more broadly, it added:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”⁹⁸

This idea raises many questions. The line between major and nonmajor questions is not exactly clear and crisp. If the major questions doctrine is limited to cases of “vast economic and political significance,” it will not come into play very often. My point is not to offer a final evaluation of the doctrine, but simply to note that the Court is developing an interpretive canon, one that falls into the same category as several others that limit *Chevron*’s reach, and that is directly responsive to those who are concerned about excessive administrative power and discretion.

⁹² See, e.g., *id.* at 161.

⁹³ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

⁹⁴ See *id.* at 307.

⁹⁵ See *id.* at 331.

⁹⁶ See *id.* at 333–34.

⁹⁷ *Id.* at 324.

⁹⁸ *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

D. Kisor Redux

In refusing to reject the idea of *Auer* deference in the *Kisor* case, the Court emphasized the various limits on agency authority sketched here, and added several others.⁹⁹ It noted, “if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.”¹⁰⁰ It added that the “interpretation must be one actually made by the agency. In other words, it must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views.”¹⁰¹ It said that “the agency’s interpretation must in some way implicate its substantive expertise.”¹⁰² It emphasized that the agency’s interpretation must not be a mere “litigating position” or a “*post hoc* rationalizatio[n].”¹⁰³ Importantly, it added:

And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates “unfair surprise” to regulated parties. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction “conflict[ing] with a prior” one. Or the upending of reliance may happen without such an explicit interpretive change.¹⁰⁴

Many or even all of these limitations might easily be applied to *Chevron* as well. To be sure, the Court has made it clear that an agency may depart from a prior interpretation;¹⁰⁵ that was the case in *Chevron* itself.¹⁰⁶ But we could easily imagine skepticism about a new interpretation that creates unfair surprise or that disrupts settled expectations. The point is not to suggest that the restrictions in *Kisor* automatically carry over to *Chevron*. It is that *Chevron* might be disciplined rather than abandoned.

It is important to recognize that joined by Justices Thomas, Alito, and Kavanaugh, Justice Gorsuch would have overruled *Auer*. With evident exasperation, he wrote:

Still, today’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing

⁹⁹ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019).

¹⁰⁰ *Id.* at 2415.

¹⁰¹ *Id.* at 2416.

¹⁰² *Id.* at 2417.

¹⁰³ *Id.* (alteration in original).

¹⁰⁴ *Id.* at 2417–18 (citations omitted).

¹⁰⁵ See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005).

¹⁰⁶ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984).

by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that the Chief Justice claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.¹⁰⁷

Kisor is not quite *Auer* zombified. *Auer* is not the undead. It lives, but it is disciplined and constrained. *Zombie Chevron*, understood in similar terms, would be a reasonable path forward.

IV. CONCLUSION

There is no question that many people, in the Supreme Court and elsewhere, are deeply uneasy about *Chevron*. No source of law clearly supports the idea that courts should defer to (reasonable) agency interpretations of ambiguous statutory provisions, and some people, including some of the Justices, believe that separation of powers principles forbid courts from doing that. To be sure, a careful investigation of the APA and its history suggests that *Chevron* is very far from the transgression that many people believe it to be.¹⁰⁸ To be sure, the constitutional objections run into serious trouble once we recall that Congress often gives interpretive authority to an administrator, as in the formulation “source (as defined by the Secretary).” That kind of grant of authority should be seen as part of what is, almost all of the time, a permissible conferral of discretion.

But let us stipulate that reasonable people believe that *Chevron* is wrong. Even if they are right, the argument for overruling it is not strong. Reasonable people also believe that it is right. If it has not proved entirely workable, the various alternatives would not be exactly workable, either; in fact they would be far less workable than they might seem. It cannot easily be said that other developments, or changed circumstances, strongly argue for overruling *Chevron*. Importantly, Congress has long legislated against the background set by the decision, and agencies have long promulgated regulations against the same background. However appealing, a new scope of review doctrine, and a flat (and deceptively simple) declaration that questions of statutory meaning are “for courts,” would raise a host of new questions and problems—and would also politicize interpretation of federal law within the courts of appeals. Far greater politicization of judge-made law, and far greater politicization of administrative law in particular, would not be constructive developments.

Nonetheless, a degree of domestication makes a great deal of sense. Building on existing doctrines, I have emphasized the importance of a firm Step One, a serious barrier to unreasonableness under Step Two, and use of canons of construction of multiple sorts. Limitations of this kind will—and should—remain a work in progress. What is true and best in this year may not be what is true and best

¹⁰⁷ *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., dissenting).

¹⁰⁸ See Sunstein, *supra* note 13, at 1641–57.

ten years hence. But the general goal is clear: to ensure the primacy of congressional instructions, to forbid arbitrariness, and to use time-honored principles—along with some new ones—to cabin the exercise of agency discretion.