The Kavanaugh Court and the *Schechter*-to-*Chevron* Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable

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ABSTRACT

Beginning in 1935, accelerating in the 1940s, and peaking in recent decades, federal policy has been increasingly decided by electorally unaccountable administrators. Rather than elected representatives, unelected bureaucrats increasingly make the vast majority of the nation's laws – a trend produced the Supreme Court's decisions in three areas: delegation; deference; and independence.

This trend is about to be reversed. In the coming years, Congress will delegate less, agencies will receive less deference from courts, and agencies will enjoy less independence from the President – all because the Supreme Court will add new life to Schechter*'s non-delegation doctrine, severely limit* Chevron*, and roll back* Humphrey's Executor. *With each decision, the Court will shift decisionmaking away from policymakers who are politically unaccountable, and toward those more directly controlled by the citizenry, as it moves the administrative state away from the* Chevron *extreme of what I call the* Schechter-*to*-Chevron *spectrum.*

This article argues that the Court's most junior member, Justice Brett Kavanaugh, will lead this impending movement along the Schechter-*to*-Chevron *spectrum; that Kavanaugh's conservative colleagues will follow him; and that the principle of democratic accountability will animate each movement of this jurisprudential revolution.*

Although Justice Kavanaugh's nomination process focused on hot-button topics like abortion, presidential investigations, and accusations of sexual assault, the most long-lasting impact of his confirmation lies in this area of separation of powers. His membership on the Court may not change what the federal government can do, but it will profoundly change who can do it. In this sense, we are likely to see the most rapid change in how the federal government makes national policy since the founding generation replaced the Articles of Confederation with the United States Constitution.

What follows is an exploration of how, and why, this change is coming soon.

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I. INTRODUCTION

To illustrate how much policy is made by the administrative state, Senator Mike Lee keeps two towers in his office. The first tower is a stack of all the federal regulations promulgated by administrative agencies in 2013. With 80,000 pages, it's eleven feet high. The second is a stack of all the federal legislation enacted by Congress that same year. With just 800 pages, it is only several inches tall.[1]

This ten-to-one disparity is the product of delegation, deference, and independence. Congress delegates major policymaking to agencies. Courts defer to those agencies' interpretations of enabling statutes. And Presidents are statutorily prohibited from firing administrators of independent agencies.

This combination of delegation, deference, and independence shields policymaking from democratic accountability. In a year like 2013, for every one page of law passed by democratically accountable legislators, one hundred pages of law are promulgated by unelected regulators, who do not answer to voters, and who often do not even answer to the elected President.

Three Supreme Court decisions enabled this state of affairs. First, even though Article I's Vesting Clause grants Congress – and only Congress – the

[1] MIKE LEE, OUR LOST CONSTITUTION: THE WILLFUL SUBVERSION OF AMERICA'S FOUNDING DOCUMENT 7 (2016).

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power to legislate,[2] the Court has eviscerated the non-delegation doctrine of *Schechter Poultry*,[3] and so for decades Congress has been free to delegate its legislative powers to administrative agencies. Second, even though Article III's Vesting Clause requires federal courts to interpret federal law,[4] the Court's decision in *Chevron* led to an abandonment of that judicial responsibility,[5] and so for decades Courts have allowed agencies to regulate, even when the statute's best reading precludes the agency's regulation. And third, even though Article II's Vesting Clause give the President all of "[t]he executive Power,"[6] the Court in *Humphrey's Executor* allowed Congress to strip the President of the power to remove renegade regulators,[7] and so for decades regulators have operated with independence from the President, and by extension independence from the people.

This article argues that Justice Brett Kavanaugh will lead the four other Republican-appointed Justices away from these three decisions.[8] The result will return lawmaking to elected lawmakers. On a spectrum from *Schechter* to *Chevron* – from little delegation, deference, and independence on one extreme, to massive delegation, deference, and independence on the other extreme – the new Supreme Court will move away from *Chevron* and toward *Schechter*.

Part II of this article explains how we got to the pre-Kavanaugh status quo, and why its absence of democratic accountability is in tension with the Constitution's text, structure, and history. Parts III, IV, and V share a similar structure. Each begins with the theoretical case against delegation, deference and independence – the case for *Schechter*, against *Chevron*, and against *Humphrey's Executor*. Each then proceeds to analysis of the odds that the new Court will reinvigorate *Schechter*, overrule *Chevron*, and overrule *Humphrey's Executor*. And then each concludes with an exploration of what the path to less delegation, less deference, and less independence will look like. In each instance, the Court is likely to begin with small steps, chip away at existing precedents, and create a jurisprudence in which the exceptions swallow the pre-Kavanaugh rule.

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[2] U.S. Const. art. I, § 1.
[3] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[4] U.S. Const. art. III, § 1; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
[5] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[6] U.S. Const. art. II, § 1.
[7] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
[8] As explained in Parts IV and V, Justice Kavanaugh is particularly likely to lead the Court away from deference and agency independence. As explained in Part III, he has not written as much about delegation; however, the five Republican-appointed justices, including Justice Kavanaugh, are likely to reinvigorate the non-delegation doctrine.

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Part VI ties the previous sections together, explaining how the principle of democratic accountability informs the jurisprudential earthquake that is coming to this area of separation of powers doctrine. The result will be a federal government capable of making the same policy as today, but one in which the policy must be made by elected officials. The result will be a federal government that is still vast and still powerful, but one that is no longer unaccountable to the people.

II. DELEGATION + DEFERENCE + INDEPENDENCE = THE ABSENCE OF DEMOCRATIC ACCOUNTABILITY

The first clause of the first section of the first article of the Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[9] For a nation that rebelled behind the mantra of "no taxation without representation,"[10] this vesting clause made sense. The laws we live under, taxes included, must be passed by those we elect.[11] And for the first century or so of our history, all branches of the federal government respected this principle. "Congress controlled administrative action by legislating precisely and clearly; agencies, far from exercising any worrisome discretion, functioned as mere 'transmission belts' to carry out legislative directives."[12]

That eventually changed with the creation of the administrative state, but not at first. In its infancy, the administrative state was tightly controlled by Congress, which protected its legislative prerogatives and did not make broad delegations of rulemaking power to administrative agencies.[13] For example, in 1887, Congress provided that railroad rates "shall be reasonable and just," and it created the Interstate Commerce Commission to "execute and enforce" this standard.[14] When the Commission interpreted the statutory text to imply an authority for the Commission to set rates, the Supreme Court disagreed, holding that "[t]he power given is the power to execute and

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[9] U.S. Const. art. I, § 1.
[10] Texas v. Johnson, 491 U.S. 397, 435 (1989) (Rehnquist, J., dissenting).
[11] The requirement for the House's approval ensured that no law would pass without the approval of the people's direct representatives. Of course, at the founding, Senators were elected through state legislatures. Nevertheless, every six years, they were accountable to those legislatures, which were in turn accountable to the people. Thus, even before their direct election under the 17th Amendment, they campaigned for office. *See, e.g.*, Lincoln-Douglas Debates.
[12] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001).
[13] *See id.* at 2255 ("The first generation of the nation's regulatory statutes - including preeminently the Interstate Commerce Act - largely followed this [transmission belt] model (especially as these statutes were construed by the courts), containing detailed and limited grants of authority to administrative bodies").
[14] *See* Interstate Commerce Act, 24 Stat. 379 (1887), repealed by Act of Oct. 17, 1978, Pub. L. No. 95-473, 4(b), 92 Stat. 1337, 1466-67; *see also* Kagan, *supra* note 12, at 2253.

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enforce, not to legislate."[15] It noted that fixing rates "is a power of supreme delicacy and importance" because of "the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried."[16] And in the language of what would later be called the "major rules doctrine," the Court reasoned that "if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."[17]

In the early 1900s, Congress began to prefer "open-ended grants of power" to agencies, "leaving to the relevant agency's discretion major questions of public policy."[18] The Supreme Court sought to limit such delegations in 1935, when it invalidated a provision of the National Industrial Recovery Act that empowered the President to promulgate "codes of fair competition" that a presidential board found "in furtherance of the public interest."[19] The Court held that Congress had not "itself established the standards of legal obligation, thus performing its essential legislative function," but rather "by the failure to enact such standards, ha[d] attempted to transfer that function to others."[20]

Schechter stands for the proposition, grounded in Article I's Vesting Clause, that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable."[21] But beginning in the 1940s, the Court retreated from this principle. In 1943, the Court upheld a statute empowering the FCC to issues regulations on radio and television broadcasters that the agency deemed in the "public interest."[22] The next year, in 1944, it upheld statutes authorizing the Price Administrator to set "fair and equitable" maximum prices[23] and allowing the Federal Power Commission to set "just and reasonable" utility rates.[24] By the end of the decade, when deciding whether Congress could allow an agency to decide when "profits" were "excessive," the Supreme Court had surrendered any appearance of policing the limits of delegation.[25] So long as Congress sets a "general policy" direction, the

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[15] Interstate Commerce Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 501 (1897).
[16] *Id.* at 505.
[17] *Id.*
[18] Kagan, *supra* note 12, at 2255.
[19] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 523 (1935); *see also* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
[20] *Schechter*, 295 U.S. at 530.
[21] *Id.* at 537-38.
[22] NBC v. United States, 319 U.S. 190, 225-26 (1943).
[23] Yakus v. United States, 321 U.S. 414, 427 (1944).
[24] FPC v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944).
[25] Lichter v. United States, 334 U.S. 742, 783 (1948).

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Supreme Court was willing to uphold the delegation on the theory that Congress had provided the agency with an "intelligible principle" for regulating.[26]

Under this extremely lenient test, since 1935, "the Supreme Court has upheld every delegation to a regulatory agency, even in cases where congressional guidance has been virtually nonexistent or at best nebulous."[27] Its jurisprudence reflects a belief that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[28] It has thus "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing of applying the law."[29]

When the Court retreated from *Schechter*, it was not a foregone conclusion that agencies would be left entirely to their own devices. That's because a decade before *Schechter*, in *Myers v. United States*, the Supreme Court had held that "the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."[30] The decision was based on Article II's Vesting Clause, which vests the President with all "executive power," including the power to command and control subordinates in the executive branch. Thus, even if Congress delegated rulemaking to unelected agency administrators, the administrators were still accountable to the President, who is in turn accountable to the people. The new system was not as democratic as lawmaking by representatives, but it was at least more

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[26] Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); *see also* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) (reaffirming "intelligible principle" test and applying it broadly). Although the "intelligible principle" phrase was first used in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) – "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power" – the statute in *J.W. Hampton* did not provide the agency with the kind of boundless flexibility that future, post-*Schechter* cases would validate.

[27] John Malcolm, *Criminal Law and the Administrative State: The Problem With Criminal Regulations*, HERITAGE FOUND. (Aug. 6, 2014), https://www.heritage.org/crime-and-justice/report/criminal-law-and-the-administrative-state-the-problem-criminal-regulations; *see e.g.*, Sackett v. EPA, 566 U.S. 120, 132 (2012) (Alito, J., concurring) (discussing EPA's authority to define "navigable waters" and noting, "[t]he reach of the Clean Water Act is notoriously unclear."); Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008) (discussing OSHA's authority to issue workplace regulations the agency deems "reasonably necessary or appropriate").

[28] Mistretta v. United States, 488 U.S. 361, 372 (1989); *see also id.* ("Accordingly, this Court has deemed it 'constitutionally sufficient' if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

[29] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475-76 (2001).

[30] Myers v. United States, 272 U.S. 52, 106 (1926).

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democratic by lawmaking by bureaucrats unaccountable to any elected officeholder.

That changed in 1935, when the Court held that Congress can prohibit the President from firing a Federal Trade Commissioner over a policy disagreement.[31] It thereby blessed "independent agencies," whose administrators are removable by the president not "at will," but only "for cause." The result today is as many as 75 independent agencies, offices, boards, and bureaus[32] that are unaccountable to the president and vested by Congress with quasi-legislative powers through broad statutory delegations that give "substantial, unfettered discretion to agency officials."[33] They include the Consumer Financial Protection Bureau; Commodities Futures Trading Commission; Equal Employment Opportunity Commission; Federal Communications Commission; Federal Election Commission; Federal Energy Regulatory Commission; Federal Reserve Board; Federal Housing Finance Agency; Federal Trade Commission; International Trade Commission; National Labor Relations Board; Nuclear Regulatory Commission; and the Securities and Exchange Commission.[34]

Congress's fondness for this delegation is, at best, the product of its (arguably over-) confidence in agencies' subject-matter expertise. But at worst, it's the reflection of an inability or unwillingness to regulate with the kind of precision that would cost members of Congress their re-elections.[35] It's easy for elected officials to vote for bills with names like "Clean Air" and "Clean Water" that delegate to agencies the difficult questions of who will pay to clean the air and water. It would be much harder – and perhaps politically impossible – for elected officials to decide those questions themselves through legislation. Of course, laws that lack popular support are what the text of the Vesting Clause appears designed to preclude.[36]

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[31] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
[32] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 549-591 (2010) (Breyer, J., dissenting).
[33] Kagan, *supra* note 12, at 2253.
[34] *Free Enter. Fund*, 561 U.S. at 549-591 (Breyer, J., dissenting); *but see* Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013).
[35] Kagan, *supra* note 12, at 2255-56 ("Sometimes Congress legislated in this way because it recognized limits to its own knowledge or capacity to respond to changing circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and sometimes because it wished to pass on to another body politically difficult decisions.").
[36] *See* Kagan, *supra* note 12, at 2256 n. 21 ("Lawrence C. Dodd & Richard L. Schott, Congress and the Administrative State 2 (1979) ("Although born of congressional intent, [the administrative state] has taken on a life of its own and has matured to a point where its muscle and brawn can be turned against its creator."); James Q. Wilson, The Politics of Regulation, in The Politics of Regulation 357, 391 (James Q. Wilson ed., 1980) ("Whoever first wished to see regulation carried on by quasi-independent agencies and commissions has had his boldest dreams come true. The organizations studied for this book operate with substantial autonomy, at least with respect to congressional …

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Another illustration of the current state of affairs is the ratio of the number of pages of legally binding regulations promulgated in one year by administrative agencies versus the number of pages of legislation passed by Congress – a ratio that is approximately 100:1.[37] In other words, for every page of law passed by the people we elect, there are 100 pages of laws promulgated by people we didn't elect. A stack of the former would rise only a few inches; a stack of the latter would be eleven feet tall.[38] And that's just one year's worth.

The scope of federal regulations is so vast that no one even knows how many exist. Estimates of criminally enforceable regulations range from 10,000 to more than 300,000.[39] That's as much as 67 times the number of statutory federal crimes.[40] Add to this number civilly enforceable regulations and the total number of federal regulations exceeds one million.[41]

These regulations create significant costs and benefits. Benefits include safer workplaces, more transparent securities markets, and a cleaner environment, to name just a few. The annual costs, in dollar terms, exceed $2 trillion.[42] Whether and when the benefits outweigh the costs must be

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direction."). Administrative law scholars, to the limited extent they have addressed this question, generally have echoed the findings of these political scientists. See, e.g., JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 160 (4th ed. 1998) (noting "doubt whether existing connections between Congress and administrative bodies are effective means for accomplishing any of several plausible objectives, including assuring fidelity to congressional intent, preserving the political responsiveness of administration, or dispassionately assessing the strengths and weaknesses of regulatory programs"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1696 n. 128 (1975) (questioning whether "Congress can responsibly accomplish through other means what it cannot achieve through legislation").").

[37] *See* LEE, *supra* note 1, at 7 (2016). In other years, the ratio is smaller, but still significant: "In 2016, federal agencies promulgated almost 100,000 pages of federal rules in the Federal Register, about 17 times as many pages as the roughly 6,000 pages of statutory law enacted during the 114th Congress. Today, the Code of Federal Regulations (C.F.R.) includes one million regulatory mandates or prohibitions, and imposes over one trillion dollars in costs." Brief for Inst. For Justice as Amicus Curiae Supporting Reversal at 3, Gundy v. United States, No. 17-6086 (U.S. June 1, 2018).

[38] *Id.*

[39] Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL STREET J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920; *see also* United States v. Baldwin, 745 F.3d 1027, 1031 (10th Cir. 2014).

[40] John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), http:// www heritage.org/research/reports/2008/06/revisitingthe-explosive-growth-of-federal-crimes (4,450 statutory crimes).

[41] Patrick McLaughlin & Oliver Sherhouse, *Regulatory Accumulation since 1970*, MERCATUS CTR, AT GEORGE MASON UNIV., https://quantgov.org/charts/regulatory-accumulation-since-1970/ (last visited Dec. 18, 2018).

[42] Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State,* 2017 COMPETITIVE ENTERPRISE INSTITUTE, 2-3.

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decided by *someone*; the only question is whether the decider will be Congress or administrative agencies. But in considering this question, it's worth noting how tangible the allocation of those $2 trillion in costs can be. They can obstruct entry to the market by "impos[ing] large start-up costs on businesses," can cause "investment to move overseas where the investment is subject to less onerous regulations," and can chill hiring and economic growth: "Firms must allocate resources, including new hires, in order to comply with regulations. The resources utilized to comply with regulations will not be utilized for other productive activities."[43]

Typical of the current state of affairs was the FCC's 2015 net neutrality rule, promulgated by the FCC. Although there were strong policy arguments for and against the rule, what cannot be doubted is that it would have "transform[ed] the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule [would have] affected every Internet service provider, every Internet content provider, and every Internet consumer."[44] And yet, even though the rule was vast, Congress never spoke directly for or against it; instead, the FCC, an independent agency unaccountable to the president (or to anyone), relied on a 1934 statute for the authority to promulgate a rule of vast "economic and political significance."[45]

Eight decades ago, when the Supreme Court began to abandon *Schechter*'s non-delegation doctrine and first upheld agency independence, it may not have anticipated that agency rulemaking would so dwarf congressional lawmaking. But rather than cut back on it by interpreting statutes to authorize agency action only when the authorization is clear, or at least only when the action is authorized by the best reading of the statute, the Supreme Court chose to allow agencies to act even when it lacks authorization under the best reading of the statute, so long as the statute is sufficiently ambiguous and the agency's interpretation of the ambiguity is sufficiently reasonable.[46] In 1984, *Chevron v. NRDC* held that when statutory ambiguity leaves "a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling

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[43] Richard Williams, *The Impact of Regulation on Investment and the U.S. Economy*, MERCATUS CTR. AT GEORGE MASON UNIV., https://www mercatus.org/system/files/House%20Oversight%20Response%20on%20Regulations%20and%20Economy%5B2%5D.pdf (last visited Dec. 13, 2018).

[44] United States Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[45] *Id.* After the D.C. Circuit upheld the FCC's rule, the FCC repealed the rule after the makeup of the commission changed in 2017.

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

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weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[47] Under *Chevron*, even when the legislative delegation to the agency is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[48] Thirteen years later, in *Auer v. Robbins*, the Court extended *Chevron* from agency interpretations of statutes, to agency interpretations of the agency's own regulations.[49]

This brings us to the *Schechter-to-Chevron* spectrum:

> 1. On one end of the spectrum is *Schechter*, which held Congress cannot delegate its legislative powers to an agency. At this end of the spectrum, democratic accountability is at its peak, because laws are passed by elected officials, most of whom face re-election every two years.[50]
>
> 2. Moving along the spectrum gradually, the next point on it would be a regime under which Congress can delegate to agencies, but only when the authorizing statute has a clear statement empowering the particular agency regulation.[51]
>
> 3. Then, still moving away from *Schechter*, the spectrum's next point would be a regime under which Congress can delegate to agencies if the best reading of the authorizing statute empowers the agency regulation, even if the statute does not include a clear statement authorizing it.
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> 4. Finally, at the far end of the spectrum is *Chevron*, which allows the agency to promulgate almost any regulation unless Congress has clearly prohibited it.

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[47] *Id.* at 844.
[48] *Id.*
[49] Auer v. Robbins, 519 U.S. 452 (1997) (reaffirming a pre-*Chevron* principle first articulated in *Bowles v. Seminole Rock*, 324 U.S. 410 (1945), and applying it to a post-*Chevron* era).
[50] Loving v. United States, 517 U.S. 748, 757-58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberate lawmaking.").
[51] Interstate Commerce Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 494-95 (1897) ("The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication.").

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Add to this *Humphrey's Executor*'s insulation of some agencies from presidential control, and the result is near-boundless rulemaking authority for regulators elected by no one and often accountable to no one.

In short, after the abandonment of *Schechter*'s non-delegation principle, and under *Humphrey's Executor*, *Chevron*, and *Auer*, Congress can pass an ambiguous statute whose best reading does not authorize Regulation X, promulgated by an agency that is independent of any elected official; the agency can then interpret the statute to authorize Regulation A, so long as the regulation is not unreasonable; and if Regulation X is itself ambiguous, the agency can punish a individual who the agency deems to have misinterpreted it, even if the individual's interpretation was the best interpretation of Regulation X. The United States is now at the extreme *Chevron* end of the *Schechter-to-Chevron* spectrum. However, with our new Supreme Court, we are unlikely to remain there for long.

III. DELEGATION

Since the 1940s, the Supreme Court has allowed Congress to delegate rulemaking to administrative agencies so long as Congress provides an "intelligible principle" to guide the agencies. An intelligible principle can be as vague as guidance that the agency regulate in the "public interest,"[52] or in a "fair and equitable" manner,[53] or in a way that's "just and reasonable."[54] But in recent years, a small, growing band of academics has made the case for a more stringent non-delegation test.

A. The Case for Schechter

The case begins with first principles. As Hamilton wrote in *Federalist 75*, "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."[55] And as Madison, quoting Montesquieu, wrote in *Federalist 47*, "There can be no liberty where the legislative and executive powers are united in the same person."[56] The Constitution's tripartite structure reflects this principle, with the legislative power reserved for the legislature, the executive for the executive, and the judiciary for the judiciary.[57] "The Vesting Clauses, and

[52] NBC v. United States, 319 U.S. 190, 225-26 (1943).
[53] Yakus v. United States, 321 U.S. 414, 427 (1944).
[54] FPC v. Hope Nat. Gas Co., 320 U.S. 591, 600 (1944).
[55] THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[56] THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed., 1961).
[57] *Cf.* Whitman v. Am. Trucking Assn's, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers.") (citing Loving v. United States,

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indeed the entire structure of the Constitution, make no sense" without a limit on legislative delegations.

Professor Philip Hamburger has proposed that that limit should reflect the line between"between rules that b[i]nd subjects and those that d[o] not," which he calls "the natural dividing line between legislative and nonlegislative power."[58] To be sure, "few statutes can resolve every possible issue that can arise in every possible application."[59] But as Professor Gary Lawson writes, when "'application' shades into legislation," administrative agencies "exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directing their own text into the Statutes at Large."[60]

Beyond formalism, an important source of criticism of the amount of delegation persisting under the current nondelegation doctrine centers on the impact delegation has on the political process. Professor Neomi Rao, President Trump's nominee to replace Justice Kavanaugh on the D.C. Circuit, has explained that there are process-problems with the current state of delegation.

First, as Professor Rao explains, "delegation reduces the cost of legislating" by eliminating the constitutionally prescribed "hurdles to the exercise of legislative power, requiring bicameralism and presentment for the passage of laws."[61] Justice Kavanaugh, in a different context, has noted that "the Framers first made it very difficult to enact laws" on purpose: "Legislation that attained broad support was less likely to be oppressive—to unfairly benefit one faction at the expense of another."[62] However, Professor

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517 U.S. 748, 771 (1996)); Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825 (Marshall, C.J.) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative.").

[58] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 84 (2014).

[59] Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339 (2002).

[60] *Id.* at 339-40.

[61] Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1477 (2015).

[62] Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1909, 1910 (2014); *see also id.* at 1913 ("So what is the unifying theme between the pardon and prosecutorial discretion powers on the one hand and the habeas corpus right on the other? The former grants unilateral power to the President. The latter forbids unilateral power by the President. What is the connective tissue? The answer is liberty. The constitutional structure is tilted toward liberty. The President can act unilaterally to protect liberty and free or protect some- one from imprisonment; but with limited exceptions, the President cannot act, except pursuant to statute, to infringe liberty and imprison a citizen.").

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Rao notes that "delegations allow legislators to avoid specificity and therefore to reduce the cost of enacting legislation" that the Constitution established.[63]

An additional process problem with excessive delegation is that it "may allow members of Congress to avoid responsibility for difficult choices. . . . Open-ended statutes provide a general solution to a pressing problem, but leave the details to an administrative agency. Therefore, members can take credit for responding, but then shift the blame to the agency for imposing regulatory costs."[64] As Senator Mike Lee has argued, when "Congress "delegates to executive-branch bureaucrats the power to make legally binding rules or 'regulations,' which will themselves determine the law's real-world impact," elected legislators receive "all the credit for the popular goal and none of the blame for the controversial particulars of regulation."[65] A leading critic of delegation, Lee calls the Clean Air Act a "prominent example of this kind of lawmaking" because it "contains relatively few details as to how its laudable objectives will be achieved."[66] Then, under the Act, "when the EPA adopts a new regulation carrying the force of law, those who find that law unnecessary, unreasonable, or even harmful are left with little recourse."[67] They can't complain to Congress, because Congress didn't pass the regulation. And they can't complain to the EPA, because "the people at the EPA – as hardworking, well educated, and well intentioned as they may be – tend not to be terribly concerned about citizen complaints because they cannot be voted out of office."[68]

At least one scholar, Joseph Postell, has argued that delegation violates the social compact theory, and the nondelegation doctrine should, in turn, rest on that theory. "Social compact theory maintains that sovereignty…resides in the people alone. Governments derive their just powers from the consent of the governed, who must agree to vest the government with its powers. Furthermore, the social compact theory holds that the sovereignty of the people is inalienable."[69] Based on these principles, Postell posits that "under the social compact theory, only the

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[63] Rao, *supra* note 61, at 1478.
[64] *Id.* at 1478-79.
[65] LEE, *supra* note 1, at 7.
[66] *Id.* at 8.
[67] *Id.*
[68] *Id.* at 8-9. For additional process problems, see Rao, *supra* note 61, at 1479-1492 (Congress can "lock in a specific policy choice," by "delegat[ing] to agencies insulated from political control and therefore from future political uncertainty."[68] And "members may realize a variety of individual benefits outside the legislative process" after delegating to an administrative agency. For these reasons, "delegations disconnect the interests of congressmen from the interests of Congress and the common good.").
[69] Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1012 (2016).

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people can delegate legislative power, and when legislative power is delegated by the people to their agents in the legislature, the legislature cannot delegate its powers away because legislative power was never fully alienated by the people."[70]

B. The Chances of Reinvigorating Schechter

The movement toward reinvigorating the non-delegation doctrine is not as great as the movement toward curbing deference to agency interpretations of delegations, which will be discussed later in the article. But the movement, once relegated to the fringes of academia, has reached the Supreme Court, where it appears to be gaining momentum.

Just this Term, the Court granted cert in *Gundy v. United States*.[71] In *Gundy*, a criminal defendant is challenging is conviction for failing to follow the Attorney General's regulation requiring certain sex-offenders to register with a sex-offender registry. It will decide whether Congress, through the Sex Offender Registration and Notification Act, 42 U.S.C. § 16913(d), can allow "the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction."[72] The Court will likely issue an opinion by June 2019, and the Justices' questions at oral argument strongly indicate they will hold Congress violated the non-delegation doctrine when its statute gave the Attorney General unfettered discretion to decide who among offenders whose convictions pre-dated the statute must register.

Three aspects of *Gundy* indicate that the Supreme Court appears ready to at least begin to reinvigorate the non-delegation doctrine, perhaps even beyond the narrow facts of that case. First, it's the [first time] the Court granted cert in a non-delegation case in nearly twenty years. Its new-found interest in the doctrine is alone a sign that it may be dissatisfied with the status quo. Second, of the thirteen amicus briefs filed in *Gundy*, all supported Gundy's non-delegation argument. They included briefs from groups as ideologically diverse as the liberal ACLU, the libertarian Cato Institute, and the conservative Beckett Fund.[73] This is precisely the kind of consensus that the Supreme Court prefers to see before upsetting the status quo and reconsidering precedents. And third – and perhaps most telling – the Court

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[70] *Id.* at 1013.
[71] Gundy v. United States, 138 S. Ct. 1260 (2018).
[72] United States v. Nichols, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[73] *No. 17-6086*, UNITED STATES SUPREME COURT, https://www.supremecourt.gov/docket/docketfiles/html/public/17-6086 html (last visited Dec. 20, 2018).

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granted cert in *Gundy* even though all eleven courts of appeals to consider the question had found *no* violation of the non-delegation principle.[74] Since there was no confusion or uncertainty in the lower courts to resolve, the Supreme Court likely granted cert in order to correct what it viewed as the lower courts' mistake.

Even before the Supreme Court's cert grant in *Gundy*, five justices of the Court authored opinions – as either justices or appellate court judges – that I believe show an eagerness to revisit the Court's non-delegation precedents. Those justices are Thomas, Alito, Gorsuch, Kavanaugh, and Roberts.

Justice Thomas

Justice Thomas has been the most outspoken justice with regard to his dissatisfaction with current non-delegation doctrine. As far back as 2001, in a concurrence joined by no other justice, he noted that although the Court has treated "the 'intelligible principle' requirement" as the only limit on grants of power to agencies, "the Constitution does not speak of 'intelligible principles.'"[75] Instead, Article I's Vesting Clause assigns "*All* legislative Powers herein granted" to Congress alone (emphasis added by Justice Thomas).[76] Volunteering "to reconsider our precedents on cessions of legislative power" when the issue is properly raised, Justice Thomas concluded, "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[77]

In two recent opinions from 2015, Justice Thomas has again expressed a desire to overturn the Court's non-delegation precedents. In *Perez v. Mortgage Bankers Ass'n*, he said the Court's current "approach runs the risk

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[74] Pet. App. A4 n.2 (citing United States v. Guzman, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010)); United States v. Nichols, 775 F.3d 1225, 1231-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); United States v. Richardson, 754 F.3d 1143, 1145-1146 (9th Cir. 2014) (per curiam); United States v. Cooper, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); United States v. Goodwin, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 134 S. Ct. 334 (2013); United States v. Kuehl, 706 F.3d 917, 918-920 (8th Cir. 2013); United States v. Parks, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 133 S. Ct. 2021 (2013); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Whaley, 577 F.3d 254, 262-264 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); see United States v. Sampsell, 541 Fed. Appx. 258, 259 (4th Cir. 2013) (per curiam)).

[75] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[76] *Id.* (quoting U.S. Const., art. I, § 1).

[77] *Id.*

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of compromising our constitutional structure."[78] And in *Department of Transportation v. Association of American Railroads*, he spent 16 pages excoriating the Court's current non-delegation jurisprudence and arguing that Congress cannot authorize agencies to promulgate generally applicable rules of private conduct.[79]

Thomas began his anti-delegation cri-de-coeur by claiming "[w]e have come to a strange place in our separation-of-powers jurisprudence."[80] He noted that "the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it." And he argued that since Article I vests all herein granted legislative power to Congress, it "require[s] that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."[81] For support he cited Coke, Locke, Montesquieu, Madison, Marshall, and Blackstone, who "defined a tyrannical government as one in which 'the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men,' for 'wherever these two powers are united together, there can be no public liberty.'"[82]

Justice Alito

In the same case, without Justice Thomas's heavy reliance on original history, Justice Alito argued that the excesses of delegation threaten liberty because they make lawmaking unaccountable to the people. "The principle that Congress cannot delegate away its vested powers exists to protect liberty," he explained. "Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints."[83] Quoting from *American Trucking*'s majority, he admitted past Courts have "'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[84] But he argued that "the inherent difficulty

[78] Perez v. Mortg. Bankers Ass'n, 135 S.Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment).
[79] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1240-1255 (2015) (Thomas, J., concurring in the judgment).
[80] *Id.* at 1240.
[81] *Id.* at 1246.
[82] *Id.* at 1244 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 142).
[83] *Id.* at 1237 (Alito, J., concurring) (citing INS v. Chadha, 462 U.S. 919, 959 (1983)).
[84] *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001)).

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of line-drawing is no excuse for not enforcing the Constitution." And he called "the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance" – its faith that "other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking" – a mere "fig leaf of constitutional justification."[85] Hardly a vote of confidence for the Court's current jurisprudence.

Justice Gorsuch

Like Justices Thomas and Alito, Justice Gorsuch has also expressed serious reservations about the scope of currently-permissible delegation. In dissent when on the Tenth Circuit Court of Appeals, then-Judge Gorsuch said, "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce."[86] His dissent would have invalidated the very delegation the Court is considering this Term in *Gundy v. United States*, which suggests Justice Gorsuch's addition to the Court may have been what made possible the Court's decision to grant cert on a question that had not divided the lower courts.

According to Justice Gorsuch, at least in the criminal context, the non-delegation doctrine should include "three 'meaningful' limitations" on authorizations for agency regulation: "(1) Congress must set forth a clear and generally applicable rule . . . that (2) hinges on a factual determination by the Executive . . . and (3) the statute provides criteria the Executive must employ when making its finding."[87] He argued that SORNA exceeds each of those three limits and "is a delegation run riot, a result inimical to the people's liberty and our constitutional design."[88]

Justice Kavanaugh

Unlike Justices Thomas, Alito, and Gorsuch, Justice Kavanaugh has not written directly about the non-delegation doctrine, but there are signs that he will share their hostility to the Court's permissive "intelligible principle" text. As this article's next section explains in more detail, Justice Kavanaugh has proposed a "major rules" test that would uphold a "major" agency regulation only when Congress has clearly authorized it. Professor Chris Walker has read into this Kavanaugh doctrine an "attempt[] to address

[85] *Id.*
[86] United States v. Nichols, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
[87] *Id.* at 673.
[88] *Id.* at 677.

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nondelegation concerns through a substantive canon of statutory interpretation instead of a constitutional doctrine, by establishing an interpretive presumption that Congress does not intend to delegate rulemaking authority over questions of major economic or political significance absent a clear congressional statement to the contrary." Although this doesn't prove that Kavanaugh thinks broad, ill-defined delegations are unconstitutional, it does suggest he has concerns about such delegations and is eager to shape the Court's jurisprudence to address those concerns better than the Court has done in recent decades.[89]

For example, in 2015, then-Judge Kavanaugh wrote in a dissenting opinion that the FCC's net neutrality rule was invalid. He noted that "Congress has debated net neutrality for many years, but Congress has never enacted net neutrality legislation or clearly authorized the FCC to impose common-carrier obligations on Internet service providers."[90] Absent "*clear* congressional authorization for the FCC to impose common-carrier regulation on Internet service providers," Kavanaugh concluded that the FCC could not do so."[91] His opinion "provides some fascinating clues for how a Justice Kavanaugh might address nondelegation and separation-of-powers concerns more generally."[92] In it, we see a jurist who insists – over, and over, and over again, for the first half of his twenty-page opinion – that he is deeply troubled by the prospect of an unaccountable agency issuing important rules of private conduct when the people's most accountable representatives, members of Congress, have not clearly voted in favor of those rules.[93] His reasoning echoes the accountability concerns Justice Alito expressed in *Department of Transportation v. Association of American Railroads* in the context of the non-delegation doctrine.[94]

Chief Justice Roberts

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[89] Christopher Walker, *Judge Kavanaugh On Administrative Law and Separation of Powers (Corrected)*, SCOTUSBLOG (July 26, 2018), http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/.

[90] United States Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[91] *Id.*

[92] Walker, *supra* note 89;
see also id. ("He has a long record of constraining agency action within what he perceives as the limits of the statutory text. Here, again, we see Kavanaugh's separation-of-powers vision at play in that regulatory authority comes from Congress and is constrained by Article I nondelegation values.").

[93] United States Telecom Ass'n v. FCC, 855 F.3d 381, 417-426 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[94] Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

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s with each of the three doctrines that define the extreme *Chevron* end of the *Schechter*-to-*Chevron* spectrum – delegation; deference; and independence – Chief Justice Roberts is the least likely of the five conservative justices to quickly and drastically move the Court away the *Chevron* end. He is cautious by nature, and particularly so when reconsidering Court precedents. However, he is not averse to overruling precedents when he believes the circumstances are right. And he has not hesitated to articulate moderate limits to delegation,[95] deference,[96] and independence[97] that may grow less moderate over time, in much the same way that he voted to invalidate compulsory public-sector union fees, campaign finance limits on corporate expenditures, and a section of the Voting Rights Act only after first cautiously chipping away at the precedents supporting them.[98]

Like Justice Kavanaugh, Chief Justice Roberts has never spoken directly on the question of delegation – except for a hostile exchange with the Deputy Solicitor General in *Gundy*'s oral argument, when Roberts called SORNA's delegation "different" from previously upheld delegations because under SORNA "the Attorney General is deciding what law applies, not whether a particular act or a particular exercise in commercial activity is covered by an Act that certainly applies in a general sense."[99] But also like Justice Kavanaugh, Roberts has expressed concerns about the thin line between "legislating" and "regulating" that agencies frequently blur.

Most notably, in his dissent in *City of Arlington v. FCC*, Chief Justice Roberts noted that the Constitution's tripartite structure reserves legislating to Congress, quoted Madison's famous line that the "'accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny,'"[100] and cautioned that although it "would be a bit much to describe" the current administration state as "the very definition of tyranny," nevertheless "the danger posed by the growing power of the administrative state cannot be dismissed."[101] The

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[95] Oral Argument at 40:06, Gundy v. United States, No. 17-6086 (U.S. Oct. 2, 2018), https://www.oyez.org/cases/2018/17-6086.
[96] City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).
[97] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
[98] *See* Harris v. Quinn, 134 S. Ct. 2618 (2014) (foreshadowing overturning Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)., in Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018)); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (foreshadowing invalidation of Voting Rights Act in Shelby County v. Holder, 570 U.S. 529 (2013)) FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (foreshadowing overturning Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)., in Citizens United v. FEC, 558 U.S. 310 (2010)).
[99] Oral Argument at 40:06, Gundy v. United States, No. 17-6086 (U.S. Oct. 2, 2018),
[100] City of Arlington, v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).
[101] *Id.* at 315.

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administrative state ""wields vast power.""[102] It includes "hundreds of federal agencies poking into every nook and cranny of daily life."[103] And "the citizen confronting thousands of pages of regulations – promulgated by an agency directed by Congress to regulate, say, 'in the public interest' – can perhaps be excused for thinking that it is the agency really doing the legislating. And with that citizen might also understandably question whether Presidential oversight—a critical part of the constitutional plan—is always an effective safeguard against agency overreaching."[104]

While these are not the words of someone as eager to move the Court all the way to the *Schechter* end of the *Schechter*-to-*Chevron* spectrum, they are the words of someone who appears at best uncomfortable with the amount of legislative power that has been delegated by Congress to the administrative state. And so while Roberts may not lead the non-delegation charge of the Court's more conservative wing – just as he did not lead the charge overturning precedents in *Janus* or *Citizens United* – and while his penchant for caution may slow it down, his dissent in *City of Arlington* suggests he will not completely stand in its way.

C. The Path to Less Delegation

Despite the Court majority's skepticism of the current non-delegation doctrine, a return to *Schechter* is unlikely. In fact, of delegation, deference, and independence, this is the area where the Court is likely to show the most caution. Yet even here, there's likely to be significant movement. This section first considers why the Court will proceed with caution, and then explores alternatives to the current doctrine that the Court may adopt.

A return to *Schechter* would be highly disruptive. When *Schechter* was decided in 1935, the size of the administrative state was a fraction of its current size. Today, although workers, consumers, manufacturers, banks, investors, and countless other groups are frequently impeded by some of the more than the administrative state's one-million regulations, those groups also rely on many of those regulations. If the Supreme Court were to invalidate massive numbers of regulations as the products of unconstitutional delegations of Congress's legislative power, whole industries would face destabilizing uncertainty at best, and chaos at worst. In situations like that, the force of stare decisis is at its strongest.[105]

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[102] *Id.* at 313 (quoting *Free Enter. Fund*, 561 U.S. at 499).
[103] *Id.* at 315.
[104] *Id.* at 315.
[105] *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994) ("The rationale for th[e] virtually complete abandonment of the nondelegation principle is simple: the Court believes -- possibly correctly -- that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.").

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In addition, a return to *Schechter* would also require the type of difficult line-drawing that the Court may find problematic. As Justice Breyer asked Gundy's attorney at oral argument, "Are we supposed to, in your opinion, start distinguishing among the 300,000 [criminal regulations] and say, well, you have a weak standard if all [what's] at interest is the cost of pollution or something, but you have to have a strong standard where, in fact, it's liberty and so on, and a medium standard perhaps for the SEC?"[106] That kind of difficult line drawing can often appear arbitrary, a concern that led the Supreme Court to abandon policing not just the non-delegation principle but also, from beginning in1937, almost all constitutional checks on Congress in the context of economic legislation.[107]

Nevertheless, the difficulty of line-drawing in this context may not deter the Court from creating categories of delegations that require more guidance from Congress than an intelligible principle test, or from adopting new tests that put teeth back into the intelligible-principle test. For starters, the Court polices blurry lines all the time, not because it dislikes bright lines but because a blurry line compelled by the Constitution is better than no line at all. What's an important government interest under the intermediate scrutiny for sex discrimination?[108] What's the line between expressive and non-expressive conduct under the First Amendment's free speech clause?[109] Which rights are rooted in the nation's history and tradition under *Glucksberg*'s substantive-due-process test?[110] How vague is unconstitutionally vague?[111] Even though these are difficult questions whose answers can appear arbitrary, it's better to ask them than to simply say: sex discrimination is always okay; expressive conduct is never protected; and nothing is a fundamental right.[112] After all, the fact that the 90-foot distance from home plate to first base produces close plays on ground balls is not a reason to put first base 190 from home, even if it would greatly reduce the number of difficult calls for the umpire.

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[106] Oral Argument at 22:09, Gundy v. United States, No. 17-6086 (U.S. Oct. 2, 2018), https://www.oyez.org/cases/2018/17-6086;
see also id. at 05:34 (Breyer: "We'll be busy in this Court for quite a while.").
[107] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, (2005); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937); *cf.* NFIB v. Sebelius, 567 U.S. 519 (2012) (tax holding).
[108] *See* United States v. Virginia, 518 U.S. 515 (1996).
[109] *See* United States v. O'Brien, 391 U.S. 367 (1968).
[110] Washington v. Glucksberg, 521 U.S. 702 (1997).
[111] *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Johnson v. United States, 135 S. Ct. 2551 (2015); *see also* Brief for Pac. L. Found. as Amicus Curiae Supporting Reversal, Gundy v. United States, No. 17-6086 (U.S. May 31, 2018).
[112] *Cf.* Brief for Cato Inst. as Amicus Curiae Supporting Reversal at 9, Gundy v. United States, No. 17-6086 (U.S. May 24, 2018).

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To be sure, line drawing can be difficult in the context of non-delegation. But it hasn't proven too difficult for state courts to apply a test with teeth. In the past 85 years, at a time when the U.S. Supreme Court has never invalided a delegation under the U.S. Constitution, and when only 0.06 percent of non-delegation challenges have succeeded in lower federal courts, similar challenges have succeeded in state courts under state constitutions 16 percent of the time – a rate similar to the 20-percent success rate of all constitutional claims in state courts.[113]

Even if reliance and administrability concerns foreclose a severe non-delegation test that would prohibit agencies from promulgating any rules that legally bind individuals – the test that originalist judges like Clarence Thomas and academics like Philip Hamburger have proposed[114] – the Court is likely to reinvigorate the non-delegation doctrine by more consistently applying a principle the Court has repeatedly stated but rarely applied: the more significant the agency rule, the more guidance Congress must provide.[115]

To begin with, in *Gundy*, the Court appears poised to hold that when a statute provides for imprisonment, Congress cannot delegate to the Attorney General the decision of whom to apply the rule to. Even Justice Ginsburg, in joining a dissent several years ago written by Justice Scalia, appeared comfortable with this limit on congressional delegation: "it is not entirely clear . . . that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals."[116] Such a delegation "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable."[117]

The authority for such a rule is longstanding. The Marshall Court said, "It is the legislature . . . which is to define a crime, and ordain its

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[113] Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636-37 (2018); *see also* Brief for Inst. for Justice *supra* note 37, at 2.

[114] HAMBURGER, *supra* note 58, at 84 ("the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not").

[115] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, see § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.") (citing Loving v. United States, 517 U.S. 748, 772-73 (1996); United States v. Mazurie, 419 U.S. 544, 556-57 (1975)).

[116] Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting).

[117] *Id.*

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punishment."[118] Today's Court could adopt the rule James Madison read into the Constitution in 1800: in the context of "criminal subjects," Congress should "leave as little as possible to the discretion of those who are to apply and to execute the law."[119] This principle is the reason that *Chevron* deference, though broadly applied for three and a half decades, has not generally been applied to the definition of crimes.[120]

This first step would be relatively minimal, and the oral arguments at *Gundy* suggested widespread support for it on the Court. Chief Justice Roberts said it's "different" from typically permissible delegations when "the Attorney General is deciding what law applies, not whether a particular act or a particular exercise in commercial activity is covered by an Act that certainly applies in a general sense." Justice Sotomayor was bothered that Congress "delegate[d] to the Attorney General a fundamental decision about who gets covered or doesn't get covered by a statute." And even Justice Breyer, no skeptic of the administrative state and no friend of criminal defendants, said that "there is a particular danger when you combine prosecuting a person with the writing of the law under which you prosecute."[121]

Beyond *Gundy*, the next step the Court could take would be a heightened standard for an intelligible principle for all regulations punishable as crimes, even when the regulation in question is written not by not the Attorney General, but instead by an administrative agency. This was the step Justice Breyer and Justice Kagan feared at oral arguments in *Gundy* when they worried about the prospect of the Court needing to apply a heightened level of scrutiny to the possibly 300,000 regulations that carry criminal sanctions.[122]

Justices Breyer and Kagan are correct that this step toward *Schechter* would be far from minimal, but it would not necessarily be as drastic as they

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[118] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).
[119] JAMES MADISON, THE REPORT OF 1800 (1800*), reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 307, 324 (Robert A. Rutland et al. eds., 1983); *see also* Brief for Petitioner at 20, Gundy v. United States, No. 17-6086 (U.S. May 25, 2018).
[120] Abramski v. United States, 134 S. Ct. 2259, 2274 (2014) ("criminal laws are for courts, not for the Government, to construe"); United States v. Apel, 134 S. Ct. 1144, 1151 (2014) ("we have never held that the Government's reading of a criminal statute is entitled to any deference"); *see also* Brief for Petitioner, *supra* note 119, at 21.
[121] Oral Argument at 40:06, Gundy v. United States, No. 17-6086 (U.S. Oct. 2, 2018), ; *see also id.* at 43:40 (Gorsuch: "the suggestion of this Court in Touby that delegations in the criminal context involving the Attorney General may merit a heightened standard of review.").
[122] *Id*. at 22:09; *Id*. at 23:59 (Kagan: "I mean, there are numerous of those cases, but I'll just give you three: *Kollock* is like that, *Grimaud* is like that, *Avent* is like that. So these are all places where the delegation is to a civil regulation as it is here, but if you violate that regulation that some secretary or attorney general or whatever has written, you're going to face criminal sanctions.").

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make it sound. The Court could allow agencies to continue promulgating regulations with minor criminal sanctions even when Congress has not provided precise guidance. Only when the criminal sanctions are major would Congress need to either write the rule itself, or at least provide an "intelligible principle" more precise than what the Court has required since abandoning *Schechter*.

This approach would capture aspects of the robust major-rules doctrine that Justice Kavanaugh championed on the D.C. Circuit[123] (and in the *Harvard Law Review*[124]), and aspects of a watered-down version of the doctrine that eight members of the current Court have signed on to in *King v. Burwell* (Roberts; Ginsburg; Breyer; Sotomayor; Kagan)[125] and *Utility Air Regulatory Group v. EPA* (Roberts; Thomas; Alito; and in the opinion vindicated below, then-Judge Kavanaugh).[126] Under the milder version of the major-rules doctrine, the Court does not apply *Chevron* deference to rules of great significance. And under the Kavanaugh version of the doctrine, courts require a clear statutory statement authorizing the rule. Each version is explored in greater detail in this article's next section on deference.

Either approach would inform a rule that major agency rules require major guidance from Congress, because both approaches are grounded in the principle that although necessity may dictate that agencies fill in administrative details left unresolved by Congress, unelected agencies should not make important laws that our elected representatives haven't approved. And just as deference's major-rules doctrine says courts can't read into statutes an implied delegation to agencies to makes major rules, a delegation version of the major-rules doctrine would say courts can't allow statutes to expressly delegate major decisions to agencies.[127]

This prohibition on guidance-free delegation for major agency rules could and should be extended beyond regulations with criminal sanctions. Indeed, in *King* and *Utility Air Regulatory Group*, deference's major-rules doctrine was applied to civilly enforceable regulations. In those cases, the regulations' massive economic implications made the rules "major," and the Court did not defer to agencies' statutory interpretations purportedly

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[123] *See, e.g.*, United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc).
[124] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).
[125] King v. Burwell, 135 S. Ct. 2480, 2489 (2015).
[126] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000).
[127] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317-18 (2000) ("The most convincing claim on behalf of the conventional doctrine is far narrower and more modest: that certain highly sensitive decisions should be made by Congress, and not by the executive pursuant to open-ended legislative instructions.").

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implying delegations to make the regulations at issue. Similarly, why should the Court defer to Congress's interpretation of Article I's Vesting Clause when it expressly delegates authority for agencies to decide whether to regulate in a manner that has massive economic implications?

The Court should not. And before long, if the recent writings of Justices Thomas, Alito, Gorsuch, Kavanaugh, and Chief Justice Roberts lead to their likely conclusion, the Court will not.

IV. DEFERENCE

Chevron deference requires courts to "uphold an agency's reading of a statute – even if not the best reading – so long as the statute is ambiguous and the agency's reading is at least reasonable."[128] Decided in 1984, it was championed by a widespread consensus across the ideological spectrum – until recently. Judges on the right like Justice Scalia loved the constraints it put on "activist judges." As the products of a Reagan administration de-regulatory agenda sometimes faced obstruction from judges on the then-liberal D.C. Circuit, judges like Scalia saw *Chevron* as empowering agencies – at least non-independent agencies – that, though unelected, were at least supervised by an elected president. Moreover, *Chevron* brought the clarity and predictability that Scalia and similar rules-over-standards judges preferred – in this context, clear and predictable if only because as a general matter the agency would simply always win (can't get much clearer and more predictable than that!).

At the other end of the ideological spectrum, liberal judges like Justice Breyer liked the emergence of *Chevron* deference because it promised almost completely free reign to an administrative state of experts theoretically more qualified to make policy than judges or even legislators. Ever since the New Deal, proponents of the regulatory state put great faith in the wisdom of experts, trusting them to tinker with industries and economic forces to promote everything from the environment, to workplace safety, to economic equality. With *Chevron* in place, those experts could work their magic even when Congress had not expressly authorized the experts' preferred policies, and even when judges believed the best reading of the authorizing statute precluded them.

In recent years, a growing chorus of academics have expressed varying degrees of skepticism about *Chevron*.[129] Even Justice Kennedy joined in, just

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[128] Kavanaugh, *supra* note 124, at 2150 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984)).

[129] Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEORGETOWN J. L. & PUB. POL'Y 103 (2018); *see also, e.g.*, HAMBURGER, *supra* note 58; Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 NYU J. L. & LIBERTY 491 (2008); Lawson, *supra* note 105, at 1247.

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before his retirement, writing that the "reflexive deference exhibited in some of these cases is troubling"[130] and "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[131] But the critic who has laid out one of the most thorough cases against now sits on the Supreme Court: Justice Brett Kavanaugh.

A. The Case Against Chevron

What follows is Justice Kavanaugh's case against *Chevron*. And I'll begin with a warning: my exploration of it is lengthy, because I believe it's the legal theory that not only will guide his approach to deference on the Court, but that will allow him to lead four other justices who will follow.

Kavanaugh believes "the liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression, in particular from the effects of legislation that would unfairly prohibit or mandate certain action by individual citizens, backed by punishment."[132] The framers made it "difficult to enact laws" because they wanted "to protect individual liberty and guard against the whim of majority rule."[133] When agencies out-flank the legislative process that requires approval by the House, the Senate, and the President, they threaten liberty, they risk promulgating regulations that have not yet attained the "broad support" required by bicameralism and presentment.[134] And when courts abandon their "critical role" in protecting the "separation of powers," they threaten liberty as well.[135]

According to Kavanaugh, when courts aggressively apply *Chevron* deference, they abdicate their "critical role" by permitting agencies to regulate when Congress has not clearly authorized the regulations. *Chevron*'s requirement that judges make an initial determination of whether a statute is ambiguous leads judges to disregard the best reading of statutes. Kavanaugh describes having been involved in cases where "different judges will reach different results even though they may actually *agree* on what is the best reading of the statutory text."[136]

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[130] Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).
[131] *Id.* at 2121.
[132] Kavanaugh, *supra* note 62, at 1909.
[133] *Id.*
[134] *Id.* at 1910.
[135] Brett M. Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. (Feb. 1, 2018), http://report heritage.org/hl1284.
[136] Kavanaugh, *supra* note 124, at 2153.

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Moreover, *Chevron* requires "clarity versus ambiguity determinations" that are difficult to make "in a coherent, evenhanded way."[137] For some judges, a statute is not clear unless it is 90 percent clear; for others, like Kavanaugh, a statute is clear if it's 60 or 65 percent clear.[138] "Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line" and trigger *Chevron* deference.[139] And yet "that simple determination of clarity versus ambiguity may affect billions of dollars; could affect the individual rights of millions of citizens; may affect the fate of clean-air rules, securities regulations, labor laws, or the like."[140]

In addition to producing incoherence and unpredictability, Kavanaugh believes *Chevron* can also abet bias, because "there can be serious incentives and pressures – often subconscious – for judges to find the textual ambiguity or clarity in certain cases." For example, a judge can be "subtly incentivized to categorize the statute as ambiguous in order to create more room to reach a result in line with what the judge thinks is a better, more reasonable policy outcome" if she knows the agency's regulation advances that outcome.[141] After all, each judge knows the agency's interpretation of the statute *before* the judge decides if the statute is ambiguous enough to trigger deference to the agency.[142] "This kind of decisionmaking threatens to undermine the stability of the law and the neutrality (actual or perceived) of the judiciary."[143]

Kavanaugh's solution is to "seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons."[144] Judges "should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous."[145] Only after judges have determined the statute's best reading should they then apply any relevant substantive canons, "such as plain statement rules."[146]

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[137] *Id.* at 2121; *see also id.* at 2137 ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or any else) to perform that kind of task in a neutral, impartial, and predictable fashion.").
[138] Kavanaugh, *supra* note 135.
[139] *Id.* The problem affects other canons of interpretation as well, such as the constitutional avoidance doctrine and the question of whether to look to legislative history. *Id.*
[140] *Id.*
[141] Kavanaugh, *supra* note 124 at 2140.
[142] *See id.*
[143] *Id.* at 2143.
[144] *Id.* at 2121.
[145] *Id.* at 2144.
[146] *Id.*

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The plain-statement rule is the most important substantive canon that Kavanaugh proposes applying to interpretations of authorizations for agency rulemaking. Under this rule, when "an agency wants to exercise expansive regulatory authority over some major social or regulatory activity," Judge Kavanaugh would hold that "an *ambiguous* grant of statutory authority is not enough."[147] Only with a clear statement can Congress authorize an agency to promulgate a major regulation.[148]

In his dissent against the Obama-era FCC's net neutrality rule, Kavanaugh applied this clear-statement rule, arguing that Supreme Court cases supported it in the context of "major rules." He quotes the Court's statement in *Utility Air Regulatory Group v. EPA*'s that "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[149] And he relied on other precedents that have not deferred to agencies' statutory interpretations when major regulations were at issue, including *King v. Burwell*,[150] *Gonzales v. Oregon*,[151] *FDA v. Brown & Williamson Tobacco*,[152] and *MCI Telecommunications Corp v. AT&T*.[153]

But Kavanaugh's appears to be "a rather expansive view of" the major-rules doctrine, compared to where the Supreme Court's doctrine currently stands – "one that would essentially prohibit agencies from doing anything that seems like a really big deal unless Congress expressly called for it."[154] He "is developing his own method of empowering courts to hold the line against the administrative state."[155] This would be, at least, an expansion of the major-rules doctrine, and at most a "weaponized" version of it that "prior cases do not justify."[156]

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[147] United States Telecom Ass'n v. FCC, 855 F.3d 381, 421 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc).
[148] *Id.*
[149] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[150] King v. Burwell, 135 S. Ct. 2480 (2015).
[151] Gonzales v. Oregon, 546 U.S. 243 (2006).
[152] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[153] MCI Telecomms. Corp., v. AT&T Co., 512 U.S. 218 (1994).
[154] Eric Citron, *Kavanaugh on Net Neutrality: U.S. Telecom Association v. Federal Communications Commission*, SCOTUSBLOG (July 24, 2018), http://www.scotusblog.com/2018/07/kavanaugh-on-net-neutrality-u-s-telecom-association-v-federal-communications-commission/.
[155] Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018), http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/.
[156] Daniel Deacon, *Judge Kavanaugh and "Weaponized Administrative Law,"* YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), http://yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/ ("Suffice it to say the prior cases do not justify the rule that Judge Kavanaugh advocates. To be sure, those cases stand for the proposition that a given interpretation's potentially 'major' consequences may bear on whether the interpretation is permissible (under *Chevron* Step One) or reasonable

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Although Kavanaugh has argued at length for his expansive view of the major-rules doctrine in academic settings,[157] his record on the bench suggests his theories on *Chevron* are not merely academic. Of his 100 opinions on agency actions,[158] "Judge Kavanaugh has written 40 opinions finding agency action to be unlawful," and he has "joined majority opinions reversing agency action in at least 35 additional cases."[159] He has dissented 19 times against agency actions.[160] By way of contrast, Judge Merrick Garland has sat on the same court for nearly a decade longer but has *never* dissented against agency actions.[161] In short, as Professor Jonathan Adler has written, "As much as any District of Columbia Circuit judge, he questions whether federal agencies have followed the relevant requirements and acted within the scope of their delegated authority. Where agencies come up short, he is not one to give them a pass."[162]

B. The Chances of Overruling Chevron

The Supreme Court is likely to curb *Chevron* as soon as this Term by overruling *Auer*, which was *Chevron* at its most extreme. Under *Auer*, a court gives *Chevron* deference not only to an agency's interpretation of a statute, but also to an agency's interpretation of its own regulation. This Term, in *Kisor v. O'Rourke*, a cert petition presented the Court with two questions: whether *Auer* should be overruled, and whether in the alternative,

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(under *Chevron* Step Two). But they do not say that every time an agency adopts an interpretation with such consequences that the agency must meet a special burden to show that its interpretation is not only both permissible and reasonable but also the result of a *clear* congressional command.").

[157] *See* Kavanaugh, *supra* note 124.

[158] Jonathan H. Adler, *Will Kavanaugh Curb Sloppy White House Deregulation?,* N.Y. TIMES (July 16, 2018), https://www.nytimes.com/2018/07/16/opinion/brett-kavanaugh-supreme-court-administrative-state html ("Of Judge Kavanaugh's nearly 300 opinions as a federal judge, over one-third concern administrative law — and they are quite revealing.").

[159] Jennifer Mascott, *Judge Kavanaugh: Interpretive Principles as a Way of Life*, YALE J. ON REG.: NOTICE & COMMENT (July 2, 2018), http://yalejreg.com/nc/judge-kavanaugh-interpretive-principles-as-a-way-of-life/.

[160] *See* Aaron Nielson, *D.C. Circuit Review – Reviewed: Brooding Spirits, Judge Kavanaugh Edition*, YALE J. ON REG.: NOTICE & COMMENT (July 9, 2018), http://yalejreg.com/nc/d-c-circuit-review-reviewed-brooding-spirits-judge-kavanaugh-edition/.

[161] *See* Aaron Nielson, *D.C. Circuit Review – Reviewed: Brooding Spirits, C.J. Garland Edition*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 16, 2016), http://yalejreg.com/nc/d-c-circuit-review-reviewed-brooding-spirits-c-j-garland-edition-by-aaron-nielson/; *see also* Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL STREET J. (July 9, 2018), https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402 ("His dozen years on the U.S. Circuit Court of Appeals for the D.C. Circuit have been marked with dozens of votes to roll back rules and regulations. He has often concluded that agencies stretched their power too far and frequently found himself at odds with the Obama administration, including in dissents he wrote opposing net-neutrality rules and greenhouse-gas restrictions.").

[162] Adler, *supra* note 158.

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it should be trimmed.[163] The Court strongly signaled its inclination to overrule *Auer* by granting cert on the first – and only the first – question.[164]

Whether the Court will go beyond overruling *Auer* in future Terms and trim *Chevron* further depends largely on the five Republican appointees. As described above, Justice Kavanaugh is no fan of *Chevron* and is likely to lead an effort to narrow or eliminate it. And as described in this section below, based on their recent writings, the other four Republican appointees also appear ready to trim *Chevron* significantly, which may lead to an outright overruling.

Justice Thomas

For many years, Justice Thomas has had "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[165] And in 2015, he argued that "*Chevron* deference raises serious separation-of-powers questions."[166]

In critiquing *Chevron*, Thomas began with the principle that "the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting expounding upon the laws."[167] He argued that "*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction."[168] *Chevron* thereby "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive."[169]

Thomas went on to argue that in reality, agencies are not interpreting statutes; they are making policy decisions delegated to them by Congress.[170] "Although acknowledging this fact might allow us to escape the jaws of Article III's Vesting Clause, it runs headlong into the teeth of Article I's, which vests "[a]ll legislative Powers herein granted" in Congress. For if we give the 'force of law' to agency pronouncements on matters of private conduct as to which 'Congress did not actually have an intent,' we permit a

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[163] Petition for a Writ of Certiorari at i, Kisor v. O'Rourke, No. 18-15 (U.S. June 29, 2018).
[164] *No. 18-15*, UNITED STATES SUPREME COURT, https://www.supremecourt.gov/docket/docketfiles/html/public/18-15.html (last visited Dec. 23, 2018).
[165] Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).
[166] *Id.*
[167] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment).
[168] *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005)).
[169] *Id.* (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
[170] *Id.* at 2712-13.

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body other than Congress to perform a function that requires an exercise of the legislative power."[171] Connecting *Chevron*'s constitutional infirmities to unconstitutional delegations, he bemoaned "the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."[172]

Justice Alito

Like Justice Thomas, Justice Alito used a concurrence in *Perez v. Mortgage Bankers Association* to call for a reconsideration of *Auer* deference.[173] Even before then, in *Christopher v. SmithKline Beecham Corp.*, Justice Alito's majority opinion found "strong reasons for withholding the deference that *Auer* generally requires."[174] And in that opinion, Alito went out of his way to criticize *Auer*: "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."[175]

Although Justice Alito has not been as outspoken as Justice Thomas with regard to his concerns about forms of *Chevron* deference other than *Auer*, he has not been silent. In 2014, he joined Justice Scalia's articulation of the major-rules doctrine in *Utility Air Regulatory Group v. EPA*: "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[176] To the extent that Justice Kavanaugh will lead the Court in an evisceration of *Chevron* through a robust major-rules doctrine, Justice Alito's anti-deference opinions in *Perez* and *Christopher*, his join in *Utility Air*, and his consistent votes against aggressive agency interpretations of regulations, all suggest he will be eager to follow.

Justice Gorsuch

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[171] *Id.* at 2713 (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
[172] *Id.*
[173] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment).
[174] Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012).
[175] *Id.* at 158-59.
[176] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

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It is rare for a lower-court judge to express opposition to a Supreme Court precedent, but as a judge on the Tenth Circuit, then-Judge Gorsuch did exactly that in 2016 when he took the unusual step of writing a solo concurrence to a majority opinion that he himself had also written. In his concurrence in *Gutierrez-Brizuela* v. *Lynch*, Gorsuch called for a reconsidering of *Chevron*,[177] and by doing so, filed what was in effect a ten-page job application for a Supreme Court nomination (in the event that, as would happen in three months, an anti-regulation president won the White House). Now that he is on that Court, there's little doubt he is eager to fulfill what was in effect a preview of his hostile approach to *Chevron*.

Gorsuch began his *Gutierrez-Brizuela* concurrence by calling *Chevron* the "elephant in the room" because it allows "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[178] He observed that "the framers endowed the people's representatives with the authority to prescribe new rules of general applicability" in an "avowedly political legislature" based on "enlightenment theory and hard won experience under a tyrannical king."[179] They "considered the separation of powers a vital guard against governmental encroachment on the people's liberties" because "a government of diffused powers, they knew, is a government less capable of invading the liberties of the people."[180]

Gorsuch's analysis reflects Justice Kavanaugh's observation several years earlier that "the liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression, in particular from the effects of legislation that would unfairly prohibit or mandate certain action by individual citizens, backed by punishment."[181] It was "to protect individual liberty and guard against the whim of majority rule" that "the Framers first made it very difficult to enact laws."[182]

Gorsuch's critique of *Chevron* was multi-faceted, beginning with the tension between *Chevron* and *Marbury*. "*Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision," which "seems no less than a judge-made doctrine for

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[177] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).
[178] *Id.* at 1149.
[179] *Id.*
[180] *Id.*
[181] Kavanaugh, *supra* note 62, at 1909.
[182] *Id.*

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the abdication of the judicial duty."[183] This eliminates the important check of independent courts, which has allowed "executives throughout history . . . to exploit ambiguous laws as license for their own prerogative."[184]

Gorsuch also argued that *Chevron* is in tension with a robust non-delegation doctrine by inferring delegation through silence. It "suggests we should infer an intent to delegate not because Congress has anywhere expressed any such wish, not because anyone anywhere in any legislative history even hinted at that possibility, but because the legislation in question is *silent* (ambiguous) on the subject. Usually we're told that 'an agency literally has no power to act . . . unless and until Congress confers power upon it.' Yet *Chevron* seems to stand this ancient and venerable principle nearly on its head."[185] By permitting agencies to assume lawmaking powers even where Congress has not expressly delegated them, *Chevron* concentrates power "in the hands of a single branch of government" and "certainly seems to have added prodigious new powers to an already titanic administrative state – and spawned along the way more than a few due process and equal protection problems."[186]

Predictions about how Supreme Court justices will vote are generally risky propositions, but based on Justice Gorsuch's apparent belief that *Chevron* violates Article I's Vesting Clause, Article III's Vesting Clause, due process, and equal protection, and based on his statement in *Gutierrez-Brizuela* that stare decisis's "reliance interests . . . count against retaining *Chevron*" because *Chevron* empowers agencies to upset reliance on previous administrations' interpretations of ambiguous statutes,[187] there's little doubt Justice Gorsuch will vote to overrule *Chevron*.[188]

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[183] *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).
[184] *Id.* (citing HAMBURGER, *supra* note 58, at 287-91 ("recounting James I's effort to claim the right to interpret statutes, an effort rejected by the courts in a campaign Roscoe Pound called a 'valiant fight' that confirmed the 'supremacy of law'").
[185] *Id.* at 1153 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).
[186] *Id.* at 1155 (citing THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").
[187] *Id.* at 1158.
[188] Until then, as Professor Chris Walker has observed, Gorsuch will likely adopt a "muscular *Chevron* step one inquiry" that "was Justice Scalia's approach" and "has been adopted by a number of other textualist judges who seldom find statutes ambiguous," including Justice Kavanaugh. Chris Walker, *Gorsuch's "Clear Enough" & Kennedy's Anti-"Reflexive Deference": Two Potential Limits on* Chevron *Deference*, YALE J. ON REG.: NOTICE & COMMENT (June 22, 2018), http://yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/. Indeed, Justice Gorsuch has already adopted this approach on the Court. *See, e.g.*, Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("in light of all the textual and structural clues before us, we think it's clear enough that the term 'money' excludes 'stock,' leaving no ambiguity for the agency to fill").

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Chief Justice Roberts

As with changes to delegation, changes to deference depend on Chief Justice John Roberts. The other four Republican appointees seem ready to overrule *Chevron*, but they can go only as far as Chief Justice Roberts is willing to go with them. And even more so than on delegation, when it comes to reigning in deference, it's likely Roberts is willing to go quite far.

Roberts is not averse to legal change, but he prefers that it be incremental. He voted to overrule *Austin*'s validation of campaign finance laws in *Citizens United*, but not before first narrowing *Austin* in *Wisconsin Right to Life*. Later, he voted to overrule *South Carolina v. Katzenbach*'s validation of the Voting Rights Act's section 4 in *Shelby County*, but not before first narrowing section 4 in *Northwest Austin Municipal Utility District Number One*. And most recently, he voted to overrule *Abood*'s validation of compulsory public-sector union dues, but not before first narrowing *Abood* in *Harris v. Quinn*.

By this point in time, Chief Justice Roberts's pattern is clear. Unlike Justice Thomas or Justice Gorsuch in solo opinions,[189] unlike Justice Alito in pointed oral-argument questions,[190] and unlike Justice Kavanaugh in lengthy opinions and law review articles,[191] Chief Justice Roberts lets others fire the first shots, and he does not overrule precedent at the first opportunity. Instead, he joins an opinion criticizing the precedent, then joins an opinion narrowing the precedent, and only later agrees to be the fifth vote to overturn the precedent.

This same pattern is likely to play out with regard to *Chevron*. First, the criticism: Roberts has already railed against the excesses of deference in his *City of Arlington* dissent. There, as described in this article's Part II, he cautioned against "the danger posed by the growing power of the administrative state,"[192] with its "hundreds of federal agencies poking into every nook and cranny of daily life."[193]

Second, the narrowing: Roberts argued in *City of Arlington* that *Chevron* should not be extended "to include not only broad power to give

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[189] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); Gutierrez-Brizuela, 834 F.3d at 1149-58 (Gorsuch, J., concurring).
[190] *See, e.g.*, Oral Argument, Harris v. Quinn, 134 S. Ct. 2618 (2014) (No. 11-681),https://www.oyez.org/cases/2013/11-681; Oral Argument, Knox v. SEIU, Local 1000, 567 U.S. 298 (2012) (No. 10-1121), https://www.oyez.org/cases/2011/10-1121.
[191] *See, e.g.*, United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc).; Kavanaugh, *supra* note 124.
[192] City of Arlington, v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).
[193] *Id.*

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definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power."[194] Instead, "before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue."[195]

In his *City of Arlington* dissent, Roberts claimed, "I do not understand petitioners to ask the Court – nor do I think it necessary – to draw a 'specious, but scary-sounding' line between 'big, important' interpretations on the one hand and 'humdrum, run-of-the-mill' ones on the other."[196] But just two years later, in *King v. Burwell*, Roberts did exactly that. Writing for a 6-3 majority and upholding the validity of ACA tax credits offered on the federal health insurance exchange, Robert said there are some cases where *Chevron* doesn't apply, and "[t]his is one of those cases."[197] Because the question presented was one "of deep 'economic and political significance' that is central to this statutory scheme," it is the Court's task, and not an agency's, "to determine the correct reading of" the statute.[198] In other words, Roberts "dr[e]w a specious . . . line between big, important interpretations on the one hand and humdrum, run-of-the-mill ones on the other."[199]

To be sure, Roberts did not go as far with the major-rules doctrine in *King* as Justice Kavanaugh has proposed, because Roberts did not require a clear statutory statement to authorize agency action. But with *King* and *City of Arlington*, Roberts put himself on the record as supporting two significant limits on *Chevron*. And in the likely event he joins an opinion overturning *Auer* deference this Term, that will mark his support for a third limit – signaling a death for *Chevron* that is three cuts into what will likely take far fewer than a thousand.

The majority in *City of Arlington* was not blind to where Chief Justice Roberts was heading. As Roberts said, "What is afoot, according to the Court, is a judicial power-grab, with nothing less than '*Chevron* itself' as 'the ultimate target.'"[200] To which Roberts replied with a sentence in defense of *Chevron* and a paragraph and a half warning (again) about the power of an unchecked administrative state: "Our duty to police the boundary between the Legislature and the Executive is . . . critical" and "means ensuring that

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[194] *Id.*
[195] *Id.* at 317.
[196] *Id.* at 324 (quoting majority opinion at 297 and 304).
[197] King v. Burwell, 135 S. Ct. 2480, 2489 (2015).
[198] *Id.*
[199] *City of Arlington*, 569 U.S. at 324 (quoting majority opinion at 297 and 304) (internal quotation marks omitted).
[200] *Id.* at 326-27 (quoting majority opinion at 304).

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the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive – a shift effected through the administrative agencies."[201]

C. The Path to Less Deference

As the section above suggests, the Supreme Court's days on the *Chevron* end of the *Schechter*-to-*Chevron* spectrum are numbered. But the question remains: what path away from *Chevron* will the Court take, and what will be its limits.

The Court's path will begin with overruling *Auer*, which will likely occur this Term when the Court decides *Kisor v. O'Rourke*. *Auer* applied *Chevron* deference to agency interpretations of ambiguous agency regulations that were themselves sometimes the product of ambiguous statutes construed by the agency – in effect, *Chevron* squared. A readiness to eliminate *Auer* deference is by far the most logical explanation for why the Court granted cert in *Kisor* and struck the only question presented other than whether to overrule *Auer*.

Beyond overruling *Auer*, the Court also extremely like to carve out more and more exceptions to *Chevron* deference. In *King* – and arguably in *Utility Air Regulatory Group v. EPA*,[202] *Gonzales v. Oregon*,[203] and *FDA v. Brown & Williamson*[204] and before it – the Court created an exception to *Chevron* for major rules. But what counts as a major rule? *King* was profoundly unclear. *Utility Air*, *Gonzales v. Oregon*, and *Brown & Williamson* were even more so. Taken to its extreme, a major-rules exception to *Chevron* could be an exception that swallows the rule. After all, agency regulations impose a two-trillion-dollar cost on the economy – a figure that is not reached through "minor" rules.

To be sure, *King*'s health-insurance tax credits and *U.S. Telecom*'s net neutrality rule were exceptionally important to the economy and citizenry, and so if the test for major rules is that they must be as important as those two, a relatively robust version of *Chevron* could survive. But if every

[201] *Id.* at 327.
[202] Util. Air. Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).
[203] Gonzales v. Oregon, 546 U.S. 243, 266-67 (2006).
[204] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

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"question of deep economic and political significance"[205] is a major rule excepted from *Chevron* deference, there may not be much of *Chevron* left.

Beyond denying *Chevron* deference for major rules, the Court has also denied *Chevron* deference to agency interpretations of criminal statutes.[206] The rationale is that Article III's Vesting Clause empowers and requires courts to faithfully interpret statutes as written – or, as *Marbury* phrased it, "to say what the law is."[207] But as Justice Gorsuch has said, and before him Judge Jeffrey Sutton on the Sixth Circuit, "the same rationale would appear to preclude affording *Chevron* deference to agency interpretations of statutes that bear both civil and criminal applications."[208] But as with an expansive major-rules doctrine, this exception would almost swallow the rule, since the category of statutes bearing both civil and criminal applications is a "category that covers a great many (most?) federal statutes today."[209]

Even if statutes with civil and criminal applications are not the majority of federal statutes, the Court would have a hard time finding a principled reason to stop the slide away from *Chevron* there.[210] "After all, the APA doesn't distinguish between purely civil and other kinds of statutes when describing the interpretive duties of courts," as then-Judge Gorsuch wrote. "Neither did the founders reserve their concerns about political decisionmakers deciding the meaning of existing law to criminal cases; Article III doesn't say judges should say what the law is . . . only when a crime is alleged."[211]

Imagine, for a moment, what this jurisprudential world would look like. Currently, courts that reach *Chevron* step two rule for the agency a whopping 93.8 percent of the time, but they rule for agency only 39 percent of the time when a decision is reached at step one, before deference to the agency.[212] That's not to say that without *Chevron* deference, only 39 percent of agency regulations would be upheld in court. But the disparity between 39 percent and 93.8 percent suggests there a lot of agency regulations that wouldn't survive in a world without *Chevron*.

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[205] King v. Burwell, 135 S. Ct. 2480, 2489 (2015).
[206] *See, e.g.*, Abramski v. United States, 134 S. Ct. 2259, 2274 (2014).
[207] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[208] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027-32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring)).
[209] *Id.*
[210] *Id.* ("And try as I might, I have a hard time identifying a principled reason why the same rationale doesn't also apply to statutes with purely civil application.").
[211] *Id.* at 1156.
[212] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

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At the very least, eliminating *Chevron* deference would have "major practical implications" for administrative agencies and the parties they regulate.[213] On the one hand, it would introduce new uncertainty about the validity of regulations purportedly authorized by ambiguous statutory text. On the other hand, it would introduce new certainty about judicial interpretations of ambiguous text because agencies would not later be able to alter the court's interpretations with alternative, "reasonable" interpretations.[214]

Scholars like Joshua Geltzer have pointed out that *Chevron* is not "the only foundation for the 'administrative state,'" and agencies "do not rely on Chevron for their very existence."[215] Fair enough. As Justice Gorsuch argued, "Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes."[216]

But that analysis assumes the Court replaces *Chevron* with a regime under which courts impose their preferred reading of ambiguous statute text on regulators and the regulated. And to be sure, that was the state of affairs before *Chevron*, when Congress was frequently creating ambiguous delegations and judges were frequently accused of imposing their pro-regulatory preferences on agencies that, at least in the Reagan administration, were interpreting ambiguous statutes to authorize a deregulatory agenda.[217] This conflict was a major reason many conservatives embraced *Chevron*.

While this regime would preclude unelected bureaucrats from quasi-legislating, it would invite unelected judges to quasi-legislate. Instead of empowering agencies to resolve statutory ambiguities, it would empower courts. From a policy perspective, this may or may not be preferable. But from a perspective of democratic accountability, it's out of the frying pan and into the fryer.

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[213] Joshua Matz, *The Imminent Demise of* Chevron *Deference?*, TAKE CARE (June 21, 2018), *https*://takecareblog.com/blog/the-imminent-demise-of-chevron-deference.
[214] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[214] *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring) ("*de novo* judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law"); *id.* ("It would 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.").
[215] Joshua Geltzer, *Trump's Supreme Court Might Overturn a Doctrine, but That Won't Destroy the 'Administrative State'*, L.A. TIMES (Aug. 5, 2018), http://www.latimes.com/opinion/op-ed/la-oe-geltzer-kavanaugh-administrative-state-20180805-story html.
[216] *Gutierrez-Brizuela*, 834 F.3d at 1158; *see also id.* ("We managed to live with the administrative state before *Chevron*. We could do it again.").
[217] For example, the D.C. Circuit of that era was frequently accused of activism on administrative law matters.

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And herein lies the difference between Justice Gorsuch's half-measures – extreme though they appear compared to the *Chevron* status quo – and Justice Kavanaugh's version of the major-rules doctrine. Kavanaugh's approach would authorize agencies to regulate only – *only* – when Congress has *clearly* authorized the regulation, not just when the best reading of an ambiguous statute supports the regulation.

Professor Dan Deacon has called Kavanaugh's a "weaponized" version of the major rules doctrine, with an "overall logic and tenor" that "is largely anti-regulatory."[218] Quite so. This "weaponized" version would preclude federal bureaucrats *and* federal judges from green-lighting regulation when the people's representatives lack the political support to clearly enact through bicameralism and presentment.

To the extent this would make regulation difficult – and it would – it's because the framers designed bicameralism and presentment to be difficult. They didn't want regulation unless it had the support of the people (the House of Representatives), the states (the Senate), and the president (chosen through an electoral college). "Legislation that attained broad support was less likely to be oppressive – to unfairly benefit one faction at the expense of another." Here, again, Kavanaugh's major-rules doctrine addresses concerns similar to those addressed by *Schechter*'s robust non-delegation. The doctrines are related because they strike at the same threat to liberty: laws insulated from our elected lawmakers.

Add to bicameralism and presentment other constitutional checks on government regulation like prosecutorial discretion, the pardon power, habeas corpus, judicial independence, and juries, and one sees, in Kavanaugh's words, a Constitution of "[c]heck after check after check after check" – all to "protect individual liberty" and "guard against faction" by "protect[ing] the minority against the majority."

In this context, the question is not, "What can the government do?" Rather the question is "Who decides what the government can do?"[219] When it comes to laws that deprive individuals of liberty and property, judges, presidents, and executive agencies have a say. But so must Congress – the branch most directly accountable to the voters. A robust non-delegation doctrine would prohibit Congress from abdicated its constitutionally prescribed place in the answer to the question, "Who decides?" And so would Justice Kavanaugh's major-rules doctrine.

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[218] Deacon, *supra* note 156.

[219] Kavanaugh, *supra* note 135 ("If you were in my judicial chambers, you would hear me often saying to my clerks: 'Every case is a separation of powers case.' And I believe that. 'Who decides?' is the basic separation of powers question at the core of so many legal disputes.").

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V. INDEPENDENCE

In 1935, for the first time in American history, the Supreme Court "blessed Congress's creation of the so-called 'independent' agencies."[220] When Congress creates an independent agency – like the FCC, FTC, or NLRB – it includes a "for-cause removal restriction that limits the President's ability to remove the heads of the agency – typically to cases of inefficiency, neglect of duty, or malfeasance in office."[221] The president thereby lacks the leverage to require independent agencies to adopt his policy preferences and follow his policy leadership.

The academic literature arguing against *Humphrey's Executor* is dense.[222] Its proponents argue that "Congress may not constitutionally deny the President the power to remove a policy-making official who has refused an order of the President to take an action within the officer's statutory authority";[223] that "Congress cannot effectively control the exercise of executive power by making the tenure of those who administer the laws dependent upon congressional whim";[224] and that "all federal officers exercising executive power must be subject to the direct control of the President."[225] This "unitary executive" theory includes a presidential authority to command obedience,[226] to countermand disobedience,[227] and to hire and fire.[228] It is a theory that the Supreme Court embraced ninety-two

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[220] Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 695 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).
[221] *Id.* at 695-96.
[222] *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19 (1986); Lee S. Liberman, Morrison v. Olson*: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313 (1989); Lawson, *supra* note 105; STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3 (2008); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544–46 (1994). The literature criticizing it is equally dense. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U.L. REV. 1346 (1994). Other highly respected scholars neither completely endorse nor completely oppose the theory. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).
[223] Miller, *supra* note 222, at 44.
[224] Currie, *supra* note 222, at 32.
[225] Calabresi & Rhodes, *supra* note 222, at 1158; *see also* Miller, *supra* note 222, at 58 ("the relevant considerations (listed in approximate order of importance) are these: (1) text; (2) structure; (3) history; (4) function; (5) prescription; (6) remedy; and (7) case law").
[226] Calabresi & Rhodes, *supra* note 222, at 1166.
[227] *Id.*
[228] Myers v. United States, 272 U.S. 52, 117 (1926); *see also id.* ("unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power").

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years ago in *Myers v. United States*,[229] retreated from nine years later in *Humphrey's Executor*,[230] and has made a mess of ever since.[231]

A. The Case Against Humphrey's Executor

No other lower-court judge embraced this unitary executive theory more than did then-Judge Brett Kavanaugh. In his academic writings, speeches, and judicial opinions, Kavanaugh has thoroughly, repeatedly, and consistently argued that "independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government" that "pose a significant threat to individual liberty and to the constitutional system of separation of powers and check and balances" because of their "enormous power over the economic and social life of the United States" and "the absence of Presidential supervision and direction."[232]

Kavanaugh's case against *Humphrey's Executor* begins with the Constitution's text and structure, and it returns again and again to the theme of individual liberty. "To protect individual liberty, the Framers . . . created a President independent from the Legislative Branch," and they vested "'[t]he executive Power'" in "a single President" who "possesses the entirety of the 'executive power.'"[233] He believes "a single head furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch."[234] And in order to exercise that power and maintain that accountability, "the President possesses not just the power to appoint, but also the power to *remove* executive officers."[235] That's because when "the President 'loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay.'"[236] Otherwise, "the result would be a fragmented, inefficient, and

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[229] 272 U.S. 52 (1926).
[230] 295 U.S. 602 (1935).
[231] *Compare* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010), Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991), Bowsher v. Synar, 478 U.S. 714 (1986), INS v. Chadha, 462 U.S. 919 (1983), Buckley v. Valeo, 424 U.S. 1 (1976), *and* Springer v. Gov't of Philippine Islands, 277 U.S. 189 (1928), *with* Morrison v. Olson, 487 U.S. 654 (1988), *and* Wiener v. United States, 357 U.S. 349 (1958); *see also* Froomkin, *supra* note 222 (describing many of these cases).
[232] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *see also* Jed Shugerman, *The Wolves in Kavanaugh's Footnotes*, SHUGERBLOG (July 12, 2018) https://shugerblog.com/2018/07/12/the-wolves-in-kavanaughs-footnotes/ ("Kavanaugh relies on [Scalia's dissent in *Morrison v. Olson*] to establish the 'unitary Executive' theory, a formalistic interpretation that centralized control of the executive branch under the president.").
[233] Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 689 (D. C. Cir. 2008) (Kavanaugh, J., dissenting) (quoting Vesting Clause).
[234] *Id.* (emphasis in original).
[235] *Id.* at 690 (emphasis in original).
[236] *Id.* (quoting *Myers*, 272 U.S. at 134).

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unaccountable Executive Branch that the President would lack power to fully direct and supervise."[237]

By Kavanaugh's account, this understanding of presidential power is consistent with founding-era history and subsequent practice. In the "Decision of 1789," the first Congress debated the president's authority to remove cabinet officers, and it concluded he possessed inherent constitutional authority to remove them at will.[238] Later, President Andrew Johnson's acquittal on impeachment charges for firing his Secretary of War "helped preserve Presidential control over the Executive Branch."[239] And in 1897, the Supreme Court ruled unanimously that President Cleveland could fire a U.S. Attorney, reasoning, in Kavanaugh's words, that "the debates and opinions on the removal power from the Decision of 1789 onward showed a 'continued and uninterrupted practice' of unlimited Presidential removal power."[240]

Of central importance to Kavanaugh's theory of executive power is the link between political accountability and individual liberty, a link that is severed when the president cannot fire subordinates at will. Cases about executive removal authority are also, therefore, cases about individual liberty, because the "executive power to enforce federal law against private citizens – for example, to bring criminal prosecutions and civil enforcement actions – is essential to societal order and progress, but simultaneously a grave threat to individual liberty."[241] It was in order to "ensure accountability for the exercise of executive power, and help safeguard liberty," that the framers "lodged full responsibility for the executive power in the President of the United States, who is elected by and accountable to the people."[242] Under this framework, if the president brings inappropriate prosecutions or civil enforcement actions, the people can fix the problem by voting him out of office. But when prosecutors and civil administrators are independent of the president, they are also independent of the people, and the people thus cannot check their exercises of power.[243]

There's nothing original about Kavanaugh's case for the unitary executive theory, and with it his implied (and sometimes express) criticism of *Humphrey's Executor*. To give just one example of the many attacks on *Humphrey's* from the legal academy, Professor Geoffrey Miller once called it "one of the more egregious opinions to be found on pages of the United

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[237] *Id.* at 691.
[238] *Id.* at 692.
[239] *Id.*
[240] *Id.* at 693 (citing Parsons v. United States, 167 U.S. 324, 340 (1897)).
[241] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5 (D.C. Cir. 2016).
[242] *Id.*
[243] *Id.* at 5-6.

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States Supreme Court Reports."[244] But what's unprecedented is for a lower-court judge to put into his judicial opinions the previous paragraphs' quotations – including Professor Miller's.[245]

Typically, lower court judges at least pretend to agree with Supreme Court precedents. But in opinions in 2008,[246] 2011,[247] an 2016,[248] and 2018,[249] he authored 130 pages distinguishing, undermining, and at times outright lambasting the Supreme Court's opinion in *Humphrey's Executor*. (The Supreme Court opinion itself was only 15 pages, and at 4,475 words, it had one-third the number of the words in Judge Kavanaugh's *footnotes*.[250]) Kavanaugh quoted leading unitary-executive theorists like Steven G. Calabresi, William K. Kelley, Geoffrey P. Miller, Saikrishna Prakash, Peter L. Strauss, and Christopher S. Yoo.[251] And he lumped *Humphrey's Executor* in with the "'discarded . . . relics of an overly activist anti-New Deal Supreme Court.'"[252]

When writing away from the bench, Kavanaugh added to these critiques. In a 2012 *Minnesota Law Review* article, he said "there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today," primarily because "this independence has clear costs in terms of democratic accountability" and is "in considerable tension with our nation's longstanding belief in accountability and the Framers' understanding that one person would be responsible for the executive power."[253] Even though "the people expect that the leader they elect" after "presidential candidates criss-cross the country for two years" of campaigning "will actually have the authority to execute the laws, as prescribed by the Constitution," unfortunately "that is not the way the system works now for large swaths of American economic and domestic policy, including energy regulation, labor law, telecommunications, securities

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[244] Miller, *supra* note 222, at 93.
[245] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 194 n.18 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).
[246] Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 685-715 (D. C. Cir. 2008) (Kavanaugh, J., dissenting).
[247] In re Aiken County, 645 F.3d 439-48 (D.C. Cir. 2011) (Kavanaugh, J., concurring).
[248] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5-55 (D.C. Cir. 2016).
[249] *PHH Corp.*, 881 F.3d at 164-202 (Kavanaugh, J., dissenting).
[250] Kavanaugh's footnotes in the 2008, 2011, 2016, and 2018 opinions were 13,030 words.
[251] Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1827-29 (2006); Miller, *supra* note 222, at 93; Strauss, *supra* note 222, at 597; Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive in Historical Perspective, 31 ADMIN. & REG. L. NEWS 5, 5-6 (2005); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); Calabresi & Prakash, *supra* note 222, at 598; Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 734-36 (2003).
[252] In re Aiken County, 645 F.3d at 442 (Kavanaugh, J., concurring).
[253] Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1474 (2009).

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regulations, and other major sectors where the President has little direct role in rule making and enforcement actions, despite those functions being part of the executive power vested in the President by the Constitution."[254]

In Kavanaugh's law review article, as one commentator has noted, Kavanaugh's "recommendations are cast largely as policy advice to Congress. But . . . parts of his explanation suggest that when pressed, he might well find constitutional reasons to reach the same result with respect to independent agencies."[255] Likewise, in his judicial opinions, Kavanaugh used his defense of the unitary executive theory hold only that in spite of *Humphrey's Executor*, Congress cannot create an independent agency appointed by an independent agency[256] or an independent agency led by a single commissioner, rather than by the more traditional multi-member commission.[257] But it is hard to read his 130 pages of attacks on independent agencies without concluding that he sees a constitutional problem with their independence from the president. Though he was bound by vertical stare decisis to stay within the limits of *Humphrey's Executor*, Kavanaugh nevertheless blazed a trail for limiting it and undermining it, laying the groundwork for its eventual overruling by the Supreme Court.

B. The Chances of Overruling Humphrey's Executor

Never since *Humphrey's Executor* was decided has the Supreme Court seriously considered overruling it. But on the other hand, never has the Supreme Court included so many justices with a history so much hostility to it. Whereas only one justice refused to extend *Humphrey's* in 1988 when *Morrison v. Olson* rejected the unitary executive theory,[258] a five-justice majority refused to extend *Humphrey's* in 2010 when it vindicated then-Judge Kavanaugh's tribute to the unitary executive in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[259]

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[254] *Id.* at 1473-74.

[255] Kevin Russell, *Kavanaugh on Presidential Power: Law-review Article on Investigations of Sitting Presidents (Updated)*, SCOTUSBLOG (updated July 16, 2018, 2:46 PM), http://www.scotusblog.com/2018/07/kavanaugh-on-presidential-power-law-review-article-on-investigations-of-sitting-presidents/

[256] Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 685-715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[257] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 164-202 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5-55 (D.C. Cir. 2016).

[258] Morrison v. Olson, 487 U.S. 654 (1988).

[259] *Free Enter. Fund*, 561 U.S. 477. Although Justice Gorsuch has since then replaced Justice Scalia, Gorsuch's record suggests as much fidelity to the founding era's original understanding of the unitary executive, and as much or more hostility to the potential for abuses of power by the modern administrative state.

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Like Kavanaugh, the majority in *Free Enterprise Fund* began with an embrace of a formal, strict separation of the government's three branches[260] and an interpretation of Article II's Vesting Clause consistent with the unitary executive theory.[261] And like Kavanaugh, the majority held that Congress violates the separation of powers and contravenes Article II's Vesting Clause when it restricts the President "in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States."[262]

Free Enterprise Fund considered the constitutionality of a provision of the Sarbanes-Oxley Act[263] that created a Public Company Accounting Oversight Board. The Board has the power to "Board may regulate every detail of an accounting firm's practice, including hiring and professional development, promotion, supervision of audit work, the acceptance of new business and the continuation of old, internal inspection procedures, professional ethics rules, and "'such other requirements as the Board may prescribe.'"[264] Congress made violations of the Board's rules a federal crime.[265] And it protected Board members from removal by providing that only the Securities and Exchange Commission – itself an independent agency – could remove members of the Board, and that removal can occur only under a narrow set of circumstances, such as a willful abuse of power.[266]

In striking down this arrangement, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito cited most of the weapons in the unitary executive theory's arsenal. And a "single President responsible for the actions of the Executive Branch"?[267] A "basic principle" of the Constitution.[268] The Decision of 1789? It's "'contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument.'"[269] *Myers*? A "landmark case" reaffirming the Constitution's text and history.[270] And the relation between the unitary executive and democratic accountability?

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[260] *Id.* at 483.
[261] *Id.*
[262] *Id.* at 484.
[263] 116 Stat. 745.
[264] *Free Enter. Fund*, 561 U.S. at 485 (quoting 15 U.S.C. § 7213(a)(2)(B)).
[265] *Id.*
[266] *Id.* 486 (citing 15 U.S.C. § 7217(d)(3)).
[267] *Id.* at 496-97.
[268] *Id.* at 496.
[269] *Id.* at 492 (quoting Bowsher v. Synar, 478 U.S. 714, 723-24 (1986)).
[270] *Id.*

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"Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.' That is why the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'"[271]

It's this latter point – on the importance of democratic accountability – that Chief Justice Roberts's majority opinion emphasizes the most: "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."[272]

Then, to further drive home the point, Roberts's opinion spends six more paragraphs on a mini-political-science lecture, warning against the perils of one branch (in this case, Congress) weakening another branch (in this case, the Executive). "The Framers created a structure in which '[a] dependence on the people' would be the 'primary controul on the government.' That dependence is maintained, not just by 'parchment barriers,' but by letting '[a]mbition . . . counteract ambition,' giving each branch 'the necessary constitutional means, and personal motives, to resist encroachments of the others.' A key 'constitutional means' vested in the President – perhaps *the* key means – was 'the power of appointing, overseeing, and controlling those who execute the laws.' And while a government of 'opposite and rival interests' may sometimes inhibit the smooth functioning of administration, '[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.'"[273]

In short, like Justice Kavanaugh, Chief Justice Roberts, Justice Thomas, and Justice Alito – with no reason to believe Justice Gorsuch would not have

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[271] *Id.* at 498 (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961); 1 Annals of Cong., at 499 (J. Madison)).
[272] *Id.* at 499.
[273] *Id.* at 499-501 (quoting THE FEDERALIST NO. 51, at 349 (J. Madison); THE FEDERALIST NO. 48, at 333 (same); 1 Annals of Cong., at 463).

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joined them – have *already* said that the President's "power includes, as a general matter, the authority to remove those who assist him in carrying out his duties."[274] *And* that "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[275] And *finally* that that "diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate.'"[276]

To be sure, Roberts's majority opinion in *Free Enterprise Fund* did not purport to overrule *Humphrey's Executor*, and unlike Justice Kavanaugh's opinions, it refrained from any direct criticism of *Humphrey's*. Nevertheless, Roberts's reasoning reads like a dissent from *Humphrey's*, with no praise for *Humphrey's* holding and thirty-one pages of indirect criticisms.

The current Court's hostility to *Humphrey's Executor* is also evident from its aversion to citing it since the confirmation of Justice Thomas, the longest-serving member of the current Court. Whereas many of the Court's most important precedents are cited frequently, the five Republican appointees to the Court have never authored an opinion citing *Humphrey's Executor* – with the exception of *Free Enterprise Fund*, when it invalidated the PCAOB's removal provision *in spite of Humphrey's Executor*.[277] And the only two times that any of the current Republican appointees have even joined an opinion that cited *Humphrey's Executor* were in a Justice Souter opinion that cited *Humphrey's* for the uncontroversial proposition that dicta are not binding,[278] and in a footnote to Justice Scalia's opinion for the Court in *Printz v. United States*, when *Humphrey's* was cited, without approval, for the proposition that "contemporary regulatory agencies have been allowed to perform adjudicative ('quasi-judicial') functions."[279]

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[274] *Id.* at 513-14.
[275] *Id.* at 514.
[276] *Id.* (quoting THE FEDERALIST NO. 70, at 478 (Alexander Hamilton)).
[277] Justice Thomas is the longest-serving Republican appointee on the Court, and he joined on October 23, 1991. Since then, *Humphrey's Executor* has been cited seven times: in *Free Enterprise Fund*, in *Printz* (authored by Justice Scalia), in a solo concurrence by Justice Souter, in a solo dissent by Justice Stevens, in a Breyer dissent joined by Ginsburg and Sotomayor, and in a Breyer dissent joined by Stevens, Souter, and Ginsburg).
[278] Cent. Green Co. v. United States, 531 U.S. 425, 431 (2001) (citing Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935) ("dicta 'may be followed if sufficiently persuasive' but are not binding").
[279] Printz v. United States, 521 U.S. 898, 908 n.2 (1997) (citing *Humphrey's Executor,* 295 U.S. 602).

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C. The Path to Less Independence

Justice Kavanaugh's lower-court opinions and the Supreme Court's opinion in *Free Enterprise Fund* make clear that *Humphrey's Executor* "does not rank on the majority's top-ten list of favorite precedents."[280] But the principles of stare decisis require more than disapproval of a precedent before the Court can overturn it. It's therefore unlikely that the current Court will simply overturn *Humphrey's Executor* at the first opportunity.

Instead, the Court is likely to continue striking blows against *Humphrey's* outer flank. There is already a circuit split over whether Congress can provide for removal protections for a director in charge of an agency, as in the Federal Housing Finance Agency and the Consumer Financial Protection Bureau, or whether *Humphrey's* should be limited to the more-traditional multi-member commissions like the FTC on which Humphrey served.[281] If the Court grants cert on this issue and invalidates removal protections for single-director agencies – as then-Judge Kavanaugh would have done in *PHH Corp. v. CFPB*[282] -- then the Court will have followed up on *Free Enterprise Fund* with a second blow against *Humphrey's Executor*.

At the same time, we can expect the Court to further undermine *Humphrey's Executor* through rhetoric more directly critical of than Chief Justice Roberts used in *Free Enterprise Fund.* Since Roberts is the most cautious – in substance and style – of the five Republican appoints, the next author of an opinion related to *Humphrey's Executor* is likely to use less rhetorical restraint.

After a number of years – my guess is no more than a decade – the Court will be in a position to say of *Humphrey's Executor* the same five things it said when it overturned *Abood* in *Janus v. AFSCME*.[283] First, just as "the quality of *Abood*'s reasoning" was poor, the current Court believes *Humphrey's Executor* was poorly reasoned, as described above, particularly by Justice Kavanaugh.[284] Second, *Humphrey*'s rule has proven increasingly unworkable, as divided panels, en banc courts, circuits, and Supreme Court 5-4 decisions have shown and will likely demonstrate even more vividly as the new Court moves against *Humphrey's*.[285] Third, just as *Janus* said *Abood*

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[280] Harris v. Quinn, 134 S. Ct. 2618, 2652-53 (2014) (Kagan, J., dissenting).
[281] *Compare* Collins v. Mnuchin, 896 F.3d 640 (5th Cir. 2018) (invalidating structure of FHFA), *with* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (upholding structure of CFPB).
[282] PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5-55 (D.C. Cir. 2016) (Kavanaugh, J.).
[283] Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).
[284] *Id.* at 2478.
[285] *Id.*

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had become inconsistent with related decisions – particularly the two relatively recent anti-*Abood* opinions that the same 5-4 majority wrote[286] "saying (and saying and saying)" how awful it found *Abood*[287]) – *Humphrey's* will become increasingly inconsistent with related decisions written with rhetoric hostile to *Humphrey's*, including *Free Enterprise Fund* and whichever decision the Court hears regarding single-director agencies. Fourth, "developments since the decision was handed down"[288] undermine *Humphrey's*, in particular the growth of the administrative state and the movement away from democratic accountability driven by *Humphrey's* and two lines of cases that followed it and exacerbated the undemocratic mischief it opened the door to: the weak, post-*Schechter* non-delegation approach, and *Chevron*.

Finally, fifth, the Court can say that reliance on *Humphrey's Executor* is less strong than it might appear, because, as *Free Enterprise Fund* showed, the remedy for unconstitutionally constituted agencies need not be disruptive or destabilizing.[289] As a general matter, unconstitutional tenure provisions are severable from the remainder of the statute."[290] Therefore, overturning *Humphrey's* would "affect[] the conditions under which [some agencies'] officers might some day be removed," but "would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office."[291] In other words, the administrative state can continue to administrate: all that changes is that the President can fire and replace renegade bureaucrats.[292]

In short, although administrative and constitutional law scholars will correctly view an overturning of *Humphrey's Executor* as a jurisprudential earthquake, most citizens outside that bubble, including even most lawyers, will likely view its overturning with a collective yawn. Here too, the comparison to *Janus* is not far off the mark. It's precisely the type of major

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[286] *Id.*
[287] Harris v. Quinn, 134 S. Ct. 2618, 2653 (2014) (Kagan, J., dissenting).
[288] *Janus*, 138 S. Ct. at 2478-79.
[289] *Id.* at 2479.
[290] *Id.* at 508.
[291] *Id.*
[292] There may be exceptions where reliance factors are unusually strong. "To be sure, in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control – the Federal Reserve Board may be one example, due to its power to directly affect the short-term functioning of the U.S. economy by setting interest rates and adjusting the money supply. It is possible to make a similar case, on similar grounds, for exempting other agencies from direct presidential control, and it also makes sense generally to treat administrative adjudications differently from policy decisions, rulemakings, and enforcement actions. Yet independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the Framers' understanding that one person would be responsible for the executive power." Kavanaugh, *supra* note 253, at 1474.

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decision Chief Justice Roberts believes the Supreme Court's reputation can bear – radical, but nerdy; enormously consequential from the perspective of democratic accountability, but not emotionally charged like issues of Obamacare and abortion. And Roberts's decision to author *Free Enterprise Fund* further suggests that this might be a hill he's willing to fight on – even if, unlike Justice Kavanaugh, he hasn't spent the past decade jurisprudentially preparing to lead the charge up that proverbial hill.

VI. CONCLUSION: THE RETURN OF DEMOCRATIC ACCOUNTABILITY

If the Court moves from *Chevron* toward *Schechter* on the *Schechter*-to-*Chevron* spectrum, as the above analysis argues it will, the Court will not change what the federal government can do. But it will change who, within the federal government, can do it. And in each of the three major areas ripe for change – delegation, deference, and independence – the Court is likely to require more democratically accountable parts of the federal government to do what less accountable parts have been doing for (too many) decades.

First, consider the relation between democratic accountability and delegation. Because the founding generation mistrusted government power, the Constitution requires the government to make laws through a difficult process designed to preclude laws that lack sufficient popular support. Bicameralism precludes any law not supported by a majority of the people's directly elected Representatives and a majority of Senators representing the states. And unless the law has the support of the president – the representative not of any faction or region but of the whole nation – presentment precludes any law that lacks a legislative supermajority. Each of these officials stands for election every two, four, or six years, thus increasing the likelihood that they will reflect the views of their electoral constituencies and ensuring that those who ignore that will can be removed from office.

Although one can imagine even more democratic systems, bicameralism and presentment's level of democratic accountability is relatively high. But excessive delegation eviscerates that democratic accountability. It insulates elected members of Congress from the lawmaking process, and it empowers unelected policymakers in administrative agencies. The result today is a system in which 99% of lawmaking is performed by administrators who were not chosen by the people; who have little-to-no contact with the people; and who cannot be removed at the ballot box by the people. Their regulations, many undeniably sound and some undoubtedly excessive, cost the nation's workers, consumers, and companies $2 trillion per year – in a nation founded under the banner of "no taxation without representation."

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Second, consider the relation between democratic accountability and deference, and its connection to delegation. *Chevron* deference throws gas on the fire of undemocratic delegation by empowering an unelected agency to regulate even when Congress – according to the best reading of the statute – did not authorize the regulation. Now, not only can unelected agencies create regulations Congress chooses to allow them to create – a massive amount of regulations, since members of Congress, to protect themselves from unpopular regulatory choices, have every incentive to delegate – but the agencies can also create regulations that Congress did not authorize, or even imagine.

To be sure, *Chevron* may actually be faithful to Congress's intent when Congress has unambiguously delegated an unresolved policy question to an agency.[293] But this returns us to the problem of excessive delegation. If the democratically accountable representatives of the citizenry and their states have not chosen a policy, the policy ought not to become law.

Third, consider the relation between democratic accountability and agency independence, and its connection to delegation and deference. Even without agency independence, delegation and deference create a system in which $2 trillion-worth of regulations can be enacted into law by unelected administrators. But in independent agencies, the absence of democratic accountability is multiplied by the inability of an elected president to hold administrators accountable. Thus, rather than being passed by elected representatives who are just one level removed from the people, and rather than being promulgated by administrators who are two levels from the people (with the president in between), regulations promulgated by independent agencies are *three* levels removed: they are passed not by the people, not by the people's representatives, and not by an executive agency accountable to the people's elected president, but by independent administrators who are accountable to no one – including and especially the people.

In short, by traveling from *Schechter* to *Chevron*, the Supreme Court has profoundly undermined the democratic accountability central to the Constitution's conception of self-government. To be sure, there are arguments for why lawmaking is best left in the hands of the unelected. Some say bicameralism and presentment take too long. Some say elected officials lack the necessary expertise. Some say the people are too likely to elect poor policymakers. I do not agree with these arguments. More to the

[293] Kavanaugh, *supra* note 124, at 2152 ("All of that said, *Chevron* makes a lot of sense in certain circum- stances. It affords agencies discretion over how to exercise authority delegated to them by Congress. For example, Congress might assign an agency to issue rules to prevent companies from dumping "unreasonable" levels of certain pollutants. In such a case, what rises to the level of "unreasonable" is a policy decision.").

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point, I do not believe the Constitution allows for them. And the thesis of this article is that the Supreme Court no longer believes it either.

So what will the Court do? In short term, as described above, I expect the Supreme Court to create exceptions to permissible delegation, exceptions to *Chevron* deference, and exceptions to *Humphrey's Executor*. Then, over time, the exceptions will likely swallow the rules.

If so, major delegations will be limited to delegations that include detailed guidance from Congress. Major rules will not receive *Chevron* deference and may instead require a clear statutory statement authorizing them. Minor rules will require authorization from the best reading of the statute, which may or may not be read to delegate minor policymaking decisions to the agency, depending on the statutory language and structure. And for-cause removal restrictions will be limited to agencies like the Federal Reserve, where reliance interests in *Humphrey's Executor*'s stare decisis effect are unusually strong.

Leading the way will be Justice Brett Kavanaugh, whose extensive writings in these areas show an extreme sensitivity to the relation between separation of powers, democratic accountability, and liberty. As Professor Jonathan Adler recently wrote, "In Brett Kavanaugh, President Trump may not have found a justice to 'deconstruct the administrative state' – in Steve Bannon's formulation – but he has found one who will help bring it to heel."[294]

Of course, Justice Kavanaugh and his likeminded colleagues will be able to go only as far as the cautious Chief Justice John Roberts will travel with them. His writings do not display Kavanaugh's blatant disgust with what makes the administrative state so democratically unaccountable. But Roberts's writings do reveal a skepticism of the administrative state's excesses, an openness to limiting the precedents that have fueled those excesses, and, I believe, a willingness to severely cut back on each of those precedents once they are ripe for reconsideration.

Their days are not over. But they are numbered. And with Justice Kavanaugh's ascension to the Supreme Court, that number looks smaller than ever.

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[294] Adler, *supra* note 158.

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