

## THE DEBATE

# Is Deference Dying? Our Panel Holds a Vigil Over the *Chevron* Precedent

For more than 30 years, the Supreme Court's decision in *Chevron v. NRDC* has been at the heart of environmental law and administration law generally. In *Chevron*, the Supreme Court mandated that courts defer to reasonable interpretations of ambiguous statutory provisions by the agencies charged with implementing those provisions. Under subsequent decisions, the scope of *Chevron* grew broader. In *Auer v. Robbins*, the Supreme Court mandated deference to agencies' interpretation of their own regulations. Then in *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that an agency's interpretation trumped prior judicial precedent.

But the tide may now be turning. Through the confirmation process of now-Justice Neil Gorsuch, his criticisms of the *Chevron* deference doctrine became widely known. Indeed, while sitting on the Tenth Circuit, then-Judge Gorsuch penned a concurrence advocating for the abandonment of *Chevron* deference. Nor is he alone in what Judge Janice Rogers Browns called "an Article III renaissance . . .

emerging against the judicial abdication performed in *Chevron's* name." Whether Justice Gorsuch plays a role in moving the law in that direction now that he is on the Supreme Court remains to be seen.

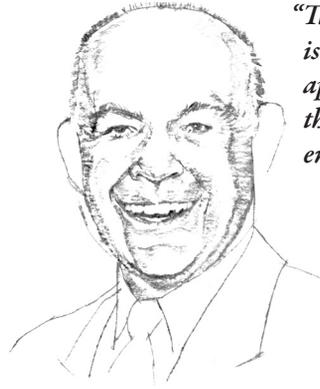
Even before the most recent addition to the High Court, the justices appeared to be stepping away from *Chevron's* broad reach. In *King v. Burwell*, for example, the Court declined to apply *Chevron* in the first instance. The Court concluded that the decision was inapplicable because the question posed was one "of deep economic and political significance" that was central to the Affordable Care Act. Moreover, multiple Supreme Court justices have suggested that it may be time to consider whether *Auer* deference should be retained, but have not yet found the appropriate vehicle to do so.

Has the death knell for *Chevron* been sounded? Would the demise of the famed precedent incapacitate EPA and other federal agencies? What would diminished deference mean for attempts to address the complex environmental challenges of the 21st century?



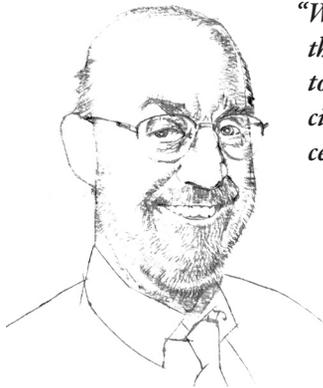
*“Courts will reach the outcomes they want, although they may have to take different pathways to get there.”*

**William Bumpers**  
*Clean Air and Climate Practice*  
BAKER BOTTS LLP



*“The Chevron structure is so ingrained in our approach to government that it will and must endure.”*

**John C. Cruden**  
*President-elect*  
AMERICAN COUNCIL OF  
ENVIRONMENTAL LAWYERS



*“We would be restricting the nation’s ability to address the circumstances of the 21st century world.”*

**David Doniger**  
*Climate and Clean Air Program*  
NATURAL RESOURCES DEFENSE  
COUNCIL



*“I don’t think the Court is likely to overrule Chevron, but that wouldn’t be the end of the world either.”*

**Dan Farber**  
*Sho Professor of Law*  
UNIVERSITY OF CALIFORNIA



*“I am close to thinking that we’d be better off with no Chevron at all than with the lopsided Chevron we now have.”*

**Lisa Heinzerling**  
*William J. Brennan Professor of Law*  
GEORGETOWN UNIVERSITY



*“If the threat to Chevron is a harbinger of things to come, the implications for the regulatory project would be dire.”*

**Sharon Jacobs**  
*Associate Professor of Law*  
UNIVERSITY OF COLORADO

## Is *Chevron* Dead or Just Morphing?

By WILLIAM BUMPERS

A great deal has been made of the impending demise of *Chevron* deference since the Supreme Court's 2015 ruling in *King v. Burwell*, the Obamacare case. Neil Gorsuch's confirmation to the Supreme Court has fueled further speculation that the death knell is tolling for *Chevron* and its progeny, with major implications on EPA's ability to do its job.

These concerns are overwrought. Future Supreme Court decisions are unlikely to eliminate *Chevron* deference or greatly diminish EPA's authority. Far more likely is that a new *Chevron* process will emerge that gives courts primary authority to interpret some issues, purely legal or major questions, but continues to give deference to agencies on scientific or technical findings. Practically speaking, not much is likely to change in this world of *Chevron* reborn. Courts will simply be able to do explicitly what they already do more covertly: bend the doctrine to their will to reach desired policy outcomes, while deferring to agency expertise when it is practical to do so.

From the beginning, courts applying the two-step *Chevron* test have had wide latitude in determining whether statutory language is "ambiguous" and whether agency interpretations of statutory language are "reasonable." These are, and have always been, squishy and mutable standards. Courts have found ambiguity where there is none, clarity in poorly drafted and conflicting language, and deemed agency interpretations reasonable or unreasonable based on how closely an interpretation comports with the court's own views.

With *King v. Burwell*, the Supreme Court arguably introduced a new, threshold step to the *Chevron* analysis that further blurs the doctrine. This "step zero" requires asking if the issue at hand is one of major "economic and political significance" (citing *Brown & Williamson Tobacco Corp.*). If so, the court need not defer to the agency or apply *Chevron* at all. The Supreme Court cut into *Chevron* in at least one other way in *King v. Burwell*, finding that agencies are "especially unlikely" to be entitled to deference on issues outside of their expertise (citing *Gonzales v. Oregon*).

In August 2016, then Judge Gorsuch wrote a concurring opinion in *Gutierrez-Brizuela v. Lynch* that strongly criticizes *National Cable & Telecommunications Association v. Brand X Internet Services*, a decision that gives agencies the ability to effectively reject and overrule a court's interpretation of statutory language. The *Gutierrez* concurrence has fueled speculation that Justice Gorsuch would vote to eliminate *Chevron* deference if given the opportunity on the Supreme Court. But *Gutierrez* is not a call for the wholesale abolishment of the *Chevron* doctrine. Instead, it is a focused criticism of the expansion of *Chevron* deference through *Brand X*—an expansion which, according to Judge Gorsuch, improperly gives the executive branch and not the judicial branch authority to say "what the law is."

The *Gutierrez* concurrence does not cite *King v. Burwell*, but Justice Gorsuch likely would view the latter case simultaneously as going too far and not far enough. He might view *King v. Burwell* as going too far to the extent it could eliminate deference to an agency's technical and scientific expertise just because significant political or economic issues are involved. In *Gutierrez* Judge Gorsuch lashed out at the notion of deferring to agencies on issues of law, not on issues requiring

an agency's specialized knowledge. At the same time, Justice Gorsuch might view *King v. Burwell* as not going far enough because he would eliminate deference to agencies on all wholly legal questions, not just those involving significant political or economic issues.

Taking *King v. Burwell* and *Gutierrez* together, a new *Chevron* process could emerge from the Supreme Court, one with up to four steps:

First, is it an issue of major political or economic significance (that does not require an agency's technical or scientific expertise)?

Second, is it a purely legal issue?

If the answer to either of those questions is yes, then the court would review the statutory language *de novo*, without applying *Chevron* deference. If the answer to both is no, then the court would move on to a more traditional *Chevron* analysis to determine if deference is appropriate:

Third, is the statutory language ambiguous?

Fourth, if so, is the agency's interpretation reasonable?

Given that *Chevron* is an ever-morphing and malleable doctrine, outcomes under a three- or four-step approach are unlikely to differ vastly from those under a two-step approach, or a world with no *Chevron* doctrine at all. Courts will reach the outcomes they want to reach, although they may have to take different pathways to get there.

**William Bumpers** heads the Clean Air Act and Climate Practice at Baker Botts LLP. The opinions expressed above are his own and should not be attributed to any of his clients. He thanks Leslie Couvillion for her support on this article.

## The Precedent Is Here for a Long Time

By JOHN C. CRUDEN

In an article published in 2016 in the *Harvard Environmental Law Review*, entitled “The Enduring Nature of the *Chevron* Doctrine,” coauthor Matthew Oakes and I refer to the famous Mark Twain quote by saying that reports of *Chevron*’s death “have been greatly exaggerated.” And, I concluded, “*Chevron* is not, in environmental terms, a dead, dying, or threatened species.”

In that forum, I explored the pre-*Chevron* law, the decision itself, and its unlikely champion — Justice Antonin Scalia. His insightful 1969 *Duke Law Review* article entitled “Judicial Deference to Administrative Interpretations of Law” must be the starting point for thoughtful scholarship in this area.

Prior to *Chevron*, courts decided on a case-by-case basis whether Congress intended a particular statutory result or, alternatively, whether Congress intended to leave resolution to the agency. In many ways *Chevron* simply replaces this ad hoc determination with a presumption that, in the face of uncertainty, agencies have discretion. In short, *Chevron* provided a measure of predictability, a framework for rational decisionmaking. And the long-standing and well-known nature of the doctrine means that Congress is fully aware of this 33-year-old legal standard and can act accordingly.

Before the precedent, it was unclear whether interpretations of ambiguous law would be in the hands of a politically accountable federal agency or a judge. And, if the court ruled, whether only Congress could reverse it. Of course, if Congress does not want an agency to have interpretive discretion, it has the power to constrain agency action in legislation.

Congress, however, has never demonstrated intent to handle the day-to-day activity that is needed to administer and interpret the laws they regularly enact. Congress, over the past several decades, has passed increasingly complex laws, many with strident mandatory deadlines for agency rulemaking. The Constitution clearly grants the executive agencies an implementation role.

If we were, instead, to rely on an imperfect implementation role by either Congress or the courts, it could lead to an unresponsive, inconsistent government overwhelmed with its tasks and crippled by inaction. We have seen some of that bureaucratic malaise in other countries who lack our Constitution and the *Chevron* doctrine.

Much has now been written about Chief Justice John Roberts’s opinion in *King v. Burwell*, where he did not use or apply *Chevron* in interpreting the Affordable Care Act, and Justice Clarence Thomas’s concurring decision in *Michigan v. EPA*, where he questioned the constitutionality of the doctrine. Similarly, last year, then 10th Circuit Judge Neil Gorsuch filed a concurring opinion to his own opinion in *Gutierrez-Brizuela v. Lynch*, also raising constitutional concerns with *Chevron* and its progeny.

However, with the exception of Gorsuch, every sitting justice has cited to, referred to, and used *Chevron* in numerous Supreme Court decisions. And, Gorsuch said on multiple occasions in his confirmation hearing that he relies on prior decisions of the court and gave special weight to those decisions with long-standing usage. *Chevron*, probably the most-cited decision of the Supreme Court in our history, clearly falls in the category of both long standing and well used.

As acting assistant attorney general, Environment and Natural Resources Division, during a Republican administration, and assistant attorney general during a Democratic administration, I can attest that the doctrine is apolitical and used often

to assist in statutory interpretation. I have frequently reminded attorneys, however, that *Chevron* is a doctrine for court interpretations. It does not obviate an agency’s responsibility to faithfully interpret and apply the law. And, it is not a get-out-of-jail-free card that allows untethered, politically based decisions to take the place of the rule of law.

I have no doubt that future government briefs will now be using *Chevron* to support agency environmental decisions that I may disagree with. It is well to remember, however, that the doctrine has two prongs, and the second provides deference to agency interpretations of an ambiguous decision only if it is “reasonable.” That is a significant balance check, and any agency interpreting statutes should feel the weight of this requirement, and the administrative record supporting an agency interpretation must be full, rigorous, transparent, and complete. If not, the agency decision should not survive judicial review.

My conclusion is that *Chevron* is here for the long term. It remains the starting point for any analysis of agency discretion, with appropriate constraints. At bottom, the *Chevron* structure is so ingrained in our approach to government that it will and must endure. However, it is premised on a firm commitment to correct administrative lawmaking and still requires careful judicial review of agency decisions.

As Justice Scalia said, “I tend to think, however, that in the long run *Chevron* will endure and be given its full scope — not so much because it represents a rule that is easier to follow and thus easier to predict (although that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.”

**John C. Cruden** is president-elect of the American College of Environmental Lawyers and the most recent assistant attorney general of the Environment and Natural Resources Division.

## How Not to Turn *Chevron* Upside Down

By DAVID DONIGER

More than 30 years ago, I argued a routine question of statutory interpretation in a D.C. Circuit case called *NRDC v. Gorsuch*. Little did I know that the case would go to the Supreme Court, emerging as *Chevron v. NRDC*, and that I'd play a role in shaping modern administrative law by losing. Lawyers can take issue with whether the *Chevron* tests are properly applied in specific cases. But the doctrine itself has proven durable — for some, too durable.

The House-passed Regulatory Accountability Act — a sprawling collection of every administrative-state-destroying idea on the right — attempts to reverse *Chevron* outright. No self-respecting president would sign a law that surrendered so much executive authority.

Justice Neil Gorsuch (ironically, son of the original respondent) has argued against *Chevron* deference largely on formal grounds, though his 10th Circuit opinion can be read to suggest he'd still expect judges to accord significant weight to agency interpretations.

The sharpest challenge has come from Judge Brett Kavanaugh, in his recent dissent from the D.C. Circuit's denial of rehearing en banc in the "net neutrality" case. Kavanaugh attempts to tee up for the Supreme Court a huge change: "While the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules."

Wow. Kavanaugh's doctrine flips *Chevron* on its head. For a "major" rule — and Kavanaugh admits that classification has a "know it when you see it" quality — there's no legislative authority at all if a statute is ambiguous. If a judge deems the question "major," and

finds Congress has not legislated with complete clarity, then Congress has not legislated at all. The non-delegation doctrine — firmly rejected by Justice Antonin Scalia for a unanimous Court in *Whitman v. American Trucking Associations* in 2001 — is B-A-A-A-CK.

This would have huge consequences across many fields, environmental law included. This judge-made doctrine would block Congress from arming the executive branch with authority to address new problems — a fundamental feature of laws like the Clean Air Act. Rather, agencies would have to come running back to Capitol Hill for new authority every time a "major" new problem comes up.

This is the opposite of current law. As the Supreme Court said in *Massachusetts v. EPA*, Congress understood "that without regulatory flexibility, changing circumstances, and scientific developments would soon render the Clean Air Act obsolete. The broad language of §202(a)(1) [addressing motor vehicle emissions] reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence."

The vehicle provision, Kavanaugh concedes, passed clarity muster with the Supreme Court, though he coyly refrains from saying whether he agrees. From his questions at oral argument in the as-yet-undecided Clean Power Plan case, however, one can readily imagine Kavanaugh declaring that the act's stationary source provision, Section 111(d), fails his clarity test.

Kavanaugh strives to present a coherent basis in Supreme Court decisions for his *Chevron* inversion, but there is less there than meets the eye. To be sure, the Court has several times referred to matters of "vast political and economic significance," but most such mentions are *within*, not apart from, applications of the *Chevron* doctrine.

See, for example, *Utility Air Regulatory Group v. EPA*, where economic and political significance is just a part of Scalia's reasoning for concluding, using traditional tools of statutory construction under *Chevron*, that Con-

gress did not intend the Prevention of Significant Deterioration permit program, designed to apply to a few thousand large industrial facilities, to extend to millions of smaller sources that emit 250 tons per year of CO<sub>2</sub>.

By reversing EPA in *UARG*, Scalia did little damage to the CAA's capacity to address new problems under other provisions. The same is true of his opinion in *Michigan v. EPA*, which required the agency to assess costs and benefits before regulating power plants under Section 112, but left EPA with substantial deference on how to analyze and weigh those costs and benefits. Many observers disagree with his outcomes in these two cases, and Scalia can be accused of torquing statutory meanings. But at least he did his work within the *Chevron* framework.

Then there's *King v. Burwell*, which Kavanaugh intriguingly sets aside. Chief Justice John Roberts gave two reasons for not using the *Chevron* framework: that the health insurance question was of vast significance, and that the Internal Revenue Service lacks health insurance expertise. From that point on, however, his opinion seems no different than a *Chevron* Step One analysis of the statute's meaning, using the traditional tools of statutory construction. In the end, he concluded the statute had only one possible meaning — the one the government had adopted.

So here's hoping there aren't enough takers on the Supreme Court for Kavanaugh's "major rules" gambit. Even if the Congress of today weren't virtually incapable of legislating — even if we had the Congress of the New Deal or Earth Day — we would be ill-served by so restricting the nation's ability to pass laws that give agencies the authority and responsibility to address the fast-changing circumstances of the 21st century world, whether in the environmental field or so many others.

**David Doniger** is director of the climate and clean air program at the Natural Resources Defense Council.

## Will *Chevron* Be Overruled? Would It Matter?

By DAN FARBER

For over thirty years, courts have used the *Chevron* doctrine when an agency's interpretation of a statute is challenged. In a nutshell, the doctrine requires the courts to accept the agency's interpretation of a statute if that interpretation is reasonable, even though the court might otherwise have adopted a different interpretation. Some conservatives now argue that the doctrine gives agencies too much power and usurps the authority of the courts to interpret the law. What does the future hold for this doctrine?

As the saying goes, prediction is difficult, especially about the future. Still, I'm skeptical that the Supreme Court will overrule *Chevron* any time soon. So far, Justices Neil Gorsuch and Clarence Thomas seem to be likely votes to overrule. But it's not clear where the other three votes would come from.

There are several reasons why John Roberts, Anthony Kennedy, and Samuel Alito might hesitate. First, *Chevron* has become a foundational decision in administrative law. In case after case, courts have applied *Chevron*. The Supreme Court itself has cited *Chevron* over two hundred times. The last time I checked Westlaw, it had been cited fifteen thousand times by other courts (and even more often by secondary sources like law journals). The Supreme Court is likely to think twice before upsetting such a well-entrenched precedent.

Second, overruling *Chevron* in the next few years would have the effect of impeding the conservative deregulatory program of a Republican president, since Trump's decisions would receive less judicial

deference. I'm enough of a realist to think that might color the justices' thinking on the subject, although not enough of a cynic to view it as decisive.

And third, the Court has shown a notable reluctance to flatly overrule major decisions — even decisions like *Miranda* that have long been derided by conservatives. Instead, the preference seems to be to chip away at those decisions by adding qualifiers and exceptions.

In fact, that process has already begun. *United States v. Mead Corp.*, which involved an obscure tariff issue, limited the *Chevron* doctrine to legally binding agency actions, such as rulemaking, as opposed to less-formal agency expressions of an agency's legal views. Then, in *King v. Burwell* (the Obamacare case), Chief Justice Roberts declined to apply *Chevron* because of the importance of the issue, limiting *Chevron* to cases involving less consequential agency decisions. And in *Michigan v. EPA*, where the Court overturned EPA's regulation of mercury emissions from power plants, it put additional teeth into the "reasonableness" requirement. The upshot is that agencies don't get *Chevron* deference as often, and the extent of the deference seems more limited. It seems likely that the Court will continue to chip away at *Chevron* deference rather than overruling the doctrine outright.

In any event, it's unclear how important overruling *Chevron* would be. It seems plausible that the doctrine increases the willingness of judges to defer to agencies. But courts engage in some deference even when *Chevron* doesn't apply. The big differences are that without *Chevron*, the degree of deference would be more contextual and agencies would have less leeway to change their interpretations of statutes to follow changes in the political winds.

The alternative to *Chevron* is called *Skidmore* deference, under

which the court's deference to an agency depends on multiple factors, not just whether a statute is ambiguous: the strength of agency's reasoning; the complexity of the statute; the extent of the agency's expertise; the consistency of the agency's views; and the carefulness of its consideration of the issue. (The *Skidmore* doctrine dates back to a 1944 case by that name about overtime pay.) So *Chevron* makes the most difference in cases where the agency lacks expertise, its reasoning is poor, its decision is inconsistent with earlier or later decisions, and it was shooting from the hip. Are we really sure that we want courts to defer to agencies under those circumstances?

*Chevron* has some advantages over the *Skidmore* test. It is simpler and hopefully more predictable. It also gives more leeway than *Skidmore* for agencies to change their interpretations of statutes when circumstances have changed. But the practical differences between the two standards aren't as dramatic as their different formulations might suggest.

The conventional wisdom is that overruling *Chevron* would be crippling to the modern administrative state. But EPA and other administrative agencies were thriving before *Chevron* was decided in 1984, and agencies like the Securities and Exchange Commission and the Federal Trade Commission had been active and prompting rage from conservatives far earlier. I don't think the Court is likely to overrule *Chevron*, but that wouldn't be the end of the world either.

**Dan Farber** is the Sho Professor of Law at the University of California, Berkeley, where he co-directs the Center for Law, Energy, and the Environment.

## The “Power Canons” and *Chevron’s* Remains

By LISA HEINZERLING

So much attention has lately focused on *Chevron’s* potential demise that it is easy to forget the damage the Supreme Court has already done to the interpretive framework of the precedent. Recent decisions embracing what I have called the “power canons” have badly skewed *Chevron’s* framework, empowering courts to disfavor ambitious regulatory programs while allowing the usual *Chevron* pass for deregulatory or weakly regulatory programs. The dangers of this asymmetry for broadly protective regulatory initiatives are grave enough that I am close to thinking that we’d be better off with no *Chevron* at all than with the lopsided *Chevron* we now have.

Three recent decisions from the Supreme Court elaborate the power canons. In *Utility Air Regulatory Group v. EPA*, the Court warned that it would view with skepticism an agency’s assertion of regulatory authority it has not previously used when that authority is drawn from a long-existing statute and the underlying matter has large economic and political significance.

In *King v. Burwell*, the Court declined to apply the *Chevron* framework when it found that an agency decision involved a question central to the statutory scheme, of large economic and political significance, and outside the agency’s expertise.

In *Michigan v. EPA*, the Court rejected an agency’s interpretation of an ambiguous statutory provision where that interpretation allowed the agency not to consider costs before deciding whether to regulate.

These interpretive principles fundamentally upset the *Chevron* balance by scuttling deference for ambitious regulatory actions while preserving

it for deregulatory or weakly regulatory agency approaches. The principle that courts should look askance at agencies’ new assertions of regulatory authority under long-standing statutes favors a passive status quo over an active change in approach. The principle that courts should be reluctant to defer to agencies making decisions of great economic and political significance also skews against ambitious regulatory programs because the Court has consistently considered economic and political significance only from the perspective of regulated entities. The principle that agencies must consider costs if their implementing statutes allow them to do so is explicitly predicated on the importance of considering costs in the context of “regulation.”

With these principles in place, the *Chevron* framework threatens to recede when an agency acts energetically to tackle a social problem and to surge when an agency’s response to a social problem is passivity. In practical terms, this new ordering will disfavor the interpretations of a presidential administration with an ambitious regulatory agenda (like the Obama administration) and favor the interpretations of an administration with an ambitious deregulatory agenda (like the Trump administration).

Interpretive principles that create such asymmetry are not neutral principles. They are deeply political tools for deconstructing the most consequential regulations of administrative agencies. As such, they are the worst kind of interpretive rules: “presumptions and rules of construction,” as Justice Antonin Scalia (who, strangely, authored two of the opinions embracing the power canons) once put it, “that load the dice for or against a particular result.”

The power canons do not just threaten the power of administrative agencies; they also threaten the power of Congress itself. This effect is evident in Judge Brett Kavanaugh’s dissent from the D.C. Circuit’s recent denial of en banc review in the case

challenging the Federal Communication Commission’s net neutrality rule. Judge Kavanaugh argued that the FCC’s rule was invalid because it was a “major rule” not clearly authorized by Congress. In Kavanaugh’s rendering, the principle that agency interpretations involving questions of large economic and political significance may receive more gimlet-eyed scrutiny from the courts became a full-blown presumption against ambitious regulatory action.

As Judge Kavanaugh wrote, “If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an ambiguous grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action.” [Emphasis in original.]

On Kavanaugh’s theory, Congress simply does not have the power to give agencies the power to act on major social problems unless it speaks clearly in granting them that power. Yet how is the legislature supposed to “speak clearly” in assigning interpretive authority to an agency, when the legislature is enacting a statutory provision that is, by hypothesis, ambiguous? (If the statute were clear, we would not be talking about *Chevron* deference.) The interpretive principle embraced by Kavanaugh is an instruction to Congress to avoid ambiguity altogether in enacting statutory provisions of great importance.

*Chevron* has mutated from a broad and neutral principle of deference to agencies’ interpretive choices to a framework mottled with politically inflected exceptions that now appear to limit not only agencies’ interpretive discretion but also Congress’s legislative power. A large question is whether the framework that remains is worth the price we’ve paid for it.

**Lisa Heinzerling** is the Justice William J. Brennan Jr. Professor of Law at Georgetown University Law Center. Her article “The Power Canons” in the *William & Mary Law Review* elaborates on the themes discussed here.

## The Implications for the Regulatory Project Are Dire

By SHARON JACOBS

Statutory interpretation is about power. In *Marbury v. Madison*, Chief Justice Marshall boldly claimed this power for the courts, proclaiming that “it is emphatically the province and duty of the judicial department to say what the law is.” But things change. Following the rise of the administrative state in the early part of the 20th century, judges began to take agency views into account in determining statutory meaning. And in 1984, in *Chevron v. NRDC*, the Supreme Court formalized the practice of deferring to reasonable agency interpretations of the statutes they administer.

For agency skeptics like the new associate justice, Neil Gorsuch, this move was problematic. Gorsuch would have us believe that agencies are partisan while judges operate above the political fray. He has written that agency decisionmakers are “avowedly politicized” and “expressly influenced by majoritarian politics,” implied that they tend to alter rules “based on shifting political winds,” and accused them of “exploit[ing]” statutory gaps to implement their “own (continuously revisable) policy-influenced vision of what the law should be.” By contrast, Gorsuch views judges as “detached magistrate[s],” and “neutral decisionmakers who will apply the law as it is, not as they wish it to be.”

Both portraits — of agencies as partisan hacks and of judges as bastions of impartiality — are oversimplified. We may concede that judges, while only human, are by virtue of their structural independence less partisan than administrators. And executive agency partisanship, or at least ideological leaning, is undeniable. If all else were equal, because

of their relative neutrality, courts would have the advantage when it comes to statutory interpretation.

But all else is not equal. Agencies, while headed by political appointees, are also expert, while judges are generalists. It is the complexity of modern regulatory problems that makes *Chevron* such good policy. Then Judge Gorsuch’s anti-*Chevron* diatribe was written in an immigration case in which the subject matter was relatively straightforward. But what about cases like *Michigan v. EPA*, in which a comprehensive and highly technical scheme for the regulation of air emissions from power plants was at stake? And what of *Hughes v. Talen Energy Marketing*, a case from last term in which the Supreme Court waded into the mechanisms of wholesale energy market pricing?

What judges have made, they may un-make. And thus *Chevron* deference, notwithstanding its virtues as a decisional tool, is subject to destruction by its creators. Justice Gorsuch is clearly a *Chevron* skeptic, as is Justice Clarence Thomas. Other justices appear sympathetic to limiting *Chevron*’s reach, if not to wholesale reversal.

At the end of the day, *Chevron* is, like the legislative filibuster in the Senate, an institutional arrangement that is neither inherently pro-environment nor anti-environment. And even though attacks on *Chevron* are coming from the current Supreme Court’s right flank, it is worth recalling that the decision itself upheld an interpretation by EPA Administrator Anne Gorsuch (Justice Gorsuch’s mother) making it easier for plant operators to modify their facilities without triggering stricter air permitting requirements.

But losing *Chevron* would still have substantive policy consequences. Those consequences will depend on the preferences (and perhaps politics) of agencies on the one hand and the judiciary on the other. Currently, agencies with environmental and clean energy portfolios like EPA

and the Department of Energy are headed by anti-regulatory political appointees. These appointees would like to roll back regulations and programs that require companies to reduce pollutants, especially greenhouse gas emissions, and to increase energy efficiency. In the short term, a *Chevron* reversal might stymie these agencies’ efforts to repeal existing regulations.

What about the medium term? President Trump will have the opportunity to nominate more than a hundred lower federal court judges. Even if we assume that judges do their best to be impartial, these nominees are likely to have an anti-regulatory bent. Because federal judges are appointed for life, their influence will outlast the current administration. This remade judiciary may be less willing than future agencies to interpret environmental and energy regulatory statutes broadly.

It is the long term, however, that keeps me up at night, both as an admirer of regulatory governance and as an environmentalist. Justice Gorsuch’s administrative law ambitions arguably go well beyond *Chevron*’s reversal. His earlier opinions give us more than a hint that he finds the modern administrative state itself problematic. His references to the “titanic” bureaucracy, his wistful reminiscences about the non-delegation doctrine’s one good year, his citations to Philip Hamburger and Gary Lawson — all of these reveal the justice’s deep skepticism about the administrative state’s constitutional foundations. If the threat to *Chevron* is but a harbinger of things to come, and if the Supreme Court ultimately seeks to unwind the federal administrative state itself, the implications for the regulatory project, and for environmental policy, would be dire.

**Sharon Jacobs** is an associate professor at the University of Colorado Law School.

# MOVERS & SHAKERS

## MOVERS

**Richard Alonso**, who served as chief of station-ary enforcement at EPA's Office of Enforcement and Compliance Assurance in the George W. Bush administration, joins the Washington, DC, office of Sidley Austin LLP.



The University of Maryland's Francis King Carey School of Law has hired former ELI staff attorney **Seema Kakade** as the new clinic director of its environmental law program.



Leaving the public sector as EPA's associate administrator in the Office of Water, **Joel Beauvais** enters the private sector as a partner at Latham & Watkins LLP.

**Nancy Beck** joins EPA's Office of Chemical Safety and Pollution Prevention as principal deputy administrator. She was senior director for regulatory science policy at the American Chemistry Council.

**Anita Bilbao** has been promoted by the Bureau of Land Management to associate director of the Utah State Office, where she will oversee internal operations.

Leaving the State Department, where she helped write the Paris Agreement, **Sue Biniaz** has been named a senior fellow at the United Nations Foundation.

**David Bookbinder** leaves his role as chief climate counsel at the Sierra Club and heads to the Niskanen Center to become their chief counsel.

**William C. Bradford** has been hired at the Department of Energy's Office of Indian Energy Policy and Programs. He was formerly attorney general of the Chiricahua Apache Nation.

**James Chenoweth, Tull Florey, Hillary Holmes, Shailla Prichard, Doug Rayburn, and Gerry Spedale** have been added to the roster of Gibson, Dunn & Crutcher LLP's partners in energy and oil field service transactions. All will be based in the firm's Houston office.

Previously a House Natural Resources Committee staffer, **Bill Cooper** has landed at McConnell Valdés LLP.

**Steve Croley** leaves his role as general counsel for the Department of Energy and joins Latham & Watkins LLP as a partner.

**Jody Cummings** returns to Steptoe & Johnson LLP as a partner in the firm's DC office after serving as deputy solicitor for American Indian affairs at the Interior Department.



Previously head of DOE's foreign policy team, **Jonathan Elkind** leaves behind the public sector and joins the Center on Global Energy Policy at Columbia's School of International and Public Affairs.

The American Wind Energy Association welcomes **Mary Farrell** as senior vice president for government and public affairs. She leaves behind her position at the American Petroleum Institute, where she was group director for market development.

**Avi Garbow** has become a partner at the DC office of Gibson, Dunn & Crutcher LLP. He previously served as EPA's general counsel.



Taking the helm of the DC office of the Massachusetts Institute of Technology is **David Goldston**. He leaves his role as director of government affairs of the Natural Resources Defense Council.



**J. Derck Hardberger and Gary L. Keele II** have joined the expanded environmental law practice of McAfee & Taft.

Ogilvy Washington has acquired **Melissa Harrison** as a vice president for corporate and public affairs. She was a deputy associate administrator for public affairs at EPA.

**John Holdren** returns to Harvard after serving as a science advisor during the Obama administration. He is the Teresa and John Heinz Professor of Environmental Policy at the Kennedy School of Government.

**Cale Jaffe** is the new director of the Environmental and Regulatory Law Clinic at University of Virginia. Prior to joining UVA, he was an attorney with the Southern Environmental Law Center.



**Kate Kelly** was selected as the new director of the public lands team at the Center for American Progress. She comes to the think tank from the Interior Department.

**Nancy Kete**, former managing director at The Rockefeller Foundation, is now executive director of the Joint Program for Resilience Engineering.

ClearView Energy Partners LLC announces that energy analyst **Michael Levi** is a senior adviser after serving as special assistant to President Obama on the National Economic Council staff.

Wilkinson Barker Knauer LLP has added **Robin Lunt** as of counsel in the firm's practice. Prior to joining, she was an adviser at the Federal Energy Regulatory Commission.



The Senate Environment and Public Works Committee has selected **Elizabeth Mabry** as a staff member. She had been senior policy manager for the Environmental Defense Fund's ecosystems program.

**Roger Martella** changes positions, from co-leader of the DC office of Sidley Austin's environmental practice to GE, headquartered in Boston.



**Janet McCabe** joins the Environmental Law & Policy Center as a senior law fellow. She was EPA's acting assistant administrator for the Office of Air and Radiation.

Former EPA Administrator **Gina McCarthy** will provide her expertise as a resident fellow at the Harvard Kennedy School's Institute of Politics.