

# Judicial Deference and Doctrinal Clarity

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## I. INTRODUCTION

The Supreme Court’s most recent foray into clarifying when courts ought to “defer” to agency interpretations of their own regulations—*Kisor v. Wilkie*—resulted in little clarity.<sup>1</sup> Instead, in the words of Justice Gorsuch’s concurrence, the Court left in place a “zombified” doctrine<sup>2</sup> that kept alive the applicable form of deference—known as “*Auer* deference”—while appearing to narrow the scope of the doctrine’s application and to reduce the weight given to agency constructions.<sup>3</sup>

In the wake of *Kisor*, precisely what is the path forward for agency interpretations of statutes? In a concurring opinion in *Kisor*, Chief Justice Roberts said that, in his view, “[i]ssues surrounding judicial deference to agency

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\* Professor, University of Virginia School of Law. I owe thanks to Divya Bamzai and to the editors of the *Ohio State Law Journal* for soliciting this response to Professor Sunstein’s Essay. My sincere gratitude also to Professor Sunstein, from whom I have had the great good fortune to learn ever since I was a 1L assigned to his class two decades ago. Any reader hoping to get a full sense of the exchange should turn immediately to his Essay, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565 (2021). All errors are my own.

<sup>1</sup> See generally *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

<sup>2</sup> See *id.* at 2425 (Gorsuch, J., concurring) (remarking that, after *Kisor*, the doctrine of *Auer* deference “emerges maimed and enfeebled—in truth, zombified”).

<sup>3</sup> *Id.* at 2414–18 (majority opinion) (reasoning that agency interpretations may only receive *Auer* deference if the regulations are “genuinely ambiguous,” the agency interpretation is “reasonable,” the agency interpretation is “authoritative,” the agency interpretation “in some way implicate[s] its substantive expertise,” and the interpretation reflects the agency’s “fair and considered judgment”). The case that preceded *Kisor*—*Auer v. Robbins*, 519 U.S. 452 (1997)—arguably embraced a more robust form of deference to an agency’s interpretation of its own regulations, although it may well be that *Kisor* simply restated, rather than supplemented, the preexisting limits to *Auer*.

interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.”<sup>4</sup> He explained that he did “not regard the Court’s decision today to touch upon the latter question.”<sup>5</sup>

The modern case that is associated with that question—*Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*<sup>6</sup>—held (much like *Auer*) that ambiguities in statutes that an agency administers are effectively delegations of authority to fill the statutory gap in a reasonable manner.<sup>7</sup> According to *Chevron*, filling in those gaps—even when doing so requires interpretation—involves a difficult policy choice that agencies, rather than courts, should make.<sup>8</sup> *Chevron* thus conceived of a two-step process—the first step of which asks whether the statute’s plain terms “directly address[] the precise question at issue” and the second step of which asks whether, if the statute is ambiguous, the agency’s construction is “a reasonable policy choice for the agency to make.”<sup>9</sup> *Chevron* has subsequently been cited in a vast number of the Court’s opinions, with the addition of many permutations and qualifications to this seemingly straightforward two-step process.<sup>10</sup>

Professor Sunstein’s Essay in these pages is an attempt to sort out how *Chevron* might be approached after *Kisor*.<sup>11</sup> As I understand it, his goal is to encourage the Court to apply to *Chevron* the limiting approach that it applied to *Auer* deference in *Kisor v. Wilkie*—the same kind of approach that prompted Justice Gorsuch’s characterization of a “zombified” doctrine. Such an approach, Professor Sunstein believes, is preferable to a wholesale rethinking of the doctrine because of the values associated with stare decisis—specifically, that

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<sup>4</sup> *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring).

<sup>5</sup> *Id.*

<sup>6</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>7</sup> *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (noting that *Chevron* established a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows”).

<sup>8</sup> *Chevron*, 467 U.S. at 865–66.

<sup>9</sup> *Id.* at 843, 845.

<sup>10</sup> Some cases have qualified *Chevron*. See generally *United States v. Mead Corp.*, 533 U.S. 218 (2001). Others have taken *Chevron* to its logical conclusion. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”); *Smiley*, 517 U.S. at 742 (“[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”); see also *Chevron*, 467 U.S. at 863–64 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

<sup>11</sup> See generally Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565 (2021).

Congress has legislated against the backdrop of *Chevron* for some decades and disturbing it might result in unnecessary, harmful ripple effects.<sup>12</sup>

In this Essay, I will propose an alternative framework. In a nutshell, I will argue that Professor Sunstein's suggestion that *Chevron* be modified in various ways poses all the same stare decisis costs that concern him, but provides none of the benefits of a properly theorized doctrine. Against the alleged benefits of zombified Supreme Court doctrine, there is a significant cost: the lack of clarity and direction that the Court's approach provides those institutions and parties that must interpret and then apply its pronouncements. In Part II of the Essay, I will try to define the ways in which Professor Sunstein and I agree, and where we disagree. In Part III, I will discuss several ways in which we might assess our disagreements: conceptual framework, predictability of the doctrine, and values associated with stare decisis.<sup>13</sup>

## II. THE GROUNDS OF THE DEBATE

Before turning to an evaluation, let me first try to define, as clearly as I can, where my own perspective departs from that of Professor Sunstein. In my view, it is possible that the practical differences in our perspectives are not large, but they might be revealing nevertheless. For that reason, this Part discusses (a) what I understand to be Professor Sunstein's amendments to the *Chevron* doctrine; (b) one of his characterizations of the current scope of the *Chevron* doctrine with which I disagree; and (c) if I am correct on my points (a) and (b), the class of cases where Professor Sunstein and I might approach matters differently.

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<sup>12</sup> *Id.* at 565 (“Under standard principles of stare decisis, [overruling *Chevron*] would be a serious mistake.”).

<sup>13</sup> In addition to the issues I address in this Essay, one might also ask whether the *Chevron* doctrine, as currently understood, is a justifiable interpretation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and the Constitution. On this issue, Professor Sunstein concedes that “[n]o source of law clearly supports the idea that courts should defer to agency interpretations of ambiguous statutory provisions.” Sunstein, *supra* note 11, at 583. I have elsewhere developed at length the argument that *Chevron*, at least as currently understood, is a poor fit for the legal framework that Congress and the Constitution have established. See generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) [hereinafter Bamzai, *Origins*]; Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) [hereinafter Bamzai, *Delegation*]. But as neither the APA nor the Constitution is the major focus of Professor Sunstein's Essay, I will not repeat my arguments here, but rather point the reader to those two articles.

### A. Professor Sunstein's Vision of a "Zombie Chevron"

Professor Sunstein proposes three primary mechanisms by which *Chevron* may be "domesticated."<sup>14</sup> First, he suggests that judges should "proceed to Step Two" of *Chevron* "only if the statutory provision is genuinely ambiguous."<sup>15</sup> That approach, Professor Sunstein argues, might assuage critics (like Justice Kavanaugh) who worry that *Chevron* requires deferring "to an agency's interpretation even though all judges agreed that a different interpretation was best."<sup>16</sup> That approach might take the form of 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 . . . or something fairly close to equipoise."<sup>17</sup>

Next, Professor Sunstein suggests that a second way to domesticate *Chevron* is to stress "that agency interpretations must not be unreasonable or arbitrary."<sup>18</sup> Professor Sunstein clarifies that, in his view, the idea of arbitrary legal interpretation "is different from general arbitrariness review under the APA, which calls for invalidation of arbitrariness in fact-finding or pure policymaking."<sup>19</sup> According to Professor Sunstein, in the Supreme Court's leading case on arbitrariness review—*Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>20</sup>—"there was no dispute about the meaning of the organic statute," but rather "[t]he only question was whether the agency had made reasonable judgments of fact and policy."<sup>21</sup> By contrast, relying on the Court's decision in *Michigan v. EPA*,<sup>22</sup> Professor Sunstein contends that the appropriate question under *Chevron* is "whether an agency has chosen *an unreasonable interpretation of a statutory term*."<sup>23</sup>

This part of Professor Sunstein's analysis (and of the *Chevron* framework) thus distinguishes between arbitrary policymaking, on the one hand, and arbitrary legal interpretation, on the other—and presupposes such a distinction

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<sup>14</sup> "Domesticated" is the term that Professor Sunstein uses, and so I will use it here, too. See Sunstein, *supra* note 11, at 575. It is unclear to me exactly what the term means. But I take it to mean that Professor Sunstein proposes that the Court would "domesticate" *Chevron* by imposing further limits on the doctrine, while keeping the terminology and basic framework of the current regime.

<sup>15</sup> *Id.* at 575.

<sup>16</sup> *Id.* at 576 (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014))).

<sup>17</sup> *Id.* (footnote omitted).

<sup>18</sup> *Id.* at 577.

<sup>19</sup> *Id.*

<sup>20</sup> *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983).

<sup>21</sup> Sunstein, *supra* note 11, at 577.

<sup>22</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707–08 (2015) (addressing an agency's decision to interpret a provision of law to make costs irrelevant); *id.* at 2714 (Kagan, J., dissenting).

<sup>23</sup> Sunstein, *supra* note 11, at 577.

can be discerned and faithfully applied by judges. I will return to this distinction below.

Finally, Professor Sunstein suggests that a third way to domesticate *Chevron* involves the use of canons of construction, which in part “operate as a kind of Step One brake on agency interpretations.”<sup>24</sup> He stresses a class of such canons termed “nondelegation canons”<sup>25</sup> and focuses, in particular, on two such canons: (1) the canon of constitutional avoidance and (2) the “major questions” doctrine.<sup>26</sup> For the first, Professor Sunstein notes that under cases like *Kent v. Dulles*<sup>27</sup> “the Executive Branch may not interpret an ambiguous provision in such a way as to raise serious constitutional problems.”<sup>28</sup> For the second, Professor Sunstein observes that several recent cases embrace a seemingly ad hoc “‘carve out’ from *Chevron* deference when a major question is involved,” under which “courts, not agencies, will interpret ambiguous provisions where resolution of the ambiguity raises an issue of sufficient importance.”<sup>29</sup>

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<sup>24</sup> *Id.* at 578.

<sup>25</sup> The term derives from Professor Sunstein’s classic article of the same name. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>26</sup> In addition to these two canons, which Professor Sunstein discusses at length, he mentions in passing others, such as the presumption against retroactivity and the presumption against extraterritoriality. Sunstein, *supra* note 11, at 578. And there are many others. *See generally* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) (collecting canons).

<sup>27</sup> *Kent v. Dulles*, 357 U.S. 116, 130 (1958).

<sup>28</sup> Sunstein, *supra* note 11, at 578.

<sup>29</sup> *Id.* at 579 (citing *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015)); *see id.* at 579 n.78 (noting that, in *King v. Burwell*, the Court held that “the major questions doctrine prevented deference to the IRS’s interpretation of the Affordable Care Act.”). As Professor Sunstein notes, the Court has on occasion applied the “major questions” doctrine as a “carve out” from *Chevron*, but nevertheless agreed with the agency’s interpretation. *Id.* at 579 (citing *King*, 135 S. Ct. at 2488–89). That approach suggests that the Court decides “major questions,” rather than the agency. *Id.* As Professor Sunstein also notes, the Court sometimes appears to treat the “major questions” doctrine as a limitation on the agency’s ability to act under the statutory provision. *Id.* at 579–80 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”)); *cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Ala. Ass’n of Realtors v. HHS*, No. 21A23, slip op. at 6 (U.S. Aug. 26, 2021) (“Even if the text were ambiguous, the sheer scope of the [agency’s] claimed authority . . . would counsel against the Government’s interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.”’” (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)). Under that approach, the Court appears to assume that Congress would not have intended to delegate to the agency such expansive authority. Sunstein, *supra* note 11, at 580. Put slightly differently, *King v. Burwell* says that Congress intends that courts, rather than agencies, should decide whether and how agencies have authority over “major questions,” whereas *Brown & Williamson* indicates that Congress does not intend to delegate authority over “major questions” to agencies at all. I agree with Professor Sunstein’s point that there is some daylight between the approach to the “major questions” doctrine in *King*

For the moment, I will note simply that the avoidance canon in this context works at cross-purposes from *Chevron* deference, and that the “major questions” exception’s ad hoc quality lends an unpredictable quality to the entire *Chevron* project. Again, I will return to these points below.

### B. *On the Meaning of “Best” Readings*

In one significant respect, I part ways with Professor Sunstein’s understanding of the current *Chevron* framework—and of the logical consequences of his own position. Specifically, Professor Sunstein contends that it would be wrong to “see *Chevron* as allowing agencies to reject the best reading of congressional instructions—which is not at all part of the *Chevron* framework.”<sup>30</sup> Professor Sunstein makes this claim in responding to Justice Kavanaugh’s remarks on the *Chevron* doctrine in a law review article, which suggest that Justice Kavanaugh *does* believe that the doctrine permits agencies to reject the best reading of congressional instructions.<sup>31</sup> Contrary to Professor Sunstein, I am inclined to think that Justice Kavanaugh has the better of the argument on the logical ramifications of *Chevron* and the current state of the Court’s doctrine. As the Court itself has put it, “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>32</sup> Because this issue is a subtle, but potentially important, one, I will address it in some detail here.

Consider a couple of Supreme Court cases that illustrate this point. To begin, in *Christensen v. Harris County*,<sup>33</sup> the Court addressed whether, under a provision of the Fair Labor Standards Act that allowed political subdivisions to compensate their employees for overtime by granting them “compensatory

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*v. Burwell* and the approach in *Brown & Williamson*. But to my eyes, this tension does not cut in any one direction with respect to the broader question regarding *Chevron*, other than by further emphasizing that the proper application of the *Chevron* doctrine “is not exactly clear and crisp,” see Sunstein, *supra* note 11, at 581, because the application of the exceptions to the *Chevron* doctrine are by no means “clear and crisp.”

<sup>30</sup> Sunstein, *supra* note 11, at 567 n.11.

<sup>31</sup> Kavanaugh, *supra* note 16, at 2150.

<sup>32</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 843 n.11 (1984)).

<sup>33</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000); see also SCALIA & GARNER, *supra* note 26, at 41 (“In federal courts and some state courts, the interpretation of a statute by the agency charged with implementing it controls so long as it is within the range of reasonable interpretation—even though it may not be what the court would have arrived at on its own. When courts subject to that limitation are reviewing agency action, our advice will be useful only in identifying the range of reasonable interpretation, not in determining the best interpretation.” (footnotes omitted)).

time,”<sup>34</sup> a political subdivision could adopt a policy requiring employees to schedule time off to reduce the fiscal consequences of having to pay for accrued compensatory time with cash.<sup>35</sup> The Court held that the relevant statutory provision was “better read” not to prohibit such a policy.<sup>36</sup> The Court then addressed whether it should reach a contrary result because of an “opinion letter” issued by the Department of Labor, which said an employer could “compel the use of compensatory time only if the employee has agreed in advance to such a practice.”<sup>37</sup> That issue turned on the question whether the Department’s opinion letter was entitled to deference under *Chevron*.<sup>38</sup> The Court held that it was not because “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>39</sup> In short, the Court held that the form (or formality) of a document bore on the question whether the interpretation articulated in the document was entitled to *Chevron* deference.<sup>40</sup>

Justice Souter joined the *Christensen* majority, but added the following “assumption” in a concurring opinion: that the Court’s opinion did “not foreclose a reading of the Fair Labor Standards Act of 1938 that allows the Secretary of Labor to issue regulations limiting forced use.”<sup>41</sup> His opinion thus illustrated what has been the dominant understanding of *Chevron*: Under some circumstances, an agency can reject the best reading of a statute for a lesser, but still perhaps permissible, reading.<sup>42</sup> Put differently, in *Christensen*, the majority that Justice Souter joined held that there was in fact a “better” interpretation of the Fair Labor Standards Act.<sup>43</sup> But Justice Souter believed that the agency

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<sup>34</sup> See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19. The precise provision of the Fair Labor Standards Act at issue in *Christensen* was 29 U.S.C. § 207(o). See *Christensen*, 529 U.S. at 578.

<sup>35</sup> See *Christensen*, 529 U.S. at 578.

<sup>36</sup> *Id.* at 583; see also *id.* at 585 (“[W]e think the better reading of § 207(o)(5) is that it imposes a restriction upon an employer’s efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer’s efforts to *require* employees to use compensatory time.”). In dissent, Justice Stevens disagreed with this interpretation of the statutory framework. See *id.* at 592 (Stevens, J., dissenting). My point in this Essay does not depend on who was right in *Christensen*—the majority or Justice Stevens—on this statutory question.

<sup>37</sup> *Id.* at 586 (majority opinion).

<sup>38</sup> *Id.* at 586–88.

<sup>39</sup> *Id.* at 587. The Court held that, instead, such interpretations were “entitled to respect” under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only if the interpretation had the “power to persuade.” *Christensen*, 529 U.S. at 587. The Court said that it found “unpersuasive the agency’s interpretation of” the Fair Labor Standards Act. *Id.*

<sup>40</sup> *Christensen*, 529 U.S. at 587.

<sup>41</sup> *Id.* at 589 (Souter, J., concurring).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 583–84 (majority opinion).

could issue regulations adopting a contrary interpretation—in other words, an interpretation that differed from the “better” interpretation.<sup>44</sup>

To the extent that Justice Souter’s *Christensen* concurrence reflected the views of only a single Justice in the year 2000, later caselaw clarifies that, under the *Chevron* doctrine, an agency can reject the best reading of a statute. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>45</sup> the Court confronted the meaning of a provision of the Communications Act of 1934 that subjects providers of “telecommunications service[s]” to mandatory common-carrier regulation.<sup>46</sup> In the order under review, the Federal Communications Commission concluded that cable companies that sold broadband Internet service do not provide “telecommunications service[s]” and, hence, were exempt from mandatory common-carrier regulation under the Communications Act.<sup>47</sup> In rejecting the Commission’s interpretation, the court of appeals relied on one of its precedents holding that cable modem service was a “telecommunications service” and, in doing so, the court of appeals did not analyze the permissibility of the Commission’s construction under *Chevron*’s deferential framework.<sup>48</sup>

The Supreme Court held that this approach was wrong.<sup>49</sup> In language that I have already quoted, the Court reasoned that, “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>50</sup> As a result, the Court concluded that the court of appeals was mistaken when it held that its own precedent’s construction “overrode the

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<sup>44</sup> *See id.* at 589 (Souter, J., concurring).

<sup>45</sup> 545 U.S. 967 (2005).

<sup>46</sup> 47 U.S.C. § 153(44) (2000) (current version at 47 U.S.C. § 153(51)). *See generally* Communications Act of 1934, 47 U.S.C. §§ 151–664.

<sup>47</sup> *See Brand X*, 545 U.S. at 979.

<sup>48</sup> *See id.* at 979–80 (summarizing proceedings before the Ninth Circuit).

<sup>49</sup> *Id.* at 980.

<sup>50</sup> *Id.* (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 843 n.11 (1984)). In a dissent, Justice Scalia agreed that the logical consequence of the Court’s *Brand X* opinion was that an agency could reject the best interpretation of a statute. *See id.* at 1016–17 (Scalia, J., dissenting). He explained that a case could arise where “the Court denies the agency position *Chevron* deference [because it was not adopted in an appropriate form under *Mead*], finds that the *best* interpretation of the statute contradicts the agency’s position, and holds the challenged agency action unlawful,” but that the agency could then “promptly conduct[] a rulemaking, and adopt[] a rule that comports with its earlier position—in effect disagreeing with the Supreme Court concerning the best interpretation of the statute.” *Id.* As Justice Scalia noted, according to *Brand X*, “the agency is thereupon free to take the action that the Supreme Court found unlawful.” *Id.* at 1017. Justice Scalia then went on to claim that this result was “bizarre” and “probably unconstitutional” under Article III. *Id.* But for present purposes, the key point is that all members of the Court agreed that an agency’s rejection of the best interpretation of a statute was, indeed, a logical consequence of the *Chevron* framework.



Commission's."<sup>51</sup> But according to the Court, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>52</sup>

As the preceding analysis demonstrates, there simply can be no denying that cases like *Christensen* and *Brand X* contemplate—and indeed, fully embrace—the view that an agency's permissible construction can displace the best construction of a statute under some circumstances. Moreover, as *Brand X* observes, "[t]his principle follows from *Chevron* itself."<sup>53</sup> It is not an unhappy consequence of post-*Chevron* cases like *Brand X*, but rather baked into the logic of the *Chevron* framework. As *Brand X* explained: "*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative."<sup>54</sup>

To see why, consider the scenario at issue in both *Christensen* and *Brand X*. A court might be confronted with the construction of a statute either (a) without an agency construction subject to the *Chevron* framework; or (b) with such an agency construction. In situation (a), the court would be required to use all the

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<sup>51</sup> *Id.* at 982 (majority opinion).

<sup>52</sup> *Id.*; *see id.* at 984 (observing that the court of appeals' "prior decision . . . held only that the *best* reading of [the relevant statute] was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute"). Although the *Brand X* Court primarily addressed the relationship between a court of appeals precedent and the *Chevron* doctrine, it elsewhere made clear that the same basic analysis applied to Supreme Court precedents as well. *Id.* at 985–86. It noted that, if it upheld the agency's action "without reaching the *Chevron* point, the Court of Appeals could once again strike down the Commission's rule based on its" own prior precedent. *Id.* at 985. That was because, according to the *Brand X* Court, its holding "that it is *reasonable* to read the Communications Act to classify cable modem service solely as an 'information service' leaves untouched [the court of appeals' old holding] that the Commission's interpretation is not the *best* reading of the statute." *Id.* at 985–86.

<sup>53</sup> *See Brand X*, 545 U.S. at 982.

<sup>54</sup> *Id.* at 983; *see also id.* ("[T]he agency may, consistent with the court's holding, choose a different construction [from the court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."). Lower courts have embraced this understanding of *Chevron*. *See, e.g., Acosta v. Hensel Phelps Constr. Co.*, 909 F.3d 723, 730 (5th Cir. 2018) ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." (quoting *Elgin Nursing & Rehab. Ctr. v. HHS*, 718 F.3d 488, 492 n.3 (5th Cir. 2013))); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation."); *Am. Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) ("We cannot set aside the Commission's reasonable interpretation of the Act in favor of an alternatively plausible (or an even better) one."); *Citizens Coal Council v. Norton*, 330 F.3d 478, 482 (D.C. Cir. 2003) ("Even assuming the correctness of [an alternative interpretation], the ambiguity of the statute in combination with the *Chevron* doctrine eclipses the ability of the courts to substitute their preferred interpretation for an agency's reasonable interpretation.").

tools of statutory construction to arrive at the best interpretation that it could reach, without the agency's legal interpretation to play a role in that analysis. In situation (b), *Brand X* demonstrates that, under current doctrine, some agency constructions will displace a court's best construction of a statute. Thus, under current doctrine, it is plain as day that, in some circumstances, *Chevron* allows agencies to reject a court's best reading of a statute.

My point, though, is a deeper one. For *Chevron* to have any bite at all as a doctrine—for it to be at all meaningful—there must be some category of cases in situation (b) where a permissible agency interpretation prevails over the court's best interpretation. If there were no such category of cases, then *Chevron* would simply play no meaningful role in a court's analysis and, indeed, the entire *Chevron* enterprise would have no practical payoff whatsoever.<sup>55</sup> For that would mean that the interpretation that a court reaches in situation (b) (with an agency's interpretation to consider) would *always* be the same as the interpretation that the court reaches in situation (a) (with no such interpretation)—which would be another way of saying that the agency's construction could never change the court's construction and, hence, did not matter.

### C. Comparing Alternatives

Against this backdrop, let's compare Professor Sunstein's proposed framework to two alternatives: the framework created by *Chevron* itself and a framework that might be embraced by *Chevron*'s critics.

Start with the framework created by *Chevron*. To my mind, Professor Sunstein's proposal retains the framework of *Chevron* in its entirety, but adds, so to speak, more "oomph." Each part of *Chevron*'s analytical framework would remain in place but, to borrow Professor Sunstein's words (which are in turn borrowed in part from Justice Frankfurter), a future Supreme Court case could "express the equivalent of a 'mood,' cautioning lower courts against seizing on potentially ambiguous terms to justify deference in cases in which one interpretation really is superior."<sup>56</sup> The Supreme Court would play the same melody, but more loudly and with greater enthusiasm.

Just how much louder—and how much more enthusiastically? That would depend in part on just how rigorously courts apply the ordinary tools of statutory construction and the canons of construction at *Chevron* step one. But no matter how rigorously courts pursued those devices, the fact would remain that, at the heart of the *Chevron* doctrine, an agency could possibly reject a "better"

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<sup>55</sup> It will not do to reclassify such cases as involving disagreement over policy. That would collapse the second step of *Chevron* into general arbitrariness review, whereas (as Professor Sunstein observes) legal interpretation "is different from general arbitrariness review under the APA, which calls for invalidation of arbitrariness in fact-finding or pure policymaking." Sunstein, *supra* note 11, at 577. I will return to this point below.

<sup>56</sup> *Id.* at 576 (footnote omitted) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

interpretation for an alternative, permissible one. As explained above, that possibility is a logical consequence of the notion that a court must approach interpretation of a statute without *Chevron* in the absence of an agency interpretation (of the right form) but must use the *Chevron* framework when considering an agency interpretation.

Consider, next, an alternative framework that might be embraced by some of the critics of the *Chevron* framework.<sup>57</sup> Under this alternative, much like Professor Sunstein's view, agency fact-finding and agency policymaking would remain subject to deferential review.<sup>58</sup> Agency legal interpretation, however, would generally be subject to de novo judicial review. But such de novo review would be tempered by deference to agency legal interpretations that reflected the agency's contemporaneous or customary understanding of the statutory language.<sup>59</sup>

A leading case, written by Justice Cardozo, that exemplifies this approach is *Norwegian Nitrogen Products Co. v. United States*.<sup>60</sup> In that case, Justice Cardozo explained the then-current state of the law as follows:

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it

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<sup>57</sup> In sketching this alternative, I do not purport to speak for all, or even any other, critics. The views are mine alone, but they seem to me to be the most feasible alternative—and indeed, a preferable path forward. For a defense of this approach, see generally Bamzai, *Origins*, *supra* note 13.

<sup>58</sup> See Sunstein, *supra* note 11, at 577; see also *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983); *Universal Camera*, 340 U.S. at 483–87; Kavanaugh, *supra* note 16, at 2153–54 (noting that agency action under some open-ended terms, such as “reasonable” or “feasible,” could be understood as policymaking with judicial review using the *State Farm* standard); cf. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). It is possible, for reasons that are outside the scope of this Essay, that such review would be subject to constitutional limits under some circumstances. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 48–65 (1932); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

<sup>59</sup> This approach is similar, but not identical, to *Skidmore v. Swift & Co.*, which appears to call for an all-things-considered, multi-factor approach to parceling out “respect” for agency interpretations. See 323 U.S. 134, 139–40 (1944). By contrast, the approach I have sketched here seems to be more disciplined in the kinds of factors that a court would consider in “respecting” or “deferring” to agency interpretations. Cf. Sunstein, *supra* note 11, at 573 (“What about *Skidmore*? In a post-*Chevron* era, should courts give agency interpretations the kind of respectful attention that *Skidmore* counsels?” (footnote omitted)). Professor Sunstein observes that one might believe that the debate between my approach and his involves “angels dancing on the head of a pin.” *Id.* On this point, I generally agree, as I have mentioned in the text, that the difference is not so terribly dramatic in terms of actual outcomes in particular cases. That said, my approach has the virtue of simplifying the analysis, directing lower courts appropriately, and providing a sound theoretical basis for the doctrine. And if it were true that the difference between our approaches involves “angels dancing on the head of a pin,” then the “shock to the legal system” of adopting my approach really would not be as dramatic as Professor Sunstein suggests. See *id.* at 572.

<sup>60</sup> *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933).

also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion . . . .<sup>61</sup>

Justice Cardozo's approach thus stresses that administrative practice ("consistent and generally unchallenged" custom) and "contemporaneous construction" are relevant to construing statutes.<sup>62</sup> At the same time, these tools of statutory construction were limited by the logic inherent in their articulation. Thus, in a 1932 opinion by Chief Justice Hughes, the Court said that it was a "familiar principle" that "great weight is attached to the construction consistently given to a statute by the executive department charged with its administration."<sup>63</sup> The Court observed that there was a "qualification of that principle" that was "as well established as the principle itself"—namely, that the Court was "not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons."<sup>64</sup>

Reading Justice Cardozo and Chief Justice Hughes together, the message is unmistakable: Custom helps a court interpret a statute, and so does contemporaneous construction. Non-uniform and non-contemporaneous constructions are of less help. That approach contrasts with the *Chevron* doctrine, which puts no such stress on custom or contemporaneity.

In what set of cases would this alternative approach lead to different results from Professor Sunstein's? Although the results depend on the application of the two approaches—the "mood" of the music—it is entirely possible that the results would be quite similar, except in a narrow band of cases. To determine which classes of cases, let's split possible agency action into three general categories.

*"Class 1" cases:* Those cases properly categorized as agency policymaking or factfinding under the Administrative Procedure Act, such that the arbitrary and capricious or substantial evidence standards apply.<sup>65</sup>

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<sup>61</sup> *Id.* at 315 (citations omitted).

<sup>62</sup> *See id.*

<sup>63</sup> *Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 16 (1932).

<sup>64</sup> *Id.*

<sup>65</sup> 5 U.S.C. §§ 706(2)(A), (E) (authorizing review of agency action found to be "arbitrary, capricious, [or] an abuse of discretion" and "unsupported by substantial evidence" in formal proceedings); *see also* *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–52 (1983); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483–87 (1951).

“Class 2” cases: Those cases where a statutory provision is not “genuinely ambiguous” and therefore not subject to a deferential standard of review.<sup>66</sup>

“Class 3” cases: Those cases where a statutory provision cannot be characterized as delegating policymaking or factfinding authority to an agency, but is rather susceptible to legal interpretation, and where the statutory provision might be susceptible to a better interpretation, but is sufficiently “ambiguous” such that the agency can characterize an alternative interpretation as “reasonable.”

Under either Professor Sunstein’s approach or my own, the outcomes upon judicial review in Class 1 and Class 2 cases would be the same, though the analysis might differ in some particulars. Specifically, my approach would likely involve a simpler analysis by forgoing the lengthy satellite litigation that often accompanies questions over whether the *Chevron* framework applies. But cases where the statutory provision can be said to delegate policymaking and factfinding authority to the agency would be subject to the APA’s deferential standard of review under both Professor Sunstein’s view and my own. And cases where a statutory provision is not “genuinely ambiguous” would be subject to nondeferential review under both Professor Sunstein’s view and my own.

It is only in Class 3 cases that the outcomes in cases might be different. Those cases would involve a statutory provision that is amenable to a “best” interpretation using all the ordinary tools of statutory construction. Nevertheless, a court might, under Professor Sunstein’s framework, determine that there remained a genuine ambiguity, such that an agency could displace the best interpretation with its own alternative, reasonable interpretation. Under my framework, by contrast, the “best” interpretation, if one existed, would always prevail. And if there truly were no “best” interpretation, then the statute under which the agency was operating could be fairly characterized as delegating policymaking authority subject to arbitrary-and-capricious review.

Precisely how many cases fall into “Class 3” is hard to determine. That is because, as I have discussed above, if the use of traditional tools of statutory construction (including the canons) are taken to their logical endpoint, then the *Chevron* doctrine collapses into *de novo* review of legal interpretation and deferential review of fact and policymaking.<sup>67</sup> Presumably some space exists under Professor Sunstein’s framework for purely legal interpretation to be subject to deferential review. After all, he claims that it “would not be a good idea” to undo *Chevron*, precisely because “purely legal competence is not enough to require a single interpretation, and the agency should be permitted to

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<sup>66</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

<sup>67</sup> See *supra* note 55 and accompanying text.

choose.”<sup>68</sup> Moreover, not all “Class 3” cases are subject to deferential review under Professor Sunstein’s approach. Some—such as cases like *Mead* or cases subject to the “major questions” doctrine—would not fall within the scope of *Chevron*. On the other side of the coin, some “Class 3” cases—those involving customary or contemporaneous agency interpretations—would be subject to deferential review under my approach.

The upshot is that it is not crystal clear how Professor Sunstein’s and my views differ in concrete cases. But it is clear that any differences would emerge in “Class 3” cases where our approaches to eliminating ambiguity and demarcating when judicial deference applies part ways.

### III. *CHEVRON* AFTER *KISOR*

Having explained what I believe to be the differences between my own position and that of Professor Sunstein, let me now turn to an evaluation of the two positions. Why might administrative law prefer one position over another? The preference cannot be based solely on the reasoning of *Chevron* itself, because (as Professor Sunstein notes) “[m]ost people should be prepared to agree that the quality of the reasoning in *Chevron* was not high,” given that “[t]he Court did not explain how its framework emerged from, or squared with, relevant sources of law.”<sup>69</sup> To make an assessment, I will first focus on some of the conceptual differences between the two positions. Next, I will turn to the relationship between statutory interpretation, the canon of constitutional avoidance, and the “major questions” doctrine. I will then discuss Professor Sunstein’s charge that an approach other than *Chevron* might risk “politicizing” administrative law. I will finally discuss *stare decisis*. In a nutshell, I continue to believe that my own framework is the best path forward.

#### A. *Conceptual Issues*

Start with some conceptual points. As is readily apparent from my explanation above, my approach to parceling out judicial deference asks courts to draw a line between several concepts: Ambiguity/nonambiguity, law/fact, contemporaneity/noncontemporaneity, and custom/noncustom. These concepts were part of a classical interpretive framework, and the legal realists criticized each one of these distinctions.<sup>70</sup> Most famously, many of the legal realists contended that the law-fact distinction was ephemeral in nature and masked what were ultimately decisions that allowed judges to allocate responsibility between judges and juries or agencies and courts based on their policy preferences.<sup>71</sup>

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<sup>68</sup> Sunstein, *supra* note 11, at 576.

<sup>69</sup> *Id.* at 568.

<sup>70</sup> See generally Bamzai, *Origins*, *supra* note 13.

<sup>71</sup> See *id.* at 971–76.

By blending the concepts of legal interpretation and policy, the *Chevron* framework is a natural outgrowth of this legal realist approach.<sup>72</sup> On the margins, *Chevron* essentially classifies some instances of legal interpretation as instances of policymaking, rather than presupposing a clear distinction between legal interpretation and policy.

The legal realists' critique of interpretation is a serious one—and one that I cannot fully address in this response to Professor Sunstein's Essay.<sup>73</sup> But consider that, to the extent that the legal realists' approach arises out of discomfort from viewing the world through the lens of the categories of "law" and "fact,"<sup>74</sup> the *Chevron* framework replaces these categories with other categories that courts must demarcate and then confront. Again, the Court's opinion in *Brand X* illustrates this point. It requires courts to discern a line between the "best reading" of a statute and "the only permissible reading of the statute."<sup>75</sup> Where a court believes there is only one permissible reading of the statute, then that judicial reading must govern under step one of *Chevron*.<sup>76</sup> But a court may believe that a statute has a "best reading" along with other permissible alternative readings.<sup>77</sup> Under such circumstances, *Brand X* holds that the agency's reading trumps the court's. Or as Professor Sunstein puts it, the framework established by *Chevron* requires a judge to distinguish, in cases where a statute may be susceptible to more than one interpretation, (a) cases where "one conclusion [for the statute's meaning] is clearly superior" from (b) cases where one candidate might be superior, but not clearly so.<sup>78</sup> The point

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<sup>72</sup> *Id.* at 976–81.

<sup>73</sup> For recent exemplary scholarship tying *Chevron* to broader questions of jurisprudence, see Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 887 (2020) (challenging "*Chevron*'s legal realist premise that all interpretive uncertainty involves policy choices calling for political accountability and nonlegal expertise"); Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. F. 103, 111 (2020) (responding to Pojanowski by seemingly acknowledging *Chevron*'s legal realist premises and claiming that "[o]nce the apple of realism has been tasted, everything changes, and the way back to the garden of naive classicism is forever barred"); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 290–93 (2021) (analogizing aspects of the *Chevron* debate to the distinction between interpretation and construction).

<sup>74</sup> See, e.g., Bamzai, *Origins*, *supra* note 13, at 971–76.

<sup>75</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005); see also *id.* at 1018 (Scalia, J., dissenting) ("A court's interpretation is conclusive, the Court says, only if it holds that interpretation to be 'the *only permissible* reading of the statute,' and not if it merely holds it to be 'the *best* reading.' Does this mean that in future statutory-construction cases involving agency-administered statutes courts must specify (presumably in dictum) which of the two they are holding? . . . How much extra work will it entail for each court confronted with an agency-administered statute to determine whether it has reached, not only the right ('best') result, but 'the only permissible' result? Is the standard for 'unambiguous' under the Court's new agency-reversal rule the same as the standard for 'unambiguous' under step one of *Chevron*?" (citation omitted)).

<sup>76</sup> See *id.* at 982–83 (majority opinion).

<sup>77</sup> See *id.*

<sup>78</sup> See Sunstein, *supra* note 11, at 575–76.

is that the *Chevron* doctrine—even Professor Sunstein’s version of it—requires line-drawing between a “best reading” and “only permissible reading.”

The conceptual question thus becomes whether it might be better to adhere to a clear distinction between the “law” and “fact” (and policymaking categories) or to acknowledge that the categories overlap in some respects. While it might be tempting to throw one’s hands in the air and concede overlap between the categories (which is what the *Chevron* framework effectively does), abdication of this sort does not eliminate the categorization problem. That is because the *Chevron* framework simply replaces the old and familiar categories (“law” and “fact”) with a new set of categories (“best reading” and “only permissible reading”), which are harder to apply. The point is that some type of categorization is necessary for legal analysis, and there is no indication that the conceptual framework created by *Chevron* and embraced by Professor Sunstein leads to greater analytical clarity. There is no escaping the need for categories to parcel out judicial deference in some sensible manner to those cases where it applies and those cases where it does not; the question, instead, is which categories to use.

### B. *Canons, Nondelegation, and Major Questions*

The two canons that Professor Sunstein stresses demonstrate the complications that can arise without a clear and cogent analytical framework. Those canons—the canon of constitutional avoidance and the “major questions” doctrine—are both justifiable when limited to their domain. But expanded beyond that domain, they each tend to introduce elements of unpredictability into statutory analysis.

To begin with, consider the avoidance canon. Professor Karl Llewellyn famously claimed that “there are two opposing canons on almost every point.”<sup>79</sup> And while Llewellyn’s skepticism of canons of construction was (in my view) overstated,<sup>80</sup> it certainly would be *better* for the Court not to have two canons of construction that work entirely at cross-purposes. The difficulty is that the *Chevron* doctrine and the canon of constitutional avoidance, when applied against the backdrop of the nondelegation doctrine, work in opposite directions. They both purport to resolve ambiguity, but they demand diametrically contrary outcomes.

*Kent v. Dulles*, on which Professor Sunstein relies, illustrates this point.<sup>81</sup> In that case, the Supreme Court confronted Secretary of State John Foster

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<sup>79</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

<sup>80</sup> See, e.g., SCALIA & GARNER, *supra* note 26, at 59–62; William N. Eskridge Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) (explaining that the canons can provide “some degree of insulation against judicial arbitrariness . . . [and render] statutory interpretation more predictable, regular, and coherent”).

<sup>81</sup> See *Kent v. Dulles*, 357 U.S. 116, 128–29 (1958).



Dulles' denial of two passport applications, pursuant to regulations promulgated by the Secretary barring the issuance of passports to communists.<sup>82</sup> Holding that the Secretary lacked such authority, Justice Douglas relied in part on the notion that Congress could not delegate away its legislative power under Article I.<sup>83</sup> He reasoned that, if the liberty to travel "is to be regulated, it must be pursuant to the law-making functions of the Congress" and that, "if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."<sup>84</sup> Driving the point home, he relied in this part of *Kent v. Dulles* on *Panama Refining Co. v. Ryan*,<sup>85</sup> which had famously held that part of the National Industrial Recovery Act violated the nondelegation doctrine.<sup>86</sup> And he reasoned that "[w]here activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."<sup>87</sup> As a result, he concluded that the relevant statutory provisions did "not delegate to the Secretary the kind of authority exercised here."<sup>88</sup>

Justice Douglas's approach illustrates the inherent tension between "nondelegation avoidance" and judicial deference. As part of the *Kent* opinion, Justice Douglas surveyed the history of passports, acknowledging that "a large body of precedents grew up which repeat over and over again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State."<sup>89</sup> The government had relied on this body of precedents to argue that "[t]his long-continued executive construction should be enough . . . to warrant the inference that Congress had adopted it."<sup>90</sup> In short, the government's argument was that a customary practice had settled the understanding of the relevant statutory provisions in favor of the Secretary's authority.<sup>91</sup> Justice Douglas rejected that argument on the theory that "while the power of the Secretary of State over the

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<sup>82</sup> See *id.* at 117–18 & n.1.

<sup>83</sup> *Id.* at 129–30.

<sup>84</sup> *Id.* at 129.

<sup>85</sup> See *id.* (citing *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 420–30 (1935)).

<sup>86</sup> *Pan. Refin.*, 293 U.S. at 430.

<sup>87</sup> *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

<sup>88</sup> *Id.* To be sure, it was by no means clear what constitutional problem Justice Douglas's opinion sought to avoid. Douglas also cited the "right to travel," which he claimed was "part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Id.* at 125.

<sup>89</sup> *Id.* at 124.

<sup>90</sup> *Id.* at 125.

<sup>91</sup> See *id.* (citing *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544–45 (1954), and *United States v. Allen-Bradley Co.*, 352 U.S. 306, 310–11 (1957), both of which embrace an interpretive principle that Congress can effectively ratify a customary statutory interpretation).

issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly.”<sup>92</sup>

There is thus an obvious tension between a canon of construction that (like *Chevron*) puts the thumb on the scales in favor of the government in cases of ambiguity, and a canon of construction that calls for the application of constitutional avoidance where nondelegation concerns might be present. In the latter scenario, the judicial thumb on the scales would favor a narrowing construction of a statute (granting less discretion to the agency), rather than a broader construction (granting more).<sup>93</sup>

As to the major questions doctrine, it poses two separate, related problems. First, it is not entirely clear where the doctrine comes from—in other words, why courts should be subject to a different set of interpretive rules for “questions of great social or economic importance.”<sup>94</sup> Professor Sunstein appears to acknowledge as much. As he notes, “when an agency is interpreting a major question (*the theory goes*), it is hazardous to infer any [interpretive] authority” for the agency.<sup>95</sup> Yet this “carve-out theory does not come from anything explicit in the [Administrative Procedure Act],” but rather “must be taken as a reading of implicit congressional instructions.”<sup>96</sup> That lack of statutory authorization (and, indeed, lack of obvious doctrinal pedigree) can raise questions about the major questions doctrine’s justification.

But even assuming that the doctrine could be justified in the abstract, it is hard to apply in practice. That is because, as Professor Sunstein also notes, “[t]he line between major and nonmajor questions is not exactly clear and crisp.”<sup>97</sup> The lack of clarity and crispness can perhaps be tolerated for a limited and targeted doctrine. But to the extent the major questions doctrine takes the place of ordinary statutory interpretation, the potential unpredictability in its application raises significant challenges. For that reason, the major questions doctrine could never be a replacement for a requirement that courts engage in the ordinary task of statutory interpretation—nothing more and nothing less.

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<sup>92</sup> *Id.* at 127. I will note, parenthetically, that I am not at all convinced that *Kent* was correctly decided. Justice Clark’s dissent vigorously disputed that point as a matter of executive practice and congressional intent. *See id.* at 138–39 (Clark, J., dissenting). And no less an authority than Professor Louis Jaffe explained that the *Kent* Court’s “so-called statutory interpretation by reference to custom was unbelievably sophistical.” LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 72 n.138 (1965).

<sup>93</sup> Indeed, as I explain in *Delegation and Interpretive Discretion*, this tension is present in the Court’s two decisions in 2019, *Kisor* and *Gundy*. *See Bamzai, Delegation, supra* note 13, at 174–76, 189.

<sup>94</sup> Sunstein, *supra* note 11, at 579.

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> *Id.* at 580 n.84.

<sup>97</sup> *Id.* at 581.

### C. Politicizing Administrative Law?

Professor Sunstein also contends that changing the *Chevron* framework could lead to “greater politicization of administrative law.”<sup>98</sup> That is because, as he puts it, “*Chevron* is indeed reducing the effects of judicial policy preferences” by curtailing “partisan rulings” and “conflicts among the courts of appeals.”<sup>99</sup> But this claim strikes me as wrong in two ways.

First, the evidence that Professor Sunstein marshals in favor of the proposition does not support it. To be sure, it is entirely possible that altering or abandoning *Chevron* would lead to greater conflicts among judges on questions of statutory interpretation. But that is not the sole, or even principal, measure of a good interpretive framework. For example, if judges were to avoid construing statutes altogether (and vote reflexively in favor of the government), then empirical studies would undoubtedly be able to establish that disagreements among federal judges had precipitously declined. But just as “[n]o legislation pursues its purposes at all costs,”<sup>100</sup> so too the goal of interpretive methodology is not to *minimize* disputes among federal judges, but rather to *optimize* them, as balanced against a host of other important values—including the need for appropriate, and appropriately constrained decision-making, by Article III judges. On this point, I assume Professor Sunstein agrees; after all, he proposes imposing more rigorous limits on application of the *Chevron* doctrine.<sup>101</sup> Those rigorous limits would necessarily lead to more *de novo* review, and perhaps more disagreements, on the federal courts of appeals.

Try the following thought experiment: It would certainly reduce “the effects of judicial policy preferences” (as assessed by empirical studies measuring judicial disputes) if courts chose to adopt a blanket rule that the government always won statutory disputes in criminal cases. But fewer judicial disputes would not mean the absence of “judicial policy preferences,” because the meta-choice to vote reflexively for the government in criminal cases would itself be a policy choice—albeit one that might not be amenable to measurement by empirical scholarship. The inability to measure the consequences of a judicial policy choice should not mask the obvious takeaway that a policy choice has been made.<sup>102</sup>

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<sup>98</sup> *Id.* at 572.

<sup>99</sup> *Id.* at 574 (citing Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018)).

<sup>100</sup> *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)).

<sup>101</sup> See Sunstein, *supra* note 11, at 575–83.

<sup>102</sup> On this point, I will note parenthetically that Professor Sunstein asks: “Might something like *Chevron* turn out to be inevitable?” *Id.* at 572–73. The answer to this question, it seems to me, is obviously not. First, criminal statutory schemes can be as complex as civil schemes, yet the criminal justice system is not governed by the *Chevron* doctrine, but rather the “rule of lenity,” which applies a thumb on the interpretive scales in favor of the criminal

In addition, there is a second, equally important, problem with Professor Sunstein's contention. Given the ad hoc nature of the framework that Professor Sunstein proposes—what's a “major question” exactly?—it is certainly possible that more and greater disputes will arise in the future under his framework. That is for the simple reason that an absence of comprehensive theoretical underpinning means that lower court judges will lack direction on how to apply the framework to new cases.

Thus, the ultimate criterion cannot be solely whether more disputes among judges might arise under some new regime. They might. But the key question is whether the *balance* between judicial decision-making and agency decision-making has been struck at the right place. And whether that balance is struck in the right place depends, in part, on the administrability and workability of the relevant doctrinal approach. If the application of the law is hard to predict, it's hard to imagine that the approach will reduce judicial politicization.

#### D. *Stare Decisis*

The primary reason that Professor Sunstein gives for adhering to *Chevron* is stare decisis—and the notion that Congress should be familiar with the interpretive rules applicable to the statutes that it enacts.<sup>103</sup> On this point, I certainly agree with Professor Sunstein that it “is of paramount importance . . . that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”<sup>104</sup> But that is precisely the problem with the current regime. The framework that the Court applied was not consistent before the Court decided *Chevron* in 1984; the framework has not been consistent since *Chevron* was decided in 1984; and, absent some basis and underlying logic for the doctrine, it promises not to be consistent going forward.<sup>105</sup> All of the factors that underlie the doctrine of stare

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defendant. See, e.g., 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, 946 (2013). (My point is not that the rule of lenity should apply to federal civil statutes, but rather that the criminal example makes it clear that *Chevron* is not inevitable in the interpretation of complex statutory schemes.) Second, as Professor Sunstein notes, “most state courts have not embraced the *Chevron* approach, though many have.” Sunstein, *supra* note 11, at 575 n.54.

<sup>103</sup> See Sunstein, *supra* note 11, at 568–75.

<sup>104</sup> *Finley v. United States*, 490 U.S. 545, 556 (1989).

<sup>105</sup> Indeed, I understand that, at various points, Professor Sunstein effectively agrees with me on the fundamental problems with workability, even if he disagrees with me on the solution. As he notes, “[w]ith respect to workability, *Chevron* has not realized its original promise, which was to make scope of review issues clean and simple. 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. 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

decisiveness—workability, consistency, stability, and reliance<sup>106</sup>—cut in favor of giving the doctrine of judicial deference a predictable theoretical framework, rather than continuing to rely on an ad hoc cluster of factors that nobody quite knows how to apply. It would be better than the current “mess, even chaos.”<sup>107</sup>

Let’s start with the pre-*Chevron* framework. As late as 1969, Justice Black, writing in a dissent, claimed that an agency’s interpretation of a statute “is in no way binding on us.”<sup>108</sup> Then in 1976, eight years before *Chevron*, in *Pittston Stevedoring Corp. v. Dellaventura*,<sup>109</sup> Judge Friendly summarized the law as follows. He explained that the court, in the case, was “confronted with the ever troubling question whether the determination at issue, namely, whether the [law at issue] should be so interpreted [in a particular way], is the kind of question which justifies or requires judicial deference.”<sup>110</sup> On that point, Judge Friendly said that he thought “it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.”<sup>111</sup> Friendly then listed “[l]eading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed

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from rulemaking or adjudication. (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. . . . The question of workability is serious and real.” Sunstein, *supra* note 11, at 569 (footnotes omitted). For the classic work defining and addressing *Chevron* Step Zero, see generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>106</sup> See, e.g., *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018) (listing as the major factors to be considered “the quality of [a precedent’s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision”).

<sup>107</sup> Sunstein, *supra* note 11, at 569. Professor Sunstein observes that portions of *Kisor v. Wilkie* “might be taken to cut out the legs from the attack on *Chevron*.” *Id.* at 570. I will simply note that the portions that he cites, *see id.* at 570 & n.33, were joined solely by a plurality of the Court and did not command a full majority. It remains to be seen, in an appropriate case, how the Court would approach the arguments based on section 706 of the Administrative Procedure Act contained in the excerpt from the plurality opinion that Professor Sunstein cites. See Bamzai, *Origins*, *supra* note 13, at 985–95.

<sup>108</sup> *INS v. Stanisic*, 395 U.S. 62, 83 (1969) (Black, J., dissenting). Specifically, in *Stanisic*, Justice Black was addressing an “ambiguity in [a] regulation” that was “precisely the same as the ambiguity in the statutory provision from which the wording of the regulation was drawn.” *Id.* In this context, he contended that “[i]t seems clear that the way in which the [government] has applied the regulation has been determined by its interpretation of the statute, an interpretation that is in no way binding on us.” *Id.* For other cases, see *Office Employees International Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318–20 (1957), and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 149–50 (1944).

<sup>109</sup> *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976).

<sup>110</sup> *Id.* at 49.

<sup>111</sup> *Id.*

only if without rational basis.”<sup>112</sup> Those cases contrasted with “an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.”<sup>113</sup>

Thus, it is clear that prior to 1984, Congress did not legislate, and agencies did not act, against a stable interpretive framework.

Next, turn to the framework that *Chevron* created in 1984. In *Chevron*’s immediate aftermath, it might have been possible to understand the Court’s two steps as establishing a stable interpretive framework against which Congress legislated—though of course there is no evidence that the Court intended to establish a new framework.<sup>114</sup> A few short years later, the Court in fact intimated as much by appearing to backtrack from some of the implications of *Chevron*.<sup>115</sup> Then, in *United States v. Mead Corp.*,<sup>116</sup> the Court qualified the doctrine in more dramatic ways. It said that “[t]he 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.”<sup>117</sup> That approach, according to the Court, “has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.”<sup>118</sup> Indeed, in *Mead*, the Court said that “where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is ‘inapplicable.’”<sup>119</sup> Describing its own precedents, the Court explained that its approach had “been to tailor deference to variety,” with a recognition of “more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.”<sup>120</sup> The Court’s very recognition of a “variety of

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–76 (2014) (noting that the Court did not view *Chevron* as a “watershed decision” at the time of the opinion).

<sup>115</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) (describing the issue in the case as “a pure question of statutory construction for the courts to decide”).

<sup>116</sup> 533 U.S. 218 (2001).

<sup>117</sup> *Id.* at 228 (footnotes omitted).

<sup>118</sup> *Id.* (citations omitted).

<sup>119</sup> *Id.* at 230 (quoting *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting)).

<sup>120</sup> *Id.* at 236–37. If anything, writing in dissent, Justice Scalia was more emphatic on the unstable nature of the framework that *Mead* created. See *id.* at 239 (Scalia, J., dissenting). He characterized the *Mead* opinion as “an avulsive change in judicial review of federal administrative action.” *Id.* That was because, he claimed, “[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 to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary.” *Id.* And he claimed that the Court would be “sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come.” *Id.* (citation omitted).

judicial deference” and a “variety of indicators” appeared to eschew a simple two-step process.

Third, consider where the law might go in the future. Professor Sunstein observes that “the Court is developing [the major questions] interpretive canon,” which limits *Chevron*’s reach.<sup>121</sup> But “developing” how and for what reason? Using what logic and under what circumstances? Without an underlying conceptual framework, the ad hoc nature of the doctrine’s various limits confounds Congress’s ability to know what might happen when it legislates.

Let me put the point another way: Professor Sunstein begins his Essay with the claim that “[f]or decades” *Chevron* “has provided the organizing framework for judicial review of agency interpretations of law.”<sup>122</sup> In a sense, that is true. The label “*Chevron*” has been affixed to the Court’s methodology ever since 1984, notwithstanding that there is little evidence that the *Chevron* Court itself intended to create a canonical decision.<sup>123</sup> In another and more important sense, however, the Court has failed to use a single identifiable methodology since 1984. Thus, even if it were true that agencies have adopted regulations against the backdrop of “*Chevron*,”<sup>124</sup> it would remain questionable whether either agencies or Congress could be said to have understood the framework against which they were acting.

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<sup>121</sup> Sunstein, *supra* note 11, at 581.

<sup>122</sup> *Id.* at 566; *see also id.* at 572 (“[F]or decades, Congress has legislated against the background set by *Chevron* . . .”). To support this claim, Professor Sunstein cites an article indicating that eighty-two percent of congressional staffers surveyed were familiar with *Chevron*. *See id.* at 572 n.37 (citing Gluck & Bressman, *supra* note 102, at 993–97). I am not certain that the views of congressional staffers should influence the Supreme Court’s interpretive methodology—for a variety of reasons, including that such staffers routinely change over with congressional elections. But even if I were prepared to accept that proposition, the study that Professor Sunstein cites does not squarely support his position. For one thing, the study reveals that the staffers might be familiar with the concept of judicial deference, but that they do not necessarily know the intricacies of the doctrine. As the authors of the study note, although 82% of study respondents were familiar with *Chevron*, “only 20% or fewer knew *Skidmore* and *Mead* by name in addition to *Chevron*,” Gluck & Bressman, *supra* note 102, at 995, though it may be possible that they know some of the content of *Mead*. *See id.* at 998–1016. In other words, it is by no means clear that the study respondents knew how the Court applies the *Chevron* doctrine—which is no surprise, given that few can predict how and when the Court applies the doctrine. For another, the respondents to the study explained that “their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language,” but rather “although ambiguity sometimes signals intent to delegate, often it does not, and *Chevron* is not a reason that drafters leave statutes ambiguous.” *Id.* at 996. The authors of the study thus suggest that *Chevron* is a “canon that does not well approximate how Congress drafts.” *Id.* Again, I do not believe that this suggestion should be dispositive, or even relevant, to the question of how and whether to define the contours of when courts defer to agencies. But if it were relevant, the study might well support my position, not Professor Sunstein’s.

<sup>123</sup> *See* Merrill, *supra* note 114, at 275–76.

<sup>124</sup> *See* Sunstein, *supra* note 11, at 566 (“Numerous regulations have been adopted, and numerous regulations have been tested and upheld or struck down, with reference to that framework.”).

Related to Professor Sunstein's argument about stare decisis is his concern that "overruling *Chevron* would create an upheaval—a large shock to the legal system."<sup>125</sup> But again, if we leave to one side the label "*Chevron*," it is by no means clear to me that his proposed solution—"domesticating" *Chevron*—would create any less "upheaval" than the alternative I have sketched above.<sup>126</sup> For one thing, consider that the difference between the two positions manifests in a small batch of cases—what I have referred to as the "Class 3" cases above.<sup>127</sup> Given the Court's recent cutbacks to the doctrine of judicial deference (in cases like *Kisor v. Wilkie*) and the narrow band of cases in which *Chevron* now truly applies, it seems somewhat exaggerated to say that a further cutback on other Class 3 cases would truly lead to an upheaval.

Equally importantly, Professor Sunstein's proposal to "domesticate" *Chevron*, if I understand it correctly, also involves cutbacks to the scope and application of the doctrine. To be sure, my proposal might involve greater cutbacks to the doctrine's scope. But relying on the canons privileging contemporaneous and customary interpretations of statutes would have the benefit of providing a solid theoretical footing for the doctrine as the Court applies it in the future. Thus, the "shock to the legal system" (assuming one would actually occur) between the two approaches seems very much a matter of degree, rather than of kind.<sup>128</sup> And respectfully, Professor Sunstein's approach does nothing to alleviate what he agrees to be the "mess, even chaos" that the current doctrine has created.

#### IV. CONCLUSION

Toward the end of his Essay, Professor Sunstein notes that, under *Chevron*, "the Court has made it clear that an agency may depart from a prior interpretation."<sup>129</sup> He then says that the Court could temper that rule and that "we could easily imagine skepticism about a new interpretation that creates unfair surprise or that disrupts settled expectations."<sup>130</sup> If the Court were to

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<sup>125</sup> *Id.* at 572.

<sup>126</sup> *Id.* at 575–83.

<sup>127</sup> See *supra* Part II.C.

<sup>128</sup> For example, Professor Sunstein asks: "What would happen to the countless regulations that have been upheld under the *Chevron* framework?" Sunstein, *supra* note 11, at 572. But the same question could be asked of his approach, assuming that the process of "Leashing *Chevron*," *id.* at 575–83, has any effect on limiting judicial deference's application. If that were so, then one could ask how those enhanced limits affect regulations "upheld" under the preexisting framework. There simply is no getting around the fact that alterations to a legal doctrine, including those alterations that Professor Sunstein proposes, might call into question some category of prior agency actions.

<sup>129</sup> *Id.* at 582. Indeed, the case that Professor Sunstein cites, *Brand X*, makes it clear that a court can depart from a prior interpretation that a court thought was best. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–86 (2005).

<sup>130</sup> Sunstein, *supra* note 11, at 582.



“discipline[]” *Chevron* in this fashion,<sup>131</sup> it would effectively be reimposing the old canons of construction requiring agency interpretations to be customary and contemporaneous before they warrant deference or respect. There would be even less daylight between Professor Sunstein’s views and my own. But under Professor Sunstein’s approach, the Court would be readopting an approach akin to the old canons without explaining why it was doing so.

What is the possible justification for preferring such a lack of clarity? If the justification is that we are all now used to the label “*Chevron*” and hence should not do away with the familiar terminology, then I confess that I am indifferent to the label, so long as the content reflects a principled and predictable way to apply the doctrine. “*Chevron*” the label—which is what “*Zombie Chevron*” appears to amount to—matters far less than the actual contours of statutory interpretation in the administrative state.

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<sup>131</sup> *Id.*