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From Gorsuch to Gorsuch: Family Reformation on Agency Power

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FROM GORSUCH TO GORSUCH: FAMILY REFORMATIONS ON AGENCY POWER

Matthew Noxsel

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INTRODUCTION

Neil Gorsuch was thirteen years old when his mother got a call from President Ronald Reagan.¹ The newly minted Executive asked her to serve as Administrator of the Environmental Protection Agency.² And her tall, studious teen,³ likely caught up in the family’s excitement, could not have imagined all the ways in which that news would someday impact his own career. Over three decades later, at Gorsuch’s confirmation hearing to be an Associate Justice of the Supreme Court, one of the first critiques of his jurisprudence concerned

1. ANNE BURFORD WITH JOHN GREENYA, ARE YOU TOUGH ENOUGH? 31 (1986) (“[O]n February 20, 1981, . . . Ronald Reagan caught me in my kitchen and asked me to be the EPA Administrator.”); *Neil Gorsuch Fast Facts*, CNN (Feb. 1, 2019 4:07 PM) <https://www.cnn.com/2017/02/03/us/neil-gorsuch-fast-facts/index.html> (listing Gorsuch’s birthdate as August 29, 1967).

2. See BURFORD, *supra* note 1.

3. See Adam Liptak et. al, *In Fall of Gorsuch’s Mother, a Painful Lesson in Politicking*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/politics/neil-gorsuch-supreme-court-nominee.html> (describing young Neil as “[s]tudious but not standoffish”).

his challenge to a judicial doctrine created at the behest of his mother during her time leading the EPA.⁴

Chevron deference, as it is commonly known, was conceived when Administrator Anne Gorsuch's EPA redefined "stationary source" under the Clean Air Act to allow emissions-emitting facilities to avoid costly state inspections while adding or modifying equipment on their property.⁵ After an environmental group challenged the rule,⁶ the Supreme Court determined that, because the definition of "stationary source" under the Clean Air Act was ambiguous,⁷ the Court was bound to defer to Administrator Gorsuch's definition so long as it was permissible.⁸ Thus, the *Chevron* two-step entered the world: if a statutory provision is ambiguous and an agency's interpretation of that provision is reasonable, the Court must defer.⁹

This huge win for the Republican-led EPA, however, was not without irony. This was most evident after multiple turns between conservative and liberal administrations, during which the implications of *Chevron* deference had time to fully manifest, when Neil Gorsuch, nominated like his mother by a Republican President considered a re-

4. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 6 (2017) [hereinafter *Justice Gorsuch Hearing*] (statement of Sen. Dianne Feinstein, arguing the *Chevron* doctrine "has been fundamental to how our [g]overnment addresses real world challenges in our country and has been in place for decades," and, "[i]f overturned, as Judge Gorsuch has advocated, legislating rules are very difficult").

5. Clean Air Act § 172(b)(6), 42 U.S.C. § 7502(b)(6). See Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981) (to be codified at 40 C.F.R. pt. 51-52) (summarizing the history of the regulation and the "practical significance" of the change put forth in the new rule); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (explaining the new EPA rule allows "an existing plant that contains several pollution-emitting devices [to] install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant . . . as though [the pollution-emitting devices] were encased within a single 'bubble'").

6. See *Chevron*, 467 U.S. at 859 ("Respondents place a fundamentally different construction on the statute.").

7. See *id.* at 862-63 (concluding the legislative history of the Clean Air Act is "ambiguous and like the text of [the statute] itself . . . does not tell us what a new source is, much less that it is to have an inflexible definition").

8. See *id.* at 866 ("We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.").

9. See *id.* at 842-43 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

former,¹⁰ was feverishly grilled by Democrat Senators whose gravest concern, it seemed, was the Tenth Circuit judge's disdain for *Chevron* deference.¹¹ What happened to transform his mother's win into a cherished precedent for her political opponents? Furthermore, why had *Chevron* deference fallen into disfavor with the son of the woman whom it had benefited?

As if that irony was not enough, on the fourth day of Gorsuch's confirmation hearing a Georgetown Law professor highlighted another dimension. Articulating the single difference between the jurisprudence of Gorsuch and the late Justice Antonin Scalia, whom Gorsuch was to replace, Professor Jonathan Turley said, "*the exception . . . is Chevron.*"¹² Without time to adequately unpack that statement, Turley's words briefly presented a fact to which many conservatives have yet to fully reconcile themselves: Justice Scalia championed *Chevron*¹³—in some of its most extreme forms¹⁴—throughout his career.¹⁵

10. See Terri Bimes, *Ronald Reagan and the New Conservative Populism* 11 (Univ. Cal., Berkeley, Inst. of Gov't Studies, Working Paper No. 2002-1, 2002) ("With Reagan's convincing victory in the 1980 presidential election, the moment appeared ripe for the triumph of his brand of conservative populism on the national stage."); see also Stephen Moore, *Welcome to the Party of Trump*, NATIONAL REVIEW (Dec. 1, 2016, 9:00 AM), <http://www.nationalreview.com/article/442605/donald-trumps-republican-party-populist-working-class-america-first/> ("What roused the ire of some of my conservative friends was my statement that just as Reagan converted the GOP into a conservative party, with his victory this year, Trump has converted the GOP into a populist, America First party."?).

11. Senator Klobuchar stated:

Last year . . . you suggested that Chevron should be overturned, yet this act would have titanic real world implications on all aspects of our everyday lives. Countless rules could be in jeopardy, protections that matter to the American people would be compromised, and there would be widespread uncertainty.

See *Justice Gorsuch Hearing*, *supra* note 4, at 30 (statement of Sen. Klobuchar);

Senator Al Franken stated:

Just this past August you wrote an opinion in which you suggested that it may be time to reevaluate what is known as the Chevron doctrine. . . . [T]o those who subscribe to [such an] extreme view, Chevron is the only thing . . . [preventing them from] gutting any environmental or consumer protection measure that gets in the way of corporate profit margins.

Id. at 36 (statement of Sen. Franken).

12. *Id.* at 452 (statement of Professor Jonathan Turley) (emphasis added).

13. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (1989) ("[T]he *Chevron* approach is correct.") [hereinafter Scalia, *Judicial Deference*]; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO L.J. 833, 867 (2001) (referring to Justice Scalia as "*Chevron's* chief judicial champion").

14. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (holding a court must defer under *Chevron* to the FCC's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority).

15. See, e.g., *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994) (applying the *Chevron* framework to deny that a statute governing the FCC was ambiguous and thus rejecting the agency's interpretation); *United States v. Mead Corp.*, 533 U.S. 218, 261 (2001)

In fact, one might say, if Anne Gorsuch is the *de facto* mother of *Chevron* deference, then Scalia is its father.¹⁶

Here, then, we arrive at the most important question: what, if anything, does Justice Gorsuch's divergence on *Chevron* from his mother and predecessor on the bench, both of whom were products of the Reagan revolution, signal about current trends in conservative thinking? This Comment seeks to answer that question, but admittedly (and with sincere hope) the attempt may raise more questions than it answers.

Although *Chevron* has drawn extensive scholarship examining its doctrinal origins,¹⁷ evolution,¹⁸ and impact,¹⁹ this is not one of those inquiries. Instead, this Comment seeks to address some of the circumstances and rationale motivating certain people behind *Chevron*, and therefore the doctrine and its impact will be discussed in short form. Accordingly, Part II of this Comment will use Anne Gorsuch's service at the EPA as a lens through which to view the conservative revolution that occurred before and during the Reagan years, with an eye toward a subtle change in thinking from previous generations regarding agency regulations. Part III of this Comment will expand on that change, showing how a parallel shift in jurisprudence, led in part by Antonin Scalia, enabled the Reagan administration to execute tradi-

(Scalia, J., dissenting) (arguing "vigorously" that *Chevron* deference should not be limited to statutes in which Congress has expressly intended that agencies issue interpretations with the force of law).

16. To be fair, it was technically more of a legitimation. Scalia did not write the *Chevron* opinion, nor was he even on the court when *Chevron* was decided. Nevertheless, he worked to establish the test as a well-oiled doctrine as soon as he was given opportunity. Furthermore, as will be shown, even Scalia's academic writings during his time as an administrative law professor and opinions while on the D.C. Court of Appeals were instrumental to *Chevron*'s genesis. See Merrill, *supra* note 13, at 838 ("It is difficult to pinpoint exactly when . . . [Chevron was] recognized as the leading case about deference . . . but it was almost certainly only after . . . Antonin Scalia[] was elevated to the Supreme Court . . . and made the promotion of *Chevron* one of his causes.").

17. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 916–19 (2017) (challenging the traditional understanding of *Chevron*'s theoretical origins); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 3–4 (2013) (arguing the doctrine of *Chevron* itself should be unmoored from the *Chevron* case because of its evolution through lower court decisions); Merrill, *supra* note 3, at 835–37 (mapping the scope and background principles of the *Chevron* doctrine).

18. See, e.g., Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN L. REV. 807, 807–09 (2002) (discussing one of *Chevron*'s most significant adaptations).

19. See, e.g., Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 3–9 (2017) (showcasing the largest to-date empirical study of outcomes when *Chevron* is applied in Circuit Courts over an eleven year period from 2003–2013).

tionally conservative policy goals when it would have otherwise been impeded by the Court. Also, in Part III, this Comment will grapple with the rationales of the proponents of interpretational deference, drawing parallels from Roman, English, and American history to better understand the arguments within a broad time frame.

Part IV turns at last to Gorsuch's view of *Chevron* deference, probing both his ideological upbringing and his Tenth Circuit jurisprudence to understand how his view of interpretational deference differs from Justice Scalia's. Finally, Part V draws from Gorsuch's split with Justice Scalia over *Chevron* to contemplate reasons for the current trend among many conservatives to disfavor the doctrine, namely its frustration of due process, harm to small business, and disruption of the tripartite balance of power. To close, this Comment argues that, should *Chevron* fall, strictly *de novo* judicial review of agency interpretations of law may ultimately force Congress to reconsider the quantum of power delegated to agencies.

I. ANNE GORSUCH: CAREER & IDEOLOGY

Viewing the brief political moment of the late 1970s and early 1980s through the lens of one of its key figures—Anne Gorsuch—shows that economic expediency and political momentum led conservatives to sacrifice dearly held constitutional values for economic success.

A. *Mother, Leader, “Crazy”*

Anne Gorsuch had three children under the age of ten when she ran for a seat in the 1976 Colorado State Legislature.²⁰ Neil, her oldest at nine, joined his mom on the campaign trail, knocking on doors to ask for support and rubbing elbows with the who's-who at a Governor's party.²¹ Her victory that year was remarkable, not just because she was a young mother of three in an era when politicians were overwhelmingly middle-to-late-aged men, but because she unseated an entrenched Democrat incumbent as a Republican in a Democrat-laden district.²²

20. John Frank & Mark K. Matthews, *Neil Gorsuch Revives His Mother's Political Legacy in Colorado*, THE DENV. POST (Mar. 20, 2017, 11:27 AM), <https://www.denverpost.com/2017/03/19/neil-gorsuch-anne-burford-colorado/>.

21. *Id.*

22. See BURFORD, *supra* note 1, at 13 (describing Anne's East Denver district political climate as 40% Democrat, 19% Republican, the rest independent, and having a Democrat incumbent who “had been in office for two terms and was on . . . a very powerful committee”).

Anne's win marked a successful shift in Republican political strategy nationwide. In 1975, at the exact nadir of Republican politics in America,²³ Bill Brock, the Chairman of the Republican National Committee who later served as Reagan's Secretary of Labor, implemented a grassroots scheme to rebuild the Republican party "from the courthouse up, not the White House down," by systematically tapping "ideal candidates" to oppose Democratic incumbents across the country.²⁴ Anne was one of those special few who got a call, and she happily joined the RNC's efforts.²⁵

The emerging political strategy in conservative circles signaled the beginning of a parallel change in governance strategy that would not be fully realized until Reagan took office. The traditional stance of conservatives has been to rally against the exercise of state power. Beginning in the early 1980s, however, conservatives began to embrace state power as a means to achieve policy aims, most notably the deregulation of the economy. Recently, Erik Erlandson aptly termed this strategic shift as "administrative deregulation," which he describes as occurring when "bureaucratic autonomy" (an administrator's power "to make decisions free from [the] external control . . . [of] other branches of government") grows and is used to decrease "administrative capacity" (the size and scope of that agency's ability to "regulate private conduct").²⁶ In essence, administrative deregulation is the "paradoxical situation[] when the state is empowered to undermine the state."²⁷

Administrative deregulation was in embryonic form in 1976 when the new crop of Republicans won a sweeping victory in both of Colorado's legislative chambers. Without wasting a moment, they began using their newfound power to "carry out a conservative agenda."²⁸ They replaced the "incumbent Republican" speaker of the house with a "conservative Republican," and then went on to repeal five taxes, reform regulatory measures, and "limit the growth of state government."²⁹ They were using the legislative power of the people to

23. See Tim Storey, *2004 Legislative Elections*, in *THE BOOK OF THE STATES 2005* 108 (Council of State Gov't ed., 37th ed. 2005) (displaying a chart of legislative seats won by Democrats and Republicans from 1938 to 2004).

24. BURFORD, *supra* note 1, at 12.

25. See *id.* ("I certainly would not have run if they hadn't come to me and said they thought I could do so and win.").

26. Erik M. Erlandson, *A Technocratic Free Market: How Courts Paved the Way for Administered Deregulation in the American Financial Sector, 1977-1988*, 29 *J. OF POL'Y HIST.* 350, 352 (2017).

27. *Id.*

28. BURFORD, *supra* note 1, at 15.

29. *Id.* at 15, 16.

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target and eliminate hindrances to the economy, and the liberal press did not like it. Soon the conservative core of the House earned a pejorative moniker that would stick with many of them for the remainder of their careers: the “House Crazies.”³⁰

Anne Gorsuch—who had earned her *juris doctor* from Colorado Law at twenty-years-old and passed the bar at twenty-one, had won a Fulbright scholarship to India, and had spent several years as a corporate attorney³¹—was informally dubbed the “legal brains of the outfit.”³² In her first year alone, she introduced and carried twenty-six bills, earning her an award as the “Outstanding Freshman Legislator.”³³ Initial success led to greater responsibility, and during her second term she was made head of the State Affairs Committee, where she was instrumental in tackling the toughest legal questions facing the House.³⁴ Thus, it can be said of Anne that she was at the exact epicenter of the shifting Republican governance strategy, and in many ways was driving it.

B. “Mafia” Member

“We did ‘Reaganism’ in the Colorado legislature before Reagan did it,” Anne claimed in her memoir written a few years after she resigned from the EPA, referring to their efforts to limit the size of the Colorado state government.³⁵ But without decades of hindsight to parse the ideological mechanics of her generation’s movement, Anne was unable to recognize that her claim was only partly true. “Reaganism,” as it was later made fully manifest, involved not mere legislative efforts, but also (and perhaps primarily) administrative efforts to deregulate the economy.³⁶

Viewed differently, however, Anne’s boast about doing Reaganism “in the Colorado legislature” was truer than she meant it to be. When Reagan was elected, he nominated two Colorado Republicans to take key cabinet positions: James Watt as the Secretary of the Interior

30. *Id.* at 16. *See also* Frank & Matthews, *supra* note 20 (noting that the label came “as a badge of honor for how they upset the moderate Republican tradition and pushed an aggressive agenda to lower taxes and cut government regulations”).

31. Frank & Matthews, *supra* note 20.

32. BURFORD, *supra* note 1, at 16.

33. *Id.* at 12.

34. *Id.* (explaining that “[t]raditionally . . . anything that was problematic, from either a legal or a political point of view, went to State Affairs”).

35. *Id.* at 17.

36. *See* Erlandson, *supra* note 26, at 369 (citing Professor Jide Nzelibé’s opinion that “officials in the Reagan Administration . . . steer[ed] the state in a deregulatory direction”).

and Anne Gorsuch as the head of the EPA.³⁷ Furthermore, slews of Coloradan legislators were given critical roles in the administration, sometimes as supporting cast for agency heads in D.C., and other times as regional directors of administrative programs.³⁸ The nominations of Watt and Anne to the Interior and the EPA are especially noteworthy because of the prominent role each of those agencies played in Reagan's deregulatory goals. The Department of the Interior works strategically with nearly every agency in the Federal government, and the EPA was targeted by Reagan for a radical regulatory overhaul.³⁹ Thus, the "conservatism" that had been the boast of the House Crazies as legislators became "Reaganism" when many of those same people became federal administrators.

Of the many ways in which this change was remarkable, the most striking feature was its subtlety. Without giving a passing thought to the overarching implications a conservative legislative strategy would bear when implemented from within the nation's executive branch, Anne and company, in their new administrative posts, went straight to work just as they had in '76. In her opening statement at her confirmation hearing, Anne explained precisely what that work would come to look like:

The President is committed to regulatory reform, and here I believe it is important to emphasize that the reform is not limited to withdrawal of unnecessary or overly burdensome singular regulations, but envisions a much broader scope involving the process by which new regulations are formulated and current regulations evaluated. . . .⁴⁰

In other words, instead of using traditional means to deregulate—by pushing legislation to unwind "unnecessary or overly burdensome singular regulations"—Reaganism seeks to use the power of agencies to alter the "process" of regulatory schemes in order to "reform" (*i.e.* mitigate) the power of the state. Here, Erlandson's administrative

37. William E. Schmidt, *The 'Colorado Mafia' Puts Its Stamp on the Government*, N.Y. TIMES, Sept. 6, 1981, at 4004005.

38. *Id.* (explaining the influence of Joseph Coors, a wealthy Coloradan businessman and personal friend of Reagan's, on placing Coloradans in the President's administration). See also KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009), for a detailed look at the influence of wealthy businessmen on conservative politics during the twentieth century.

39. Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y. TIMES (Jan. 2, 1989), <https://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html> (describing Reagan's appointment of Watt and Burford as indicative of his intent to make "the nation's environmental policies . . . a prime target of his social revolution").

40. BURFORD, *supra* note 1, at 54.

deregulation fully emerges: the state seeks for itself power to limit its own capacity.⁴¹ Under Reagan, then, the conservatism that had once been a legislative agenda was, at least in part, transformed into executive prerogative.

Tellingly, whereas Anne and her Coloradan compatriots previously earned a label questioning their sanity—“Crazies”—as federal agents they were given a new nickname that emphasized their independence and organizational power: the “Colorado Mafia.”⁴² For Anne, using the power of the EPA to constrict the EPA was a logical progression in her career:

[M]y dealings with EPA as a state legislator had taught me that the head of EPA has more unfettered power than anybody else in town. I don't care if you're Secretary of *Defense*. The Administrator of EPA has more discretionary power (all of which, incidentally, had come from Congress), which means someone could get in there and really do a job.⁴³

Here again, the subtlety and ease of conscience are noteworthy. Anne fully acknowledged that the “discretionary power” which had “come from Congress” was a means to “really do a job,” that is, limit the capacity of the EPA itself.⁴⁴ But rather than question the constitutionality of such power, she embraced it as primary motivation in leading the EPA.

C. Administrator

Once at the EPA, Anne quickly set Reaganism into play. Much to her advantage, the previous administration left many statutory obligations unfulfilled due to organizational incompetence,⁴⁵ giving the highly disciplined Anne an opportunity to fill the gaps.⁴⁶

41. See Erlandson, *supra* note 26.

42. Schmidt, *supra* note 37.

43. BURFORD, *supra* note 1, at 9–10.

44. *Id.*

45. See BURFORD, *supra* note 1, at 69 (“After I'd studied [a chart displaying the previous administration's organizational authority] briefly I could see only too clearly that using the 'system' represented by this chart one could *never* make *any* decisions!”).

46. See *id.* at 99 (“They had left us more power than we deserved, because they left agendas of inaction that we filled. What we inherited from them was a legacy of inaction, of decisional voids. We started filling those voids. And they could see all of those substantive areas slipping away from them. I will bet that we produced more regulations in the twenty-two months of my tenure than were produced in the entire four years under President Carter.”).

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Substantively, Anne's critique of the previous administration was that they had "strayed from . . . legislative intent."⁴⁷ In theory, the EPA was supposed to set a national standard, outline a general framework for state compliance, and then approve each state's individualized plans.⁴⁸ But instead, in every major program, the Carter EPA had denied states authority to implement programs unless they adopted "specific EPA regulations."⁴⁹ In other words, Anne faulted the previous administration for making the EPA's capacity as a rule maker larger and more domineering than Congress originally envisioned.

A perfect example of this problem, and how Anne practiced administrative deregulation to fix it, is seen in the regulation that ultimately led to the *Chevron* litigation. Part of the Clean Air Act Amendments of 1977 required states to "establish a permit program regulating 'new or modified major stationary sources' of air pollution."⁵⁰ Because "stationary source" was ambiguous under the language of the statute, the EPA was tasked with defining the term.

In 1980, the Carter EPA decided that, in areas where the emissions standards had not yet been achieved ("nonattainment" areas), "stationary source" would be defined as each "installation" within a plant—that is, each smoke stack.⁵¹ Because a permit would be required for each stationary source, the finite definition of each "installation" would drastically increase the red tape and costs necessary to expand or build a plant. Furthermore, this definition would apply even to states whose implementation plans were otherwise approvable—*i.e.* the Carter EPA withheld approval of state programs unless they adopted the EPA's specific definition of statutory source.⁵²

Anne's EPA had a different approach.⁵³ In 1981, she approved a regulation that redefined "stationary source" under the 1977 Clean Air

47. *Id.* at 65.

48. *See id.*

49. *See id.*

50. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837, 840 (1984).

51. *See* Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,680 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, and 124) [hereinafter Requirements for IP, Volume 45].

52. *See id.*; *see also* BURFORD, *supra* note 1, at 66 (noting the Carter EPA had left office with two thousand state implementation plans unapproved, the "most recent of which was eighteen months old").

53. It should be conceded here that the proposal to change the definition of stationary source for nonattainment areas to one encompassing an entire plant was initiated just prior to Anne Gorsuch's tenure but during Reagan's presidency. *See generally* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulga-

Act Amendments to denote an entire “plant.”⁵⁴ This definition, known as the “bubble concept,”⁵⁵ allowed plants to expand, modify, or add new pollution-emitting devices without going through the trouble of seeking a new permit, regardless of whether or not they operated in a nonattainment area. In other words, Anne’s EPA chose to mitigate the invasion of the state into the economy, and they did so by exercising rulemaking power.

II. THE *CHEVRON* STORY: FROM JAMES I, THROUGH ANNE, BY SCALIA

Anne Gorsuch’s decision to change the definition of “stationary source” under the Clean Air Act met immediate opposition. The press hated it,⁵⁶ environmentalists abhorred it,⁵⁷ and before long the EPA was in court defending it.⁵⁸ Here, then, it became apparent that for the administrative deregulation of Reaganism to work, it needed help from the third branch of government. Cue *Chevron*.

But first, to fully appreciate the judicial mechanics that enabled administrative deregulation to operate, it is helpful to briefly consider *Chevron* within a broad historical context—as a curious but decisive step in a very long argument between proponents of state power and proponents of the rule of law.

Also, as a foundation, it is important to establish a few terms. First, “law,” at least in this discussion, implies a Lockean social contract among the people conferring governing authority to a body of representatives.⁵⁹ Second, “extralegal” power, as Philip Hamburger

tion of Implementation Plans, 46 Fed. Reg. 16,280 (Mar. 12, 1981) (to be codified at 40 C.F.R. pts. 51 and 52). Nevertheless, this is irrelevant because Anne Gorsuch enthusiastically approved the plan as Administrator. See BURFORD, *supra* note 1, at 67 (describing her astonishment that the Carter EPA had not adopted the “simple” bubble concept for the Clean Air Act).

54. See Requirements for IP, Volume 45, *supra* note 51 at 50,766.

55. *Chevron*, 467 U.S. at 855-57.

56. See, e.g., Eva Hoffman & Margot Slade, *Ideas & Trends; More Pollution ‘Bubbles’?*, N.Y. TIMES (Apr. 4 1982), <https://www.nytimes.com/1982/04/04/weekinreview/ideas-trends-more-pollution-bubbles.html> (describing the EPA as “undaunted” in the face of criticism from environmental groups and its bubble policy as “controversial”).

57. *Id.* (quoting “David Hawkins, a senior attorney for the Natural Resources Defense Council, [who] said the policy would lead to ‘delays in cleaning up the air’”).

58. See, e.g., Nat. Res. Def. Council v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), rev’d sub nom. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Connecticut Fund for the Env’t v. EPA*, 696 F.2d 179 (2d Cir. 1982).

59. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 23 (2014) (explaining that “Lockean reasoning about consent” shows that “legal obligation rests on consent and that binding laws have to be made by the society’s representative legislature”); see also FORREST McDONALD, *NOVUS ORDO SECLORUM* 65 (1985) (discussing Locke’s theory of consent).

has used the term recently, means binding power derived “outside of the law.”⁶⁰ Extralegal power is not conferred by a society, but assumed by a ruler “independent or apart from the law.”⁶¹ An illustration of extralegal power would be a basketball referee who decides to prohibit dribbling in the middle of a game. Because the players had consented to a set of rules ahead of the game which allowed dribbling, the referee’s amendment, without player approval, is independent of their consent, and therefore extralegal.

Third, to justify extralegal power, rulers throughout history have relied on “supralegal” authority.⁶² Supralegal authority is that which is “above the law,” meaning “not accountable” to the consent of the governed.⁶³ Thus, if an exertion of extralegal power is derived from supralegal authority, it cannot by definition have violated the law.⁶⁴ Accordingly, supralegal power stands in direct “contrast to ideas about the supremacy of the law.”⁶⁵ This supralegal power has often been based on the concept of “necessity.”⁶⁶ As applied to the basketball analogy, should the referee choose to assert that his “no dribbling” rule derived from, in his opinion, the *need* for more passing, he would be deferring to a type of supralegal authority.

Of course, it is easy to observe from this simple illustration that the need for more passing was decided by the referee alone, and thus extralegal power exercised by supralegal authority is really an overwrought way to define “absolute” power.⁶⁷ This is especially true when, as in the basketball-referee analogy, the rulemaking occurs in a “consolidated” body.⁶⁸ One referee makes a binding rule on all players based on his conception of the need for more passing. Because no person affected by the referee’s decision has contributed to the rule, his power is absolute.

Lastly, “state power,” as it will be discussed here, is not necessarily extralegal, supralegal, or absolute, but it contains both the potential and propensity to be those things if not sufficiently constrained by the rule of law. This is because “state power,” as it is used here, means the execution of laws. To return one last time to the bas-

60. HAMBURGER, *supra* note 59, at 21.

61. *Id.*

62. *See id.* at 24.

63. *Id.*

64. *See id.*

65. *Id.*

66. HAMBURGER, *supra* note 59, at 24.

67. *See id.* (“The traditional label for extra- or supralegal mode of governance was ‘absolute power.’”).

68. *See id.* at 25.

ketball analogy, every whistle blow of the referee is “state power.” Whether or not he chooses to limit himself to the predetermined rules, however, is uncertain.

A. *The Road to Chevron*

In Rome, the large common market that facilitated unprecedented human flourishing eventually crumbled under the weight of an expansive state bureaucracy.⁶⁹ Over the course of five centuries, “[t]he steady encroachment of the state into the intimate workings of the economy eroded growth[, resulting in] . . . increasing feudalization of the economy and a total breakdown of the division of labor.”⁷⁰ Ultimately, the collapse of the Western Empire can be attributed to an “economic deterioration resulting from excessive taxation, inflation, and over-regulation.”⁷¹

This bit of world history was not lost on the English Courts and Parliament during the reign of King James I in the early seventeenth century.⁷² By championing the rule of law, England had emerged from an arduous climb out of the Dark and Middle Ages when feudalism had dominated the European continent.⁷³ Therefore, when English monarchs like Henry VIII and James I began claiming “prerogative power,” a type of extralegal and suprallegal power nearly identical to Roman “imperial” power and, later, American “administrative” power, Parliament and the English Courts fought back in order to wrangle the king’s absolute rule.⁷⁴ In fact, “the English adopted ideas about an En-

69. See Bruce Bartlett, *How Excessive Government Killed Ancient Rome*, 14 CATO J. 287, 292-301 (1994) (reviewing five centuries of Roman regulations, taxation, and monetary policy that led to feudalism, diminished military capacity, and the ruinous Barbarian invasions).

70. *Id.* at 297.

71. *Id.* at 301.

72. HAMBURGER, *supra* note 59, at 51–52 (showing the popularity of Roman legal concepts among English leaders).

73. See *id.* at 26 (“Throughout the medieval . . . era[, European rulers pressed for absolute power. . . . The English . . . in the Middle Ages, repeatedly enacted statutes attempting to restore governance through and under the law”); see also ADAM SMITH, *THE WEALTH OF NATIONS* 425 (Edwin Cannan ed. 1994) (“The ancient policy of Europe was . . . [unfavorable] to the improvement and cultivation of land . . . first, by general prohibition of the exportation of corn without a special [license], which seems to have been a very universal regulation; and secondly, by the restraints which were laid upon the inland commerce”).

74. See HAMBURGER, *supra* note 59, at 26 (“Anglo-American law has a history of an extra- and suprallegal power in what was known as the ‘prerogative.’ This was the name of the power claimed by English kings, and it corresponds to the administrative power claimed by the president [of the United States of America] or under his authority.”); *Id.* at 51. (“At the same time that James I attempted to legislate through his proclamations, he and his

lish constitution precisely in order to make clear that there could be no binding or constraining government power outside or above the law.”⁷⁵

The adoption of a constitution as a means to preclude extralegal and suprallegal governance became the hallmark of America’s founding.⁷⁶ The Founders had grown up in an era marred by the effects of concessions Parliament had made to allow monarchs to rule differently in the colonies than in the motherland. In England, the monarch’s prerogative power had been significantly constrained, but in the colonies he was emboldened to rule arbitrarily and encroach natural rights of his constituents.⁷⁷ After the Revolution, “Americans aimed to establish governments in which a governor or president had ‘the whole executive power, after divesting it of those badges of domination called prerogatives.’”⁷⁸ Accordingly, they constructed the Constitution with “principles of constitutional administrative power,” including “law-making by elected representatives, unity and responsibility in the executive, the separation of powers, and judicial review of administrative action.”⁷⁹ These four pillars were essential to the Founders to preclude corresponding absolute powers of the state: lawmaking by the executive, dispersion of executive power and responsibility among multiple executives, consolidation of power in one branch of government, and judicial deference.

prerogative courts also asserted a power to interpret statutes in a manner that amounted to lawmaking. Drawing on imperial Roman ideas, they claimed a prerogative to fill the gaps in statutes and insisted that the law courts had to defer to such ‘interpretation.’ . . . [T]he Roman foundations of their lawmaking . . . suggests the imperial and absolute character of such interpretation and the sobering implications of its administrative rival.”)

75. *Id.* at 28.

76. *See id.* at 32 (“[T]he Constitution’s grant of legislative power to Congress developed not only to authorize and control the acts of the legislature, but also to bar any prerogative or other extralegal legislative acts.”).

77. *See* JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 9 (2017) (“American colonists grappled with administrative bodies constructed by the Crown to manage their internal affairs.”); *see also* HAMBURGER, *supra* note 59, at 26 (discussing the triumphs of the English over absolute power and noting that “[o]n the Continent . . . absolute power . . . was a continuing element of Continental governance.”). *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

78. HAMBURGER, *supra* note 59, at 28 (quoting John Adams). *See also* POSTELL, *supra* note 77, at 30 (“[M]any of the debates at the Convention and during the ratification of the Constitution . . . [focused on] how to reconcile administration with American constitutionalism.”); *see also id.* at 31 (“[F]ear of executive power made them hesitate [on establishing a single Executive].”); *see also id.* at 33 (“Madison[] . . . shows a clear and conclusive commitment to the principle of nondelegation: that the legislature may not transfer legislative or judicial power over to the executive.”).

79. POSTELL, *supra* note 77, at 9.

By the twentieth century, however, after a Civil War that reshaped the nation's sociological paradigm and an industrial revolution that reorganized the world's socioeconomic landscape, the Founders' core impetuses had faded from memory or relevance, and American thought leaders began reconsidering the nation's fundamental tripartite structure to address the problems of the times.⁸⁰ Although there was broad disagreement over what new model was appropriate or how it should be superimposed over the Constitution,⁸¹ the intellectual and political debates finally culminated in the New Deal.⁸² Accordingly, President Roosevelt pushed policies that sought to regulate by making "trusts and monopolies . . . subservient to the state through centralized commissions" ⁸³ In other words, the New Deal created modern agencies, with all their power and capacity to set standards in various industries.

However successful they were at resolving the problems they perceived as stemming from America's tripartite structure, these twentieth-century reformers left many questions unanswered, and "[t]he tension between the basic principles of American constitutionalism and the modern administrative state would lead to a series of constitutional crises that reformers would have to confront later."⁸⁴ By the 1960's and 1970's, liberals began noticing two primary problems with the administrative state: agency capture and the politicization of the agencies.⁸⁵ These two issues perverted core goals of the Progressives

80. *See id.* at 174 ("Many Progressives vehemently criticized the idea that the Constitution mandated a strong separation of powers. Modern government, they claimed, necessitated the combination of certain functions and a straightjacket understanding of the separation of powers would render government incapable of meeting modern needs.").

81. *See generally id.* at 199 (contrasting two major theories of early twentieth century progressivism: the "New Freedom" and the "New Nationalism.").

82. *See id.* at 215 ("Franklin Roosevelt's closest advisors . . . argued that the New Deal should be premised on a conception of 'government as a profoundly prescriptive entity. Experts would formulate policy, agencies would implement it, and the courts would stay out of the way.' These thinkers 'rejected any role for the courts in the policymaking process.'"); *id.* at 231 ("[Roscoe] Pound . . . argued that nothing short of regime change was occurring in the New Deal. . . . In turning to administrative absolutism, Pound concluded, the New Deal was taking America in the direction of Russia.") (citing Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343 (1938)).

83. POSTELL, *supra* note 77, at 199.

84. *Id.* at 206.

85. *See id.* at 251 ("[Capture occurs when] the agency develops expertise, often drawn from experience working in the same firms the agency is supposed to oversee, [and] '[t]he commission becomes accepted as an essential part of the industrial system,' working alongside the industry itself. It sees its task as helping to manage the industry, for the betterment of the regulated, rather than the public interest with which the agency interacts only minimally."); *see also id.* ("[Politicization occurs when] a chief executive . . . use[s] the

who had established the New Deal—independence and expertise⁸⁶—and led liberals to rethink the purposes of the administrative state. Now, liberals desired to use the administrative state to “serve fundamental values that lie beyond the facts and calculations of administrators.”⁸⁷ Accordingly, liberal politicians and judges implemented changes to standing and judicial review norms, thereby democratizing the administrative state by giving advocacy groups and courts a greater role in keeping agencies accountable.⁸⁸

B. How to Deal with a Behemoth: A Bigger Behemoth?

To conservatives, the aggrandizement of the judiciary and empowerment of advocacy groups presented two main problems. First, this meant their beloved industries would continue struggling against—in their view—meddlesome regulations. Second, the enlargement of the judicial branch presented its own separation-of-powers issues by shifting lawmaking power even further away from the citizens—that is, a democratically represented majority in Congress. In response, a new wave of conservative jurisprudential leaders sought to right these wrongs by, paradoxically, aligning themselves with their old New Deal foes and pushing for greater judicial deference to agency action.

Accordingly, the two-party system of “conservatives” and “liberals” in the 1980s abandoned the classic “binary” among them. As Erikson explains:

Embedded in the language of politics and also in historical scholarship is a division between liberals who use the state and conservatives who eschew government and instead prefer market-based policy solutions. [Administrative deregulation] shatters that binary, demonstrating that conservatives covet a certain kind of bureaucratic power. While they oppose government intervention in

administrative hierarchy to *frustrate*, rather than to achieve, the ends that the modern administrative state was authorized to attain.”)

86. See *e.g. id.* at 250 (“Progressives rooted their faith in administrative expertise in the view that regulatory policy questions had an objectively right answer.”).

87. *Id.* at 251; see also Erlandson, *supra* note 26, at 356–57 (discussing the shift in liberal thought toward administrative agencies from their Progressive predecessors).

88. See POSTELL, *supra* note 77, at 260 (“As courts began to be viewed more favorably by those on the left, in light of the growing distrust of agencies, liberals began to push for laxer standing thresholds, allowing more interest groups to influence the administrative process through courts sympathetic to their purposes. This development . . . was a shift away from the earlier Progressive approach that called for judicial deference to agencies”); see also *id.* at 265 (“As a result [of agency capture and the politicization of agencies], judicial review of agency legal interpretation and policymaking discretion became more searching, expanding judicial intervention further.”).

economic activity, they support the insulation and autonomy of government agencies to dismantle those interventions. The story of . . . *Chevron* shows that federal regulators, though often portrayed as inimical to conservative ideological objectives, have actually been instrumental in advancing [conservative] deregulatory policies. Beneath . . . antistatist rhetoric—“OSHA is a four-letter word,” “Government is not the solution to our problem; government *is* the problem”—lie the realities of the modern administrative state, which . . . belie the partisan tropes that saturate our discourse.⁸⁹

In particular, one conservative administrative law professor began pushing for judicial deference to agency interpretations as a means to dramatically change the manner in which conservatives govern: Antonin Scalia. Scalia’s decision to advocate for judicial deference stemmed from an epiphany of Attorney General William Saxbe, who had once heard during a conversation at a cocktail party that “[t]he *basic* difference between the [political] parties is quite simple: The Democrats want to run the country, and the Republicans don’t want them to.”⁹⁰ Scalia, who had previously worked for the Attorney General, termed this insight the “Saxbe Hypothesis,” describing it as:

[T]he proposition that the basic goal of the Republican party is not to govern, but to prevent the Democrats from doing so. It is applicable, of course, not merely to Republicans but more generally to all those who seek to reverse the trend of increasing government control over economic and social affairs. Distrustful of government in general and executive government in particular, they are not only less eager than their political opponents to grasp the levers of government power but are also inclined to view all impediments to the exercise of that power as a victory for their cause.⁹¹

To change this, Scalia believed Republicans needed to realize “the accursed ‘unelected officials’ downtown are now *their* unelected officials, presumably seeking to move things in *their* desired direction; and that every curtailment of desirable agency discretion obstructs (principally) departure from a Democrat-produced, pro-regulatory status quo.”⁹² In other words, conservative Congressmen needed to get in line with Reaganism and embrace administrative deregulation by eschewing legislation that would limit the power of agencies.

Most important to Scalia, however, was the discretion afforded by the judiciary to regulators. In 1981 and 1982, when Congress was

89. Erlandson, *supra* note 26, at 352–53 (emphasis added) (footnote omitted).

90. Antonin Scalia, *Regulatory Reform—The Game Has Changed*, 5 REGULATION 13, 13 (1981) [hereinafter “Scalia, *Regulatory Reform*”].

91. *Id.*

92. *Id.*

considering a statute that would curtail deference to agencies, Scalia railed against it, and stated “Why a conservative Republican Senate would want thus to increase the power of the overwhelmingly liberal life-tenured judiciary appointed [during the Carter administration] is beyond me. . . . [T]here is little in this bill which should have much appeal to the executive branch.”⁹³ Not surprisingly, within the same year of publishing these thoughts, he was tapped by Reagan to fill a vacancy on the administrative law-heavy D.C. Circuit.

As a judge, Scalia wasted no time to push for judicial deference to agency interpretations of law. In a case that predated *Chevron* by eighteen months, Scalia wrote:

The first step in our analysis is to determine whether the term “owner” was used by Congress in a sense that was meant to refer to a well-established legal definition or series of legal precedents, in which case we should not defer to the agency’s interpretation; or rather in a sense that was meant to be informed by the nature and purpose of the statutory scheme which the Commission is *charged* with elaborating.

. . .

Our task, then, is to determine whether the Commission’s interpretation of the word “owner” is so unreasonable as to go beyond the bounds of interpretive discretion which Congress evidently afforded.⁹⁴

In other words, if the statute is unambiguous as to the meaning of a word, no deference is given. But if it is ambiguous, the court assumes Congress has “charged” the agency to elaborate. This latter consequence is significant because it tacitly sanctions Congress to intentionally create ambiguity for an executive agency to fill—that is, Congress may delegate not only the authority to execute a statute, but also, in certain respects, help write it. To verify this type of delegation had occurred, Scalia then searched the *legislative history* for evidence of Congress’s implicit desire for the term to be defined by the Commission.⁹⁵ Thus, Scalia displayed a willingness to sacrifice his own interpretational dogma in order to provide judicial deference to admin-

93. Antonin Scalia, *Regulatory Review and Management*, 6 REGULATION 19, 21 (1982). See Scalia, *Regulatory Reform*, *supra* note 90, at 13 (arguing against the “Bumper” amendment that would mandate judicial deference to agencies).

94. *Am. Trucking Ass’n, Inc. v. ICC*, 697 F.2d 1146, 1148-49 (1983) (emphasis added).

95. See *id.* at 1148 (“The highly flexible nature of the term, and the subordination of rigid legalities to the overall purpose of the provision is amply demonstrated by the discussion in the House Report.”).

istrative interpretations of law.⁹⁶ Further, and more importantly, he clearly articulated his preeminent justification for doing so: congressional intent to delegate.

Scalia's deference to agencies on matters of law aligned exactly with proponents of the New Deal.⁹⁷ Scalia's justifications for deference, however, differed from theirs. President Franklin Roosevelt's closest advisors argued for deference based on a "conception of 'government . . . [where] experts . . . formulate policy, agencies . . . implement it, and courts . . . stay out of the way.'"⁹⁸ But Scalia discarded the expertise argument, calling it "a good practical reason for accepting the agency's views, but hardly a valid theoretical justification for doing so."⁹⁹ Unsurprisingly, Scalia was too moored to the "deep-rooted feeling that it is the judges who must say what the law is" to allow an agency's "relative competence" to override Justice Marshall's supreme constitutional command.¹⁰⁰

For Scalia, the reason to defer to agency determinations of law was built upon Congress's intent to leave the "resolution [of the legal question] to the agency."¹⁰¹ Discerning a "conferral of discretion upon the agency," however, had proven laborious for judges in the past,¹⁰² and therefore Scalia celebrated the monumental leap taken in *Chevron* to replace "statute by statute evaluation" with "an across the board presumption that, in the case of ambiguity, agency discretion is meant."¹⁰³ This "rational presumption" allows courts to avoid the "wild goose chase" for genuine legislative intent; "[i]n the vast majority of cases [Scalia] expect[ed] 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."¹⁰⁴ Accordingly, "any rule adopted

96. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34 (1997) ("[T]he more courts have relied upon legislative history, the less worthy of reliance it has become.").

97. See POSTELL, *supra* note 77, at 214 ("Progressives . . . sought to restrict the scope of judicial review across the board, including review of agency interpretations of law.").

98. *Id.* at 215.

99. Scalia, *Judicial Deference*, *supra* note 13, at 514.

100. *Id.*

101. *Id.* at 516.

102. See *id.* ("As I read the history of developments in this field, the *pre-Chevron* decisions sought to [discern Congress's intent to confer discretion] on a statute-by-statute basis. Hence the relevance of such frequently mentioned factors as the degree of the agency's expertise, the complexity of the question at issue, and the existence of rulemaking authority within the agency. All these factors make an intent to confer discretion upon the agency more likely.").

103. *Id.*

104. Scalia, *Judicial Deference*, *supra* note 13, at 516–17.

in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”¹⁰⁵

Making Congress’s job easier, then, was the ultimate goal.¹⁰⁶ And although helping Congress in this way comes with “certain consequences,” Scalia was more than ready to accept them.¹⁰⁷ Namely, because this justification abandons the concept of experts searching for the “one, permanent, ‘correct’ meaning of the statute” for a concept of legislative convenience, “the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose.”¹⁰⁸ In other words: the fitness of laws is no longer preeminent so long as the institution that created them makes Congress’s task more predictable. Furthermore, this necessarily means “there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind.”¹⁰⁹ Even if an agency’s rule is inconsistent with prior interpretations, the Court should acquiesce.

C. Chevron & the EPA

This latter consequence of judicial deference to agency interpretations of law would have been important to Anne Gorsuch and the EPA when they defended their “bubble concept” at the D.C. Circuit. Had Judge Scalia drawn the case, perhaps the issue would have been settled at the appellate level and *Chevron*, as it is now known, would not exist. Instead, one of the “judges recently appointed by Jimmy Carter” about whom Scalia had warned,¹¹⁰ Ruth Bader Ginsburg, presided over *National Resources Defense Council v. Gorsuch*.¹¹¹

105. *Id.* at 517.

106. *See id.* (“Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”).

107. *Id.*

108. *Id.*

109. Scalia, *Judicial Deference*, *supra* note 13, at 517.

110. Scalia, *Regulatory Reform*, *supra* note 90, at 13–14.

111. *Nat. Res. Def. Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev’d sub nom. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In spite of this comment, Justice Scalia and Justice Ginsburg went on to have a very close friendship during their tenure together on the highest court. *See, e.g.*, David G. Savage, *BFFs Ruth Bader Ginsburg and Antonin Scalia Agree to Disagree*, L.A. TIMES (June 22, 2015, 3:00 AM) <http://www.latimes.com/local/lanow/la-na-court-odd-couple-20150622-story.html>.

In a holding that paralleled much of the liberal jurisprudence over agency discretion of the 1960s and 1970s,¹¹² Judge Ginsburg shot down the EPA's extension of the "bubble concept" to nonattainment areas. Relying on precedents where the reviewing courts "focused on the purpose Congress envisioned for the particular program at issue," Ginsburg held that "EPA's regulatory change, its employment of the bubble concept to shrink to relatively small size mandatory new source review in nonattainment areas, is impermissible."¹¹³

In spite of the loss at the D.C. Circuit, the EPA remained undaunted. In its Reply Brief on certiorari to the Supreme Court, the government asserted (through Solicitor General Rex Lee) that the case was "one for the application of the *conventional rule of administrative law* that a court should defer to the agency's view of its own authority under a statute committed to it for enforcement."¹¹⁴ Until *Chevron*, however, even Scalia admitted that there had been nothing conventional about judicial deference to agency interpretations of law; rather, the Court had "two lines of . . . decisions on this subject which [were] analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand."¹¹⁵ On one hand, the Supreme Court had afforded "great deference" to agencies in applying statutes.¹¹⁶ On the other, the Supreme Court had sanctioned "free substitution of judicial for administrative judgment when the question involve[d] the meaning of a statutory term."¹¹⁷

In *Chevron*, then, the Court definitively chose the path of deference. Justice Stevens, writing for the Court, appeared to accept out-of-hand the government's claim that deference was conventional, stating matter-of-factly that, where statutory ambiguity exists, "the court does not simply impose its own construction on the statute . . ."¹¹⁸ Here, at the end of this exact line, without disrupting the seemingly innocent confidence of his tone, Stevens dropped a curious footnote: "*See gener-*

112. See POSTELL, *supra* note 77, at 279 ("[C]ourts [in the 1960's and 70's] . . . became more active in countering the unchecked administrative power that Progressives and New Dealers had constructed . . .").

113. *Gorsuch*, 685 F.2d at 720.

114. Reply Brief for the Administrator of the Environmental Protection Agency, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (Nos. 82-1005, 82-1247, and 82-1591), 1984 U.S. S. Ct. Briefs LEXIS 51, at *23 (emphasis added).

115. Scalia, *Judicial Deference*, *supra* note 13, at 513 (quoting Judge Henry Friendly in *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.* *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)).

116. *Id.*

117. *Id.*

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

ally R. Pound, *The Spirit of the Common Law 174–75* (1921).”¹¹⁹ At first glance, the reference appears to be an innocuous, routine example of what Stevens was *not* doing, meant only for clarification. The excerpt from Roscoe Pound’s book asserts, *inter alia*, that “the courts . . . must to some extent make the law under the guise of interpretation” when a statute is ambiguous.¹²⁰ But students of the New Deal era immediately understand why Stevens’ selection of Pound—not a myriad other sources or cases, such as the lower court’s opinion—as a counter example is significant: Pound posed perhaps the biggest intellectual threat to the New Deal conception of administrative law from the 1920s to the 1940s.¹²¹ It could be that for Stevens, who had grown up and attended law school in the aftermath of the New Deal era, the reference to Pound’s famous book carried tremendous symbolism. But maybe not. Regardless of whether he intended it, the effect of the footnote was that of a small victory flag concluding one of the nation’s great debates during Pound’s time which had persisted until Stevens’ gavel fell: deference to agency interpretations of law is now the rule.

D. Chevron’s *Shade*

By the time *Chevron* was decided, Anne Gorsuch’s tenure at the EPA had ended.¹²² Although her twenty-two month stint as Administrator was short, it was time enough to spark a reformation on administrative power. The newly announced *Chevron*, as a simple two-step formula, would become laden with nuance and added require-

119. *Id.* at 843, n.10.

120. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW 174* (1921).

121. See POSTELL, *supra* note 77, at 231 (dissecting Pound’s “infamous 1938 ABA Report” where he “denounced Roosevelt’s ‘administrative absolutism’” and claimed “[a] judicial regime was being supplanted by an administrative regime”).

122. See BURFORD, *supra* note 1, at 217–18 (describing Anne’s meeting with Joe Coors where he, acting as the Reagan’s proxy, negotiated her resignation). Anne Gorsuch resigned after Congress accused the EPA of mishandling money allocated for a Superfund to clean up toxic waste sites. Per Reagan’s direct order, Anne asserted executive privilege and refused to turn over certain Superfund documentation to Congress, and was then held in contempt. See *id.* at 101–110 for the background of the Superfund. See *id.* at 145–174 for Anne’s explanation that her fall was the unfortunate consequence of a special project pursued by presidential advisors who wished to strengthen executive privilege jurisprudence. Although Anne vehemently opposed using the EPA or the Superfund documents for this purpose, she was ordered to comply by Reagan.

ments,¹²³ but its impact on America's constitutional system of government and the American economy would become massive.¹²⁴

Since *Chevron* took the first definitive step toward deference to agency interpretations of law, derivative cases have followed in its wake which provide agencies even greater power within our "constitutional" system. Among these, one in particular is important for understanding the limits to Scalia's deference to agencies. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (Brand X), Justice Thomas wrote for the Court that, where *Chevron* deference is applicable due to ambiguity in a statute, an agency is not required to follow the Court's interpretation of the statute.¹²⁵ In other words, in situations in which the Court interprets an ambiguous statute *before* an agency has made an interpretive ruling on the same statute, the agency is not bound by the Court's interpretation.

Scalia thought this went too far. In his dissent, he wrote, "This is not only bizarre. It is probably unconstitutional. . . . Article III courts do not sit to render decision that can be reversed or ignored by Executive officers."¹²⁶ Scalia's opinion, however, could not command a majority. Having long championed *Chevron* as a vital component of the administrative state,¹²⁷ he was unable to prevent it from spawning doctrines that, by his lights, were "bizarre."

123. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding the Court must first inquire as to whether Congress had delegated interpretive authority to the agency before administering *Chevron* deference); *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (deferring to the agency's interpretation where it occurs in an amicus brief because "there is no reason to suspect . . . [it] does not reflect the agency's fair and considered judgment"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (holding that interpretations first made by the agency in the course of litigation to which it is a party are to not be afforded deference).

124. See, e.g., *The Nomination of Neil Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2017) (statement for the record of Karen R. Harned, Exec. Dir., NFIB Small Bus. Legal Ctr.) ("For small businesses . . . [*Chevron*] has been quite problematic."); Cass R. Sunstein, *Law & Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) ("*Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-, for the administrative state.").

125. 545 U.S. 967, 982 (2005) ("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. This principle follows from *Chevron* itself.").

126. *Id.* at 1017 (Scalia, J., dissenting).

127. See PART III, SECTION B, *supra*.

III. JUSTICE NEIL GORSUCH: CAREER & IDEOLOGY

Neil Gorsuch was sixteen years old when *Chevron* was announced.¹²⁸ Thirty-two years later, he was confirmed by the Senate to be an Associate Justice of the Supreme Court.¹²⁹ As mentioned before, some have compared Gorsuch's jurisprudence to Scalia's by noting that "*the* exception [between them] . . . is *Chevron*."¹³⁰ While there might be more hyperbole than truth in that statement, it serves to at least highlight a noticeable and significant difference between the two judges. Therefore, by diagramming Gorsuch's views on *Chevron*, especially those expressed during the 2016 presidential election cycle in which the vacancy he filled was a—if not *the*—central determining factor, one might gain some understanding of the current political will regarding the doctrine.

The first section will briefly discuss Gorsuch's background with an eye toward the ways in which his conservative ideology was shaped. The second section will delve into the first of two of Gorsuch's recent Circuit Court opinions dealing with *Chevron*, examining how his personal experiences with bureaucracies could inform his propensities as a judge in ways that differ from Scalia. The last section examines Gorsuch's most recent and controversial opinion discussing *Chevron* and closely compares his arguments against deference to agency interpretations of law to those previously put forth in favor of such deference by Justice Scalia.

A. *Son, Student, Federalist*

Neil Gorsuch was the eldest son of two lawyers.¹³¹ Family life in the Gorsuch household involved healthy portions of debate and policy discussions, and the children were trained early to see and make both sides of an argument.¹³² After knocking on doors to help his mother win a seat in the Colorado legislature, he and his siblings moved to D.C. with her when she got the call from President Reagan to run the

128. See *Neil Gorsuch Fast Facts*, CNN (Feb. 1, 2019 4:07 PM), <https://www.cnn.com/2017/02/03/us/neil-gorsuch-fast-facts/index.html>.

129. See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate As Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

130. See *Justice Gorsuch Hearing*, *supra* note 4.

131. See Kimberly Kindi et al., *Simply Stated, Gorsuch Is Steadfast and Surprising*, WASH. POST (Feb. 18, 2017), <https://www.washingtonpost.com/graphics/politics/gorsuch-profile/>.

132. See *id.*

EPA.¹³³ His parents had recently divorced, and because his two younger siblings returned to Colorado for school,¹³⁴ fourteen year-old Neil became his mother's nearest family member during her contentious tenure.¹³⁵ Described by his mother as possessing an "unerring sense of fairness" and being "smart as a whip," young Gorsuch was "very upset" when his mother was forced to resign from the EPA.¹³⁶ In her memoir, Anne recounts his reaction when she told him about her resignation over the phone:

"You should not have resigned," [Gorsuch] said [to his mother] firmly. "You didn't do anything wrong. You only did what the President ordered. Why are you quitting? You raised me not to be a quitter. Why are you a quitter?"

"Honey, relax. It isn't everything it appears to be. I can't explain it all to you now, but don't be upset. There are other things going on that I will tell you about when I see you. I'm just fine."¹³⁷

However Anne was able to explain the situation at a later time, Gorsuch's first up-close-and-personal experience with a federal bureaucracy certainly did not end well.

Being the son of the powerful D.C. figure had its perks, though, and Gorsuch was able to attend a prestigious D.C. prep school.¹³⁸ Early on, Gorsuch exhibited ambition and a knack for politics, and as a Junior at Georgetown Prep he sought election for student body President.¹³⁹ Gorsuch also earned the respect of his classmates for his intellect and debate skills, and, in spite of his mother's trouble at the EPA, "[h]e was known as an especially fierce champion of Reagan and the Republican agenda."¹⁴⁰

Once at Columbia for college, his conservatism became even more noticeable, perhaps by contrast. While running for a student Senate position, Gorsuch was asked, along with the other candidates, whether the Marines should be allowed to recruit on campus.¹⁴¹ His

133. *See id.*

134. *See* BURFORD, *supra* note 1, at 225 ("Stephanie and J.J. . . . were out in Denver finishing the school year.").

135. *See* Frank & Matthews, *supra* note 20 ("Neil Gorsuch had a front-row seat for his mother's term as a student at Georgetown Prep.").

136. BURFORD, *supra* note 1, at 225.

137. *Id.*

138. *See* Kindi et al., *supra* note 131 ("At Georgetown [Prep] . . . he swapped the polo shirt, khakis and cowboy boots he wore in Colorado for the school-mandated jacket, tie and dress shoes.").

139. *Id.*

140. *Id.*

141. *Id.*

competitors argued that the military's discrimination against gays was problematic, but Gorsuch reframed the issue by invoking the First Amendment: "[t]he question here is not whether 'the Marines should be allowed to recruit on campus' but whether a University and its community . . . has the right or obligation to determine who may speak on campus or what may be said."¹⁴² In spite of his keen eye for turning arguments, Gorsuch would go on to be disqualified from the election due to a technicality: he had broken school postering rules.¹⁴³ Following in his mother's footsteps, then, Gorsuch fell prey to a bureaucracy. Later, while writing for a conservative periodical called *The Federalist* he had started on campus with some classmates, Gorsuch alluded to his rift with the Columbia campaign rule makers: "Columbia College election rules are a swamp of bureaucratic pettiness, unequaled even by the federal government. They are confusing, often unduly severe, and clearly in need of reform. Some candidates in this election may have manipulated them for personal gain."¹⁴⁴

Here, in the aftermath of his mother's fallout at the EPA, in both the Marine Corps debate and the campaign poster debacle, Gorsuch's budding views towards bureaucratic power are noteworthy. These small but salient encounters with rulemaking bodies, before he attended Harvard Law School, earned his Doctor of Philosophy from Oxford, or became a Tenth Circuit judge,¹⁴⁵ show he had already developed a sharp sense of how constraints on power are to be applied and a personal distaste for pettiness and abuses of power in bureaucratic bodies.

B. *The Judge & His Opinions*

As a judge on the Tenth Circuit, Gorsuch was willing to debate the scope, wisdom, and constitutionality of *Chevron* deference to agency interpretations of law. In two very recent opinions, Gorsuch ardently challenged the *Brand X* strain of *Chevron* deference, working to limit some of the most extreme consequences of the doctrine in the

142. *Id.*

143. Amy Wang, *What Neil Gorsuch's Old College Newspaper Columns Say about Him*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/01/what-neil-gorsuchs-old-college-newspaper-columns-say-about-trumps-supreme-court-nominee/?utm_term=.3de2bcaa82e0.

144. *Id.*

145. *Neil Gorsuch Fast Facts*, CNN (Feb. 1, 2019 4:07 PM), <https://www.cnn.com/2017/02/03/us/neil-gorsuch-fast-facts/index.html>.

Tenth Circuit.¹⁴⁶ While doing so, Gorsuch went even further, questioning *Chevron* generally and raising significant counterarguments to Scalia's core justifications for the doctrine.

In *De Niz Robles v. Lynch*, Gorsuch addressed whether an agency's statutory interpretation may be applied retroactively to deprive an illegal alien the opportunity to apply for lawful residency.¹⁴⁷ Previously, the Tenth Circuit had conceded that, under *Brand X*, they must allow the Board of Immigration Appeals (BIA) to overrule the court's prior decision regarding an important policy decision.¹⁴⁸ Congress had enacted two conflicting statutes affecting persons who enter the country illegally: one saying the Attorney General *may* grant them lawful residency,¹⁴⁹ and another mandating their automatic removal.¹⁵⁰ In *Padilla-Caldera v. Gonzalez (Padilla-Caldera I)*, the Tenth Circuit resolved the impasse, stating that the statute providing the Attorney General power to grant lawful residency should govern.¹⁵¹ Four years later, however, in *In re Briones*, the BIA reversed the Tenth Circuit's opinion by declaring the statute mandating automatic removal should control.¹⁵² Not long thereafter, the Tenth Circuit gave the BIA's choice a *Brand X* stamp of approval in *Padilla-Caldera v. Holder (Padilla-Caldera II)*.¹⁵³

But that was hardly the end of it. During the interim between *Padilla-Caldera I* and *Briones*, Mr. De Niz Robles—an illegal alien—relied on the Tenth Circuit's decision and applied for lawful residency.¹⁵⁴ But because the BIA was somehow unable to address his application for four years, they decided their ruling in *Briones* should apply—not the Tenth Circuit's holding in *Padilla-Caldera I*.¹⁵⁵ In other words, Mr. De Niz Robles was precluded from applying for lawful residency because the BIA changed the law and applied it to him retroactively, as if their interpretation had been in place at the time of his application.

146. See *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

147. *De Niz Robles*, 803 F.3d at 1167.

148. *Id.*

149. 8 U.S.C. § 1255(i)(2)(A) (2011).

150. 8 U.S.C. § 1182(a)(9)(C)(i)(I) (2013).

151. *Padilla-Caldera v. Gonzales (Padilla-Caldera I)*, 426 F.3d 1294, 1300–01 (10th Cir. 2005), *amended and superseded on reh'g* 453 F.3d 1237, 1244 (10th Cir. 2006).

152. *Briones*, 24 I. & N. Dec. 355, 371 (2007).

153. *Padilla-Caldera v. Holder (Padilla-Caldera II)*, 637 F.3d 1140, 1153 (10th Cir. 2011).

154. *De Niz Robles*, 803 F.3d at 1168.

155. *Id.*

Gorsuch was incensed. While grudgingly acknowledging that *Chevron* and *Brand X* meant “there are indeed some occasions when a federal bureaucracy can effectively overrule a judicial decision,” he questioned whether the BIA may lawfully “impose *new* legal consequences on Mr. De Niz Robles’s *past* conduct.”¹⁵⁶ Concluding it could not, Gorsuch first drew a fundamental distinction between legislative power which is presumptively *prospective* and judicial power which may be *retroactive*, relying on longstanding principles of law,¹⁵⁷ the inherent meaning of “legislative Powers” in the Constitution,¹⁵⁸ and due process (fair notice) and equal protection concerns.¹⁵⁹

Applying this binary of prospective and retroactive power to an Executive agency with delegated rulemaking power, such as the BIA, Gorsuch first pondered whether “*Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct,” and then, whether “the combination of *Chevron* and *Brand X* further muddles the muddle by intruding on the judicial function too.”¹⁶⁰ Leaving these questions looming, Gorsuch resigned that, “as but a court of appeals *Chevron* and *Brand X* bind us and the question is what to do in light of them.”¹⁶¹ Feeling constrained by the higher court,¹⁶² then, Gorsuch relied not on “the separation of powers . . . [to] forbid this form of decision-making outright,” but rather, “second-order constitutional protections sounding in due process and equal protection, as embodied in our longstanding traditions and precedents addressing retroactivity in the law.”¹⁶³ Accordingly, he concluded that

[t]he presumption of prospectivity attaches to Congress’s own work unless it plainly indicates an intention to act retroactively. That same presumption, we think, should attach when Congress’s delegates seek to exercise delegated legislative policymaking authority:

156. *Id.* at 1167–68.

157. *See id.* at 1169. (“[T]he presumption that legislation operates only prospectively is nearly as old as the common law.” (citing 3 HENRY DE BRACON, DE LEGIBUS ET CONSUE-TUDINIBUS ANGLIAE 530–31 (Travers Twiss ed. & trans., 1880) (1257))).

158. *Id.*

159. *See De Niz Robles*, 803 F.3d at 1170–71 (“[T]he Constitution has sought to mitigate the due process and equal protection concerns associated with retroactive decision making in other ways, by rules circumscribing the nature of the judicial function and the judicial actor.”).

160. *Id.* at 1171.

161. *Id.*

162. Note that Gorsuch’s phrasing implies that it is his court’s relative power, not the fact of *Chevron*’s precedent or established doctrine, that constrains him.

163. *Des Niz Robles*, 803 F.3d at 1171–72.

their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application.¹⁶⁴

In other words, the court should presume Congress intended to give only what it actually possessed. At first glance, this appears to align with Scalia's primary argument for *Chevron* deference: presumed congressional intent.¹⁶⁵ As well, here, presuming Congress has delegated only prospective rulemaking power provides Congress with tremendous certainty when writing laws and allows the court to cobble together the semblance of a coherent legal principle. However, noticeably different from Scalia's justification is the way in which the presumption functions: Gorsuch uses Congress's presumed intent to limit, rather than sanction, agency power. This distinction is significant because of the nature of a judicial presumption: an assumption requiring no further proof. As applied to an executive agency, requiring no further proof to *allow* an exertion of power is fundamentally different than requiring no further proof to *prohibit* that same exertion of power. In the former, there is a basic trust that the power will be used appropriately or restrained in other ways (like the political process), but in the latter there is a core distrust that the power will be used appropriately or properly restrained.

C. In The Mold

This core distrust seems to animate Gorsuch's views towards bureaucratic power that is both extralegal and suprallegal in nature. His most significant challenge to *Chevron* came in 2016, when he authored an opinion and a separate concurrence in a case with a fact pattern nearly identical to *De Niz Robles*.¹⁶⁶ In *Gutierrez-Brizuela v. Lynch*, an illegal alien applied for lawful residence in reliance on the *Padilla-Caldera I* holding where the Tenth Circuit chose between two conflicting laws to afford the Attorney General discretion to approve applications for lawful residence.¹⁶⁷ Unlike the plaintiff in *De Niz Robles*, however, Mr. Gutierrez-Brizuela applied for lawful residence *after* the BIA's ruling in *Briones*, which had excluded applications for lawful residence by illegal aliens by choosing the other of the conflicting statutes the court had weighed in *Padilla-Caldera I*.¹⁶⁸ Nevertheless, Mr. Gutierrez-Brizuela applied *before* the Tenth Circuit's opinion in *Pa-*

164. *Id.* at 1172.

165. *See* PART III, SECTION B, *supra*.

166. *Gutierrez-Brizuela*, 834 F.3d at 1144–45.

167. *Id.*

168. *Id.*

dilla–Caldera II, which had approved of the BIA’s decision in *Briones* under *Chevron* and *Brand X* deference.¹⁶⁹

The question for Gorsuch this time, then, was whether the BIA’s *Briones* ruling governed *before* it had been approved by the court in *Padilla–Caldera II*. Gorsuch found it most certainly did not.¹⁷⁰ Relying on the same principle he expounded in *De Niz Robles*—that Congress’s presumed intent is to limit agencies to the same powers of prospective legislation to which they are usually limited—Gorsuch drew the BIA’s attention to an obviously ignored footnote in the *De Niz Robles* opinion, reiterating that, “[u]ntil this court handed down *Padilla–Caldera II* . . . *Padilla–Caldera I* remained on the books as binding precedent in the Tenth Circuit on which litigants were free (and expected) to rely, and *Briones* bore no legal force.”¹⁷¹ In other words, once the court has ruled on a statutory ambiguity, its precedent governs—not the Agency’s contrary policy—until the Agency’s contrary policy is given *Brand X* deference by the court. If this were not so, he reasoned, “[i]t would . . . require the people to substitute reliance on judicial declarations of what the law is with finely grained legal judgments about the degree of ambiguity in the relevant statutory provisions and the reasonableness of agency pronouncements about them.”¹⁷² That is to say, allowing agency interpretations to govern before courts apply *Brand X* and *Chevron* would make the law an uncertain thing, depriving citizens of due process (fair notice). Thus, Gorsuch held that the court, and not the Agency, remained the gatekeeper of binding precedent.¹⁷³

But Gorsuch did not end there. Compelled by some instinct to carry his momentum into a separate concurrence, Gorsuch started the next section with a small bang:

There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a

169. *Id.*

170. *See id.* at 1145 (“The BIA suggests this factual distinction makes all the legal difference. But we fail to see how.”).

171. *Gutierrez-Brizuela*, 834 F.3d at 1145; *See also De Niz Robles*, 803 F.3d at 1174 n.7 (“An agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval. So, for example, the BIA depended on *Padilla–Caldera II* to render *Briones* effective.”).

172. *Gutierrez-Brizuela*, 834 F.3d at 1147.

173. *See id.* (“[P]eople are entitled to rely on *judicial precedents* as definitive interpretations of what the law is so long as those precedents remain on the books.” (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 28 (1994))) (emphasis added).

little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.¹⁷⁴

Immediately, Gorsuch's willingness to challenge *Chevron* should be appreciated for its significance to him personally. Here, in Gorsuch's theoretical "room"—where one could likely hear a pin drop—behind the "behemoth" Gorsuch is ready to face, stood both his mother and predecessor, that is, his real and ideological family. But even their presence behind *Chevron* is merely representative of larger, longer-running arguments about the way in which power is to be divided in order for people to be governed.¹⁷⁵

The enormity of the moment was not lost on Gorsuch. He did not begin his argument with a discussion of the *Chevron* case itself, but by reaching further back into history:

In enlightenment theory and hard won experience under a tyrannical king the founders found proof of the wisdom of a government of separated powers. In the avowedly political legislature, the framers endowed the people's representatives with the authority to prescribe new rules of general applicability prospectively. In the executive, they placed the task of ensuring the legislature's rules are faithfully executed in the hands of a single person also responsive to the people. And in the judiciary, they charged individuals insulated from political pressures with the job of interpreting the law and applying it retroactively to resolve past disputes. This allocation of different sorts of power to different sorts of decision-makers was no accident. To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed. To faithfully execute the laws often demands the sort of vigor hard to find in management-by-committee. And to resolve cases and controversies over past events calls for neutral decision-makers who will apply the law as it is, not as they wish it to be. Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties A government of diffused powers, they knew, is a government less capable of invading the liberties of the people.¹⁷⁶

The irony from the outset, then, is how Gorsuch based his argument against *Chevron* in the very history his mother and Scalia, as ardent conservatives and Originalists, would relish. Compare, for instance, Scalia's opening to his dissent in *Morrison v. Olson*, written around the

174. *Id.* at 1149 (Gorsuch, J., concurring).

175. See discussion *supra* Part III.A.

176. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) (citing THE FEDERALIST No. 47 (James Madison) ("No political truth . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers)).

same time he gave his speech at Duke Law advocating the merits of *Chevron* deference:

It is the proud boast of our democracy that we have “a government of laws and not of men.” Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780

. . . .

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of *The Federalist*, Madison wrote that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.” Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.¹⁷⁷

With such consensus on these core principles, one wonders why and how Gorsuch and Scalia could differ so dramatically on the issue of deference to agency interpretations of law.

D. *The Exception*

From *Gutierrez-Brizuela*, two main areas of disagreement between Gorsuch and Scalia emerge regarding deference under *Chevron*. First, and perhaps most powerfully, Gorsuch challenges Scalia’s logic regarding the purpose of *Chevron*: congressional intent to delegate interpretive authority to agencies. Second, Gorsuch rejects Scalia’s arguments regarding the effects of *Chevron*, both because of the way in which it sanctions a delegation of legislative power to agencies and the lack of institutional restraints in agency exercises of power.

Regarding the putative purpose of *Chevron* as a means to facilitate congressional intent, Gorsuch finds Congress’s contrary intent on the subject to be clearly outlined in the Administrative Procedural Act, stating that “Congress vested the courts with the power to ‘interpret . . . statutory provisions’ and overturn agency action inconsistent with those interpretations.”¹⁷⁸ Scalia, on the other hand, believed Congress had gotten it wrong in the APA, and accordingly discarded the clear mandate for *de novo* review of agency interpretations of law without

177. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 47 (James Madison)).

178. *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (citing 5 U.S.C. § 706 (2011)).

further justification or a burdened conscience.¹⁷⁹ Even if Scalia was right about the prudence of Congress's decision, however, Gorsuch submits that "legislative assignments like [the APA] are [themselves] often constitutionally compelled."¹⁸⁰ From the outset, then, Gorsuch's textualism seems even more unyielding than that of the person credited for popularizing the interpretational method.¹⁸¹

Turning then to Scalia's principal argument, that courts should presume congressional intent as a means for a stable background rule for Congress to legislate, Gorsuch counters by observing that:

Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites . . . due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail. . . . *Perhaps allowing agencies rather than courts to declare the law's meaning bears some advantages, but it also bears its costs.* And the founders were wary of those costs, knowing that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.¹⁸²

In other words, any *stabilizing* benefit interpretational deference affords Congress is obtained at the expense of a *destabilizing* effect upon the people. Taken seriously, Gorsuch's logic echoes a more fundamental (and timeless) question: is the government for the people, or are the people for the government?

179. See *Judicial Deference*, *supra* note 14, at 514 ("[T]he [APA] itself seems to have been based upon the quite mistaken assumption that questions of law would always be decided de novo by the courts.").

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

181. See Honorable Neil M. Gorsuch, *2016 Summer Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016) (arguing "there can be little doubt about the success of [Scalia's textualism] project").

182. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (emphasis added) (citing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 287-91 (2014)).

Next, stepping back to address a threshold matter, Gorsuch argues that focus on the Congress-agency dynamic is misplaced: “[f]or whatever the agency may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law.”¹⁸³ This, Gorsuch believes, is a “problem for the people whose liberties may now be impaired not by an independent decision-maker . . . promised to them by law . . . but by an avowedly politicized administrative agent . . . pursu[ing] whatever policy whim may rule the day.”¹⁸⁴ In other words, however valid the merits of Scalia’s presumed delegation of interpretational power analysis, the courts should not abdicate their role as judges.¹⁸⁵ Gorsuch concedes that “some role remains for judges even under *Chevron*,” but wonders “where in [the two-step process] does a court interpret the law and say what it is? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person?”¹⁸⁶ Unable to find suitable answers, he concludes that “[w]here *Chevron* applies that job seems to have gone extinct.”¹⁸⁷

Not thinking the “elephant” sufficiently addressed,¹⁸⁸ Gorsuch collapses his previous arguments regarding the APA and judicial abdication of duty while squarely facing the prudence of Scalia’s concession that presumed congressional intent is “fiction[al]”¹⁸⁹:

Chevron’s inference about hidden congressional intentions seems belied by the intentions Congress has made textually manifest. . . . [H]ow can anyone fairly say that Congress “intended” for courts to abdicate their statutory duty under § 706 and instead “intended” to delegate away its legislative power to executive agencies? The fact is, *Chevron*’s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that.¹⁹⁰

Without saying it directly, Gorsuch seems to imply that Scalia’s principal justification for *Chevron* is, in essence, nonsensical.

Showing himself unrelenting, Gorsuch goes on to address the effects of *Chevron* deference. First, he argues that such interpretational deference could itself be a violation of the nondelegation

183. *Id.* 1152–53.

184. *Id.* at 1153 (Gorsuch, J., concurring).

185. *Id.* at 1152 (“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”).

186. *Id.*

187. *Gutierrez-Brizuela*, 834 F.3d at 1152.

188. *Id.* at 1149.

189. *Id.* at 1153.

190. *Id.* at 1152, 1153 (Gorsuch, J., concurring).

doctrine.¹⁹¹ He points out that, in spite of the sometimes “murky” line between executive and legislative functions, the only traditionally valid delegations of Congress’s powers to the executive were for “factual findings” and “to resolve ‘details’ (like, say, the design of an appropriate tax stamp).”¹⁹² And because “*Chevron* pretty clearly involves neither of these kinds of executive functions [it,] . . . as a historical matter, appears instead to qualify as a violation of the separation of powers.”¹⁹³ Admitting, however, that “in relatively recent times the Court has relaxed its approach to claims of unlawful legislative delegation” through the intelligible principle doctrine, Gorsuch nevertheless contends that “it’s no small question whether *Chevron* can clear it.”¹⁹⁴

In analyzing *Chevron*’s validity under the intelligent principle doctrine, Gorsuch borrows from—unsurprisingly at this point—Scalia’s elucidation of the doctrine in *Whitman v. American Trucking Ass’n*.¹⁹⁵ Addressing Scalia’s “substantial guidance” requirement for “setting . . . standards that affect the entire national economy,” Gorsuch questions whether there is “substantial guidance” when “an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next,” such as the Court did in the *Chevron* opinion itself by deferring to the agency after it had reversed course on its interpretation of the Clean Air Act.¹⁹⁶ Further, he questions whether an agency has been given a “clearly delineated boundary” when it “can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next,” pointing out “that is exactly what [Justice Scalia’s] *City of Arlington*’s application of *Chevron* says it can [do]”¹⁹⁷

Finally, Gorsuch questions the notion that executive agencies are sufficiently subject to the President to be institutionally restrained in their exercise of power, noting that agencies “often receive little effective oversight from the chief executive to whom they nominally

191. *Id.* at 1153–54.

192. *Gutierrez-Brizuela*, 834 F.3d at 1154.

193. *Id.*

194. *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989)).

195. *Id.* (citing *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001)).

196. *Id.* 1154 (noting “that is exactly what *Chevron* permits, see [*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 857–59 (1984)]”).

197. *Gutierrez-Brizuela*, 834 F.3d at 1154 (citing *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 300 (“[T]he scope of agencies’ regulatory jurisdiction . . . [is a] question[] to which the *Chevron* framework applies.”)); cf. *Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (“[W]here the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct.”) (Scalia, J., dissenting)).

report.”¹⁹⁸ This argument directly touches something upon which Scalia conditioned delegation when he stated that “[i]f Congress is to delegate broadly . . . continuing political accountability [should] be assured[] through direct political pressures upon the Executive . . .”¹⁹⁹ What is important to notice here is that Gorsuch does not necessarily disagree with Scalia’s theoretical argument—that political pressure on a unitary executive is best for reigning in governmental agencies—but rather, Gorsuch demonstrates a realism in acknowledging how the administrative state, in practice, evades presidential control.²⁰⁰

In summary, Gorsuch challenges Scalia’s justifications for the *Chevron* doctrine by first attacking the purpose of interpretational deference, noting that Congress’s intent on the subject has been clearly delineated in the APA, deference to agencies creates uncertainty for the people, and the Founders’ intent regarding the judiciary’s role in interpretations of law is sufficiently prescribed in the Constitution’s design.²⁰¹ Gorsuch then notes additional negative effects of *Chevron* on the law by observing that it may fail the nondelegation doctrine and it is irrational to think agencies are politically constrained under presidential control.²⁰²

After reaching the end of his concurrence in *Gutierrez-Brizuela*, Gorsuch appeared to recognize the cogency of his arguments, and wondered aloud what would happen “[i]f this goliath of modern administrative law were to fall?”²⁰³ The only difference,” he opined, “would be that courts would then fulfill their duty to exercise their independent judgment about what the law is,” which would “avoid the due process and equal protection problems” and “promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.”²⁰⁴ In other words, with a memory of the world before *Chevron*, “very little would change—except perhaps the most important things.”²⁰⁵

198. *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

199. Scalia, *Judicial Deference*, *supra* note 13, at 518.

200. *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

201. *Id.* at 1146-48.

202. *Id.* at 1152-55 (Gorsuch, J., concurring).

203. *Id.* at 1158.

204. *Id.* (emphasis omitted).

205. *Gutierrez-Brizuela*, 834 F.3d at 1158.

CONCLUSION

Three months before Gorsuch authored *Gutierrez-Brizuela*, then-presidential candidate Donald Trump released eleven potential names to fill Scalia's vacancy on the Supreme Court—and Gorsuch did not make the list.²⁰⁶ But in September, exactly one month after the *Gutierrez-Brizuela* concurrence, Trump updated the list to include Gorsuch.²⁰⁷ These facts alone are insufficient to establish a causal connection between the *Gutierrez-Brizuela* concurrence and Gorsuch's ultimate appointment, but they are nonetheless intriguing—especially in light of Gorsuch's family history and Trump's promise to select a justice “in the mold” of Antonin Scalia.²⁰⁸ Regardless, *Chevron* is gaining negative attention recently, especially from the right side of the aisle.²⁰⁹ But why?

Arriving at a definitive causation for the growing disfavor of an esoteric doctrine as encompassing and controversial as *Chevron* is perhaps too large a question for one Comment, but Gorsuch's concurrence

206. Ginger Gibson & Lawrence Hurley, *Trump Identifies 11 Potential Supreme Court Nominees*, REUTERS (May 28, 2016, 2:23 PM), <https://www.reuters.com/article/us-usa-election-trump-court/trump-identifies-11-potential-supreme-court-nominees-idUSKCN0Y92K5>.

207. Christian Farias, *Donald Trump Expands His Supreme Court Wish List, Because Nothing Matters*, HUFFPOST (Sept. 23, 2016, 9:54 AM), https://www.huffingtonpost.com/entry/trump-second-supreme-court-wishlist_us_57e52004e4b08d73b830ad81.

208. Jonathan Adler, *How Scalia-esque Will Donald Trump's Supreme Court Nominee Be?*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be/?utm_term=.9f58cc8bf69d. As well, the relevance of Gorsuch's position on *Chevron* to his appointment was further heightened after the appointment of Justice Kavanaugh, who similarly expressed disdain for the doctrine prior to his nomination. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (“[The *Chevron*] doctrine is “indeterminate — and thus can be antithetical to the neutral, impartial rule of law — because of the initial clarity versus ambiguity decision.”); see also Ed Whalen, *Judge Kavanaugh's Record Against the Administrative State*, NATIONAL REVIEW (July 4, 2018), <https://www.nationalreview.com/bench-memos/judge-kavanaughs-record-against-the-administrative-state/?fbclid=IwAR3MNcovch2wwjQm5hZK4V6A6friR4iESeKi7ublfUZ5U18mHd0MDEGQRaA> (“Judge Kavanaugh is a strong critic of the *Chevron* principle of deference to administrative agencies—both of the foundation of that principle and of the manner in which it is often exercised.”).

209. See, e.g., Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202 (as passed by House on Jan. 11, 2017) (modifying the “scope of judicial review of agency actions to authorize courts reviewing agency actions to decide de novo (without giving deference to the agency's interpretation) all relevant questions of law”); see also Jack Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overturned*, 42 CONN. L. REV. 779, 784 (2010) (“Chevron encourages irresponsible agency and judicial behavior. Agencies expecting that their interpretive decisions will be reviewed under a deferential version of Chevron are free to disregard congressional intent and impose their own policy views.”).

in *Gutierrez-Brizuela* seems to suggest a helpful launching point. Recall that he writes:

Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail.²¹⁰

Here, Gorsuch is not speaking in ideological terms. Rather, he is extrapolating the individual experience of a person before his court to the broader public. Mr. Gutierrez-Brizuela, like Mr. De Niz Robles before him, fell prey to a bureaucratic entity whose power to enforce law was coupled with the delegated power to define law. Without the Tenth Circuit as a referee to draw a sharp distinction between prospective and retroactive rulemaking, both immigrants would have been out of luck even though they had made a reasonable attempt to comply with the law as it was written at the time they acted.

As extrapolated, then, Gorsuch's critique of *Chevron* suggests that experiences of uncertainty and disappointment at the hands of federal bureaucracies could be common. Perhaps he assumes too much in suggesting this without empirical support. But, then again, his focus on the mechanics of *Chevron*—that is, the inherent unfairness of its procedure—counsels that, here, the need for empiricism is minimal. Law should be a predictable thing. *Chevron* makes it not so. Accordingly, even if judicial review of agency interpretations is rare, one due process violation such as Mr. Gutierrez-Brizuela's is too many. Furthermore, with *Chevron*'s dominance over the last three decades, there is no telling the number of challenges to agency interpretations of law that would have been brought had a deference regime not been so entrenched.

It is not difficult to imagine how such *felt uncertainty*, if scattered across various socio-economic groups in the United States, might lead voters to grow uneasy about the concentration of power in federal agencies. Even if knowledge of *Chevron* deference remains a thing for

210. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (2016) (Gorsuch, J., concurring) (emphasis omitted.).

lawyers and academics, voters burned by or concerned over the unpredictability of agency regulation might tend to side with candidates that promise deregulation.²¹¹

But how did Reagan Revolutionaries like Anne Gorsuch and Justice Scalia not see deference the same way Justice Gorsuch sees it? For Anne and the Colorado Mafia, at least, the perceived pressing political needs of the moment seem to have made considerations such as the long-term socio-legal effects of deference to agency interpretations of law an oversight.²¹² For Scalia, whose jurisprudence seemed laser focused on shifting unconstitutional discretion away from the bench, any consideration of *Chevron's* negative effects seems to have been eclipsed by the opportunity it presented to remove from judges the temptation to legislate—especially because he considered such judicial legislation detrimental to the economy.²¹³

With over three decades having passed since *Chevron*, the pro-market impetus behind administrative deregulation that receives judicial deference is also showing signs of irony. Most notably, small businesses appear to be suffering from the effects of cronyism and immovable regulations.²¹⁴ Mechanically, this makes sense: *Chevron* provides tremendous incentive to corporate lobbyists to work alongside agencies to pry ambiguity out of every statute and suggest interpretations that benefit them while causing market barrier-entries to competition that are immune to judicial challenge.²¹⁵ Large corpora-

211. This is especially intriguing in light of the Latin-American community's surprising support for President Donald Trump during the 2016 election, which bewildered many due to accusations he did not hold Latin-Americans' interests. See, e.g., Geraldo L. Cadava, *Rural Hispanic Voters—Like White Rural Voters—Shifted Toward Trump. Here's Why.*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/rural-hispanic-voters-like-white-rural-voters-shifted-toward-trump-heres-why/?utm_term=.470832000ec5 (attributing the surprising support to “[o]ne answer: poverty”); see also Alan Gomez, *Another Election Surprise: Many Hispanics Backed Trump*, USA TODAY (Nov. 9, 2016, 6:15 PM), <https://www.usatoday.com/story/news/politics/elections/2016/2016/11/09/hispanic-vote-election-2016-donald-trump-hillary-clinton/93540772/> (noting that Trump earned 29% of the Hispanic vote while presidential-candidate Mitt Romney earned only 27% during the 2012 election). This is not to suggest *Chevron* and *Brand X* fully explain such voting, but rather that the impact of due process issues identified by Gorsuch and illustrated in cases such as *Gutierrez-Brizuela* might be one underlying factor for groups particularly affected by deference to agencies.

212. See, e.g., Shabecoff, *supra* note 39; BURFORD, *supra* note 1, at 54.

213. Scalia, *Regulatory Reform*, *supra* note 90, at 13.

214. See *The Nomination of Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement for the record of Karen R. Harned, Exec. Dir., NFIB Small Bus. Legal Ctr.) (“For small businesses . . . [*Chevron*] has been quite problematic.”).

215. See Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corpor>

tions are happy to spend *some* money to ensure regulatory compliance so long as potential competitors are dissuaded from entering their market.²¹⁶ Kill the weeds. Bask in glorious light. Indeed, since 1987 (the year after Scalia joined the court), young firms (less than five years old) as a percentage of total firms have declined by 13%.²¹⁷ In other words, since *Chevron* became a thing, data suggests it is more difficult to succeed as a new business.

Of course, the link between the decline in young firms and *Chevron* might be merely coincidental, not causal. To strengthen it, further research would be necessary, such as an inquiry into the types of regulations lobbied for since *Chevron* and the percentage of times courts defer to agencies when regulations that have an anti-competitive effect are challenged. Furthermore, not everyone owns a small business, therefore the political disfavor into which *Chevron* has clearly fallen indicates the presence of additional factors above and beyond any correlation between *Chevron* and the difficulties faced by young firms.

Another curious change is *Chevron*'s recent notoriety in Congress,²¹⁸ especially in light of Scalia's preeminent justification for the doctrine being that it gave Congress a stable background upon which to legislate. If *Chevron* has caused or is perceived to have caused *felt uncertainty* or damage to small business, perhaps this trend among conservative lawmakers is merely political. But it could also be institutional. It is easy to imagine the envy or frustration Congress might feel as they compare their lawmaking power to that of agency administrators. As long as the administrators play the game right (*i.e.* find and exploit a statutory ambiguity in a reasonable manner), they func-

ate-lobbyists-conquered-american-democracy/390822/ (arguing that, beginning in the 1980s, "rather than trying to keep government out of its business (as they did for a long time), companies . . . increasingly bring[] government in as a partner, looking to see what the country can do for them.").

216. See John Shepherd Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 725 (1986) ("Government at virtually every level offers enormously lucrative potential benefits (such as . . . entry-barrier protection against competition) to competing producers.").

217. John Haltiwanger et al., *Business Dynamics Statistics Briefing: Where Have All the Young Firms Gone?* 3-4 (2012), https://www.census.gov/ces/pdf/BDS_StatBrief6_Young_Firms.pdf; see also Jordan Weissman, *The 30-Year Decline of American Entrepreneurship*, THE ATLANTIC (Sept. 25, 2012), <https://www.theatlantic.com/business/archive/2012/09/the-30-year-decline-of-american-entrepreneurship/262831/> (discussing the import of the decline in entrepreneurship since the 1980s).

218. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 11-12 (2017) (discussing the Senate and House versions of the Regulatory Accountability Act, which would curtail deference to agencies and effectively eliminate *Chevron* deference).

tion with minimal accountability and relative ease.²¹⁹ Of course, Congress may always pass new statutes to alter or nullify regulation, but that requires countless hours of oversight and efforts to build consensus, a process exceedingly more difficult (especially in the current polarized political climate) than informal rulemaking and adjudication.²²⁰ Furthermore, time has shown that agencies are often able to accomplish the policy goals of a minority political party when Congress fails to do so.²²¹ With *Chevron*, any exploitation of statutory ambiguity used to achieve policy aims where Congress specifically did not sanction a policy would be an undemocratic backup plan for the minority that failed to enact a bill and a nuisance for the majority that voted against it. Moreover, it is possible that such actions undercut voters' confidence in the efficacy of Congress as an institution. Interestingly, since 1986, Americans' confidence in Congress has dropped steadily and dramatically from 41% to 7% in 2014.²²²

The recent trend in Congress is especially noteworthy when considering that, if Congress pulls the plug on *Chevron* deference, the unmitigated power to interpret statutes *de novo* does not shift back to them but to the Court. When the Reaganites assumed power, this ar-

219. Although it is traditionally argued that agencies are politically accountable as extensions of the Executive, this theory ignores historic difficulty of presidents to control agency actions, and furthermore fails to see the question as a matter of relative incentive: even if the President had perfect control, the Constitution does not contemplate persons with rulemaking power held accountable vicariously by a vote upon a single individual every four years. See POSTELL, *supra* note 77, at 247–48 (“FDR’s limited success in establishing presidential control over the administrative state . . . ensured that his successors would be continually frustrated in their attempts to establish their priorities over the bureaucracy.”); *id.* at 248 (“[C]ongress is . . . equipped to override presidential influence when it wants to insulate an agency from presidential oversight, particularly after the *Humphrey’s Executor* decision.”); *id.* at 250 (“Eventually Nixon abandoned regular meetings with his domestic cabinet secretaries, as he found that they increasingly opposed him and brought their own programmatic priorities to him for support.”).

220. From 1984 to 2015, the average number of Final Rules from agencies published per year was about 4241; during the same period the average number of enacted laws from Congress per year was only about 240 (99th through 114th Congresses). See Maeve P. Carey, *Cong. Research Serv.*, R43056, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 5–6 (2016); *Statistics and Historical Comparison*, GOVTRACK (Jan. 14, 2018), <https://www.govtrack.us/congress/bills/statistics>.

221. See, e.g., POSTELL, *supra* note 77, at 296 (“[A]lthough Congress failed to pass the Lieberman/Warner Climate Security Act of 2007, which would have given the EPA power to regulate greenhouse gases, this very objective was realized simply by interpreting the Clean Air Act to have already given the agency that authority.”).

222. *Confidence in Institutions*, GALLUP, <http://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited May, 5 2019), (showing the percentage of Americans who have “Great Deal/Quite a lot” of confidence in Congress). The preceding thirteen years during which data was collected indicate the previous low was 29%, with confidence levels generally around 40%. *Id.*

rangement was antithetical to their policy aims. But rather than travelling the hard road of pursuing deregulatory statutes, players such as Anne Gorsuch and Scalia found an easier path in administrative deregulation.

If agencies lose the authority to say what the law is and the task returns fully to the courts, it is conceivable that lawmakers will not like the policy decisions of courts, whose incentives are starkly different than the political branches, and over whom Congress has less control. Accordingly, Congress may at last be forced to rethink the quantum of decision-making power allocated to agencies which ends up trickling into the judiciary. In other words, if *Chevron* falls, Congress may be incited to jealousy against the Court, and, recognizing that its own positive enactments are the genesis of power ultimately seized by its robed sibling, it may work to curtail that power by cutting it off at the source.

In this way, Scalia's zeal for judicial minimalism as applied to administrative law might have prevented the tripartite system from fully functioning. Had Scalia gone the other way, fighting to suppress deference under *Chevron* and pushing for judicial oversight, it is at least theoretically possible Reagan would have been forced to work with Congress (not the federal bureaucracy) to accomplish his policy aims. Without doubt this would have been more difficult than using administrative deregulation, and his success would have made "Crazies" out of Congressmen—that is, it may have drawn severe political ire toward the Republican party.

Whether the reason for *Chevron*'s decline in popularity in conservative circles is due to feelings of instability among citizens and residents, negative impacts on small businesses, institutional competition between Congress and the Executive, or a myriad of other reasons,²²³ one thing is certain: the regulation-savvy Obama presidency squeezed both political parties to settle their particular allegiance regarding the doctrine.²²⁴ Perhaps more than anything else, this explains the strength of the current shift—especially on the Court, where at least Justices Roberts and Thomas have expressed strong dis-

223. See POSTELL, *supra* note 77, at 298 (suggesting the recent "reversion to Progressive-era institutional patterns, in which progressives defend the executive and conservatives defend judicial review of administrative decision making, is [either] a temporary response to a unique political configuration or a more permanent rethinking of the constitutionality of the administrative state").

224. See *id.* at 297 ("It was inevitable . . . that the inauguration of a more Progressive president would test the allegiance of both sides to these institutional allegiances.").

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like of the doctrine and a willingness to move past it.²²⁵ Nevertheless, with a conservative majority in both the White House and Senate, only time will tell whether the anti-*Chevron* rhetoric will amount to its demise or lead to its full revival as a means for conservatives to continue practicing administrative deregulation. And like before, a Gorsuch is at the center—but this time holding a gavel.

225. *See id.* (describing the recent shift on the Roberts Court); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (raising “serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes” under *Chevron*).
