"MAKING ADMINISTRATIVE LAW STRICT AGAIN" IN THE ERA OF TRUMP: THE FUTURE OF THE *CHEVRON* DOCTRINE, ACCORDING TO THE JUDICIAL CONFERENCE FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Opinions differed on the wisdom of limiting agency deference at the March 2018 Judicial Conference for the United States Court of Appeals for the Federal Circuit. Consistently, however, panelists suggested that potential Court-generated changes to administrative agency deference are both possible and likely. Since that conference, Justice Kennedy stepped down from the U.S. Supreme Court. The Trump Administration has since appointed Justice Brett Kavanaugh and Court of Appeals Judge Neomi Rao, with more judicial appointments to come, thus leaving administrative law's Chevron deference more vulnerable to the limitations upon which the judicial conference panel speculated.

WASHINGTON – Federal courts continue to wrestle with the

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amount of deference appropriately afforded to federal administrative agencies. Earlier this year, the topic of agency deference was a prominent concern at the Judicial Conference for the United States Court of Appeals for the Federal Circuit, the nation's appellate court for patents.[1]

The judicial conference was held in Washington D.C. on Friday, March 16, 2018, at the Grand Hyatt.[2] Chief Justice John G. Roberts addressed the audience, followed by Senator Orrin Hatch (R-UT), the Conference's keynote speaker.[3] Before the speeches, however, the conference hosted a panel of experts in administrative law, assembled "to discuss recent issues involving *Chevron*."[4] For the presentation entitled "*Chevron* & *Auer*: Appellate Review of Administrative Determinations," the panel consisted of Administrator Neomi Rao, Professor Gillian Metzger, and Professor Christopher Walker.[5] All three have acknowledged the criticisms of the doctrine and the possibility of change that lies ahead.[6]

The *Chevron* doctrine is taken from the 1984 Supreme Court case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[7]

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[1] *2018 Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Oct. 20, 2018), http://www.cafc.uscourts.gov/conference/2018-Judicial-Conference.

[2] *Id.*

[3] *Id.*; *see generally* Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, 467 U.S. 837 (1984).

[4] *2018 Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Oct. 20, 2018), http://www.cafc.uscourts.gov/conference/2018-Judicial-Conference.

[5] *2018 Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Oct. 20, 2018), itinerary, notes, and materials in possession of the author.

[6] Neomi Rao, *The Administrative State and the Structure of the Constitution,* THE HERITAGE FOUNDATION (June 18, 2018), https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution; *Should Chevron Be Overturned?*, NATIONAL CONSTITUTION CENTER, (Sept. 20, 2018), https://constitutioncenter.org/debate/podcasts/should-chevron-be-overturned; Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

[7] Jonathan Kim, *Chevron Deference*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (Oct. 20, 2018), https://www.law.cornell.edu/wex/chevron_deference.

Authored by Justice John Paul Stevens, *Chevron* established a presumptive deference for an agency's interpretation when its authorizing "statute is silent or ambiguous with respect to the specific issue."[8] The court's question then becomes "whether the agency's answer is based on a permissible construction of the statute," or a reasonable interpretation thereof, for which a court will not supplement its own.[9] Nonetheless, Neomi Rao echoed her previously published sentiment that "[a]gencies should not assume jurisdiction over issues and policies that cannot fairly be derived from a statutory delegation."[10] Rao serves as Administrator of the Office of Information and Regulatory Affairs, having been appointed by President Donald Trump in 2017.[11] Howard Shelanski[12] and Cass Sunstein[13] have previously held Rao's position. Since the conference, however, President Trump revealed new plans for Rao.[14] On November 13, 2018, Trump announced his judicial nomination for Rao ahead of schedule, and stated, "I won't say today that I just nominated Neomi to be on the DC Circuit Court of Appeals, the seat of Justice Brett Kavanaugh . . . She's going to be fantastic—great person."[15] The administrative office Rao

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[8] Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, 467 U.S. 837 (1984).

[9] *Id.* at 843-44.

[10] Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1517 (2015).

[11] Steve Eder, *Neomi Rao, the Scholar Who Will Help Lead Trump's Regulatory Overhaul*, THE NEW YORK TIMES (July 9, 2017), https://www.nytimes.com/2017/07/09/business/the-scholar-who-will-help-lead-trumps-assault-on-rules.html.

[12] Executive Office of The President Office of Management And Budget Washington, D.C. 20503, *Testimony of Howard Shelanski Administrator For The Office of Information and Regulatory Affairs Office of Management and Budget Before The House Committee On The Judiciary Subcommittee On Regulatory Reform, Commercial and Antitrust Law United States House Of Representatives,* (July 6, 2016), available at: docs.house.gov/meetings/JU/JU05/20160706/105157/HHRG-114-JU05-Wstate-ShelanskiH-20160706.pdf.

[13] John M. Broder, *Powerful Shaper of U.S. Rules Quits, With Critics in Wake*, THE NEW YORK TIMES (Aug. 3, 2012), https://www.nytimes.com/2012/08/04/science/earth/cass-sunstein-to-leave-top-regulatory-post.html.

[14] Erin Corbett, *Who Is Neomi Rao? Trump's Nominee Could Replace Brett Kavanaugh On D.C. Circuit*, FORTUNE (Nov. 14, 2018), fortune.com/2018/11/14/neomi-rao-dc-circuit/

[15] Noah Gray, *Trump nominates Neomi Rao to replace Kavanaugh on DC*

held, at the time of the conference (created under former President Carter), "approves government data collections and determines whether agencies have sufficiently addressed problems during rule-making."[16] For skeptics of agency deference, Rao's presence on the conference panel was significant, as she has previously spoken before Congress on the subject of revisiting *Chevron* deference.[17] When speaking before Congress, she contended that two problems with the administrative system are that agencies benefit from a "long lag for litigation" and that "agencies often can take actions that affect private industries without going through rulemaking."[18]

Rao has praised the late Justice Antonin Scalia's reasoning with regard to deference—that deference encourages Congress to delegate more and "avoid responsibility for difficult choices."[19] More simply put, elections should have consequences.[20] Implicitly invoking the constitutional concept of separation of powers, Rao stated that it is ultimately the executive branch's duty to see that laws are faithfully executed.[21] Interestingly, however, Scalia wrote in 1989 for the *Duke Law Journal* that "[b]road delegation to the Executive is the hallmark of the modern administrative state" and courts yield to the agency, not because of a lack of "constitutional competence to consider and evaluate policy,"[22] but because it addresses the function of administrative law in a practical manner.[23] Therefore, according to Justice Scalia, "[t]he separation-of-powers justification can be

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Circuit, CNN (Nov. 13, 2018), https://www.cnn.com/2018/11/13/politics/trump-neomi-rao-brett-kavanaugh/index.html.

[16] Eder, *supra* note 11.

[17] George Mason University Antonin Scalia Law School, Neomi Rao, Biographical Sketch, (last visited Feb. 18, 2019). https://www.law. gmu.edu/faculty/directory/fulltime/rao_neomi.

[18] Examining Agency Use of Deference Part II, S. Hrg. 114–284, 19 114th Cong. (Mar. 17, 2016) https://www.hsgac.senate.gov/imo/media/doc/RAFM%20Hearing%2003-17-2016%20-%20Final%20Printed%20Hearing%20Record.pdf.

[19] Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U.L. REV. 1463, 1478 (2015)

[20] *Id.*

[21] *Id.* at 1501–02.

[22] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515-16 (1989).

[23] *Id.* at 521.

rejected."[24] Moreover, Scalia thought that "*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 (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs."[25] Nonetheless, almost thirty years after Scalia's article, the panelists discussed the murky future of *Chevron*.[26]

The second panelist, Gillian Metzger, a professor at Columbia Law School, stated that *Chevron* deference is a result of the inevitable necessity for Congress to delegate.[27] Metzger believes that among the advantages to *Chevron* are clarity, articulation, deference with political accountability for policy, an agency's beneficial expertise, and consistency.[28] She acknowledged what she referred to as recent attacks on *Chevron*.[29] Those attacks are composed in part of the belief that the doctrine is at odds with the separation-of-powers concept and that it allows agencies to act in a judicial capacity.[30] Against those who advocate that Article III of the U.S. Constitution dictates that it is the court's role and only the court's role to say what the law is, Metzger urged the conference that such attacks on *Chevron* ignore the historical precedents of deference between agencies and courts.[31] Among those precedents are the Supreme Court cases of *Auer v. Robbins* (1997),[32] and *Skidmore v. Swift & Co.* (1944).[33] One can see the deferential wheels of *Chevron* were already conceptually in motion as early as 1944.

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[24] *Id.* at 515-16.

[25] *Id.* at 521.

[26] *2018 Federal Circuit Judicial Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, www.cafc.uscourts.gov/conference/2018-Judicial-Conference (last visited Apr. 4, 2017).

[27] *Should Chevron Be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/debate/podcasts/should-chevron-be-overturned.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Should Chevron Be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/debate/podcasts/should-chevron-be-overturned.

[32] Auer v. Robbins, 519 U.S. 452, 461 (1997).

[33] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In *Skidmore*, Justice Robert Jackson acknowledged that the "Court has long given considerable and in some cases decisive weight" to agency decisions.[34] The *Skidmore* standard of deference provides that an administrative decision's persuasiveness "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[35] Nevertheless, the deferential standard of *Auer* does not require that the agency's interpretation be the best or the only interpretation.[36] *Auer* merely requires that judges shall defer to an agency's interpretations of its regulations and uphold those interpretations unless the agency's decision is "plainly erroneous or inconsistent with the regulation."[37] *Panelist, Professor Walker, has criticized* Auer*'s low threshold, stating that "[w]hat* Auer deference allows you to do is get all the benefits of deference you'd get for the regulation, but now for just posting a memo on a website."[38] Moreover, for Walker, "many of the agency self-delegation criticisms raised against *Auer* deference could apply with some force to agency statutory interpretation and *Chevron* deference as well."[39]

Metzger carried forth her historical analysis of *Chevron* from 1983 into 2015 to the case of *King v. Burwell*.[40] In *King*, the Supreme Court's second review of the Affordable Care Act ("ACA"), individuals challenged the insurance provision and the federally created insurance exchanges that supplemented a state's refusal to do so.[41] *Chevron* deference, in the case of *King*, would have required the Court to defer to the agency (i.e. the Internal Revenue Service, "IRS") overseeing the tax credits of the ACA.[42] The Court, in its opinion authored by Chief

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34 *Id.*

35 *Id.*

36 Auer, 519 U.S. at 461.

37 Auer v. Robbins, 519 U.S. 452, 461 (1997).

38 Amanda Reilly, *Deference to agencies at issue in S.D. wetlands fight*, E&E NEWS (Sept. 26, 2016), https://www.eenews.net/stories/1060043401/.

39 Christopher J. Walker, *Administrative Law Without Courts*, 65 U.C.L.A. L. REV. 1620, 1637 (2018).

40 *See generally* King v. Burwell, 135 S. Ct. 2480 (2015).

41 *Id.* at 2482.

42 *Id.* at 2488.

Justice John G. Roberts, held that *Chevron* deference did not apply.[43] In *King*, Roberts found that *Chevron* lacked the "appropriate framework" to address the issue at hand, and that it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting [a] health insurance policy of this sort."[44] One can glean from the decision that if deference had been given to the IRS under the Obama-administration in 2015, the IRS would have interpreted the language to support the ACA, resulting in an effectively identical outcome.[45] However, that would have been ineffective to settle the issue. Such deference to the IRS would have left the ACA vulnerable to subsequent administrations that could "interpret" the provisions to eviscerate the ACA.[46] Roberts acknowledged that the ACA's hasty enactment via the reconciliation process resulted in "inartful drafting," and the Court must read "the words of a statute . . . in their context and with a view to their place in the overall statutory scheme."[47] As an aside, it would not have made sense for Roberts, having previously upheld the constitutionality of the ACA in *National Federation of Independent Business. v. Sebelius* (2012),[48] to have used this weak opportunity to strike down the Act. After all, this is a Chief Justice who has continually evinced a desire to render unanimous narrow decisions that further the public faith in the Court, rather than undermine it.[49] Nonetheless, as reported by Fox News, Roberts "infuriated conservatives when he wrote the [*King*] opinion to uphold ObamaCare."[50] However, in spite the political backlash from some,[51]

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[43] *Id.* at 2489.

[44] *Id.* at 2483 (italicization omitted).

[45] *See* King v. Burwell, 135 S. Ct. 2480, 2480 (2015) (holding that the ACA's key provisions did not merit a *Chevron* review due to its "economic and political significance" however, the Court still held the key tax credit provisions valid upon review of the ambiguous statutory language).

[46] *Id.* at 2496.

[47] *Id.* at 2492.

[48] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[49] Sarah Turberville & Anthony Marcum, *Those 5-To-4 decisions on the Supreme Court? 9 to 0 is far more common.*, THE WASHINGTON POST (June 28, 2018), https://www.washingtonpost.com/news/posteverything/ wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?utm_term=.a722e0a729b0.

[50] Chad Pergram, *Justice Roberts' ObamaCare ruling could be boon for congressional Republicans,* FOX NEWS (July 19, 2015),

Fox also reported that many Republicans in Congress were secretly thanking Roberts for "saving conservatives from themselves" because any party concession to fix ObamaCare would have angered the "conservative base if they did anything short of scrapping the entire law."[52]

Professor Metzger expressed her criticisms of Roberts' decision to the conference audience, stating that she is not convinced by *King*, and shared her concern that it detracts from the clarity of *Chevron*.[53] Metzger does not expect the Supreme Court to conduct a dramatic overturning of *Chevron*, but does anticipate a narrower sphere of *Chevron* from the Chief Justice.[54] Nevertheless, the author of the *King* majority opinion himself, Chief Justice Roberts, was to take the stage next to address the audience at the judicial conference following Metzger.[55]

Time will tell if the Roberts Court brings a narrower sphere to deference, but Justice Neil Gorsuch has expressed dissatisfaction with *Chevron*.[56] In 2016, while on the Tenth Circuit, Gorsuch—then judge—wrote a concurring opinion regarding the Board of Immigration Appeals and *Chevron* wherein he opined that "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded

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www.foxnews.com/politics/2015/07/19/justice-roberts-obamacare-ruling-might-just-be-surprise-gift-to-congressional.html.

[51] Christian Ketter, A Second Amendment in Jeopardy of Article V Repeal, and "AMFIT," A Legislative Proposal Ensuring the 2nd Amendment into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (AMFIT), A Solution to Maintaining, 64 Wayne L. Rev. 431, 473 (2019).

[52] *Justice Roberts' ObamaCare ruling could be boon for congressional Republicans*, *supra* note 50.

[53] *Should Chevron Be Overturned?*, *supra* note 27.

[54] *Should Chevron Be Overturned?*, *supra* note 27.

[55] *2018 Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Oct. 20, 2018), itinerary and notes in possession of the author.

[56] Cass R. Sunstein, *Commentary: As Justice Gorsuch steps into full term, what do we know about him?*, CHICAGO Tribune (Oct. 02, 2017), www.chicagotribune.com/news/opinion/commentary/ct-perspec-neil-gorsuch-supreme-court-1003-story.html.

on judicial functions."[57] Gorsuch further stated, however, "the problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them."[58] Gorsuch referred to *Chevron* as the "goliath of modern administrative law,"[59] and found its "purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well."[60] Notwithstanding the foregoing, Metzger believes that in light of *City of Arlington, Texas v. F.C.C.*, wherein Chief Justice Roberts was joined in his dissent by Justices Anthony Kennedy and Samuel Alito, agencies may see a shift in courts to require more specific evidence for authority to gap-fill.[61] In *Arlington*, Roberts stated that courts "should not defer to an agency until the court decides, on its own, that the agency is entitled to deference," which starkly contrasted with the majority opinion authored by the then deference-leaning Justice Antonin Scalia.[62]

With Scalia replaced by Justice Gorsuch amidst the current administration and its impending judicial appointments, a higher standard of proof for agencies may indeed be foreseeable.[63] Gorsuch telegraphed this possibility recently when he declined to extend deference in *SAS Institute, Inc. v. Iancu*, and in writing the majority opinion stated that "under *Chevron,* we owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, we find ourselves unable to discern Congress's meaning."[64] Gorsuch further remarked that "whether *Chevron* should remain is a question we may leave for another day."[65] Additionally,

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

[58] *Id.* at 1153 (Gorsuch, J., concurring) (italics in original).

[59] *Id.* at 1158 (Gorsuch, J., concurring).

[60] *Id.* at 1154 (Gorsuch, J., concurring).

[61] *Podcast Transcript: Should Chevron be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/podcast-transcript-should-chevron-be-overturned.

[62] City of Arlington, Texas v. F.C.C., 569 U.S. 290, 312 (2013) (Roberts, J., Kennedy, J., & Alito, J., dissenting).

[63] *Id. at* 325-26 (Roberts, J., Kennedy, J., & Alito, J., dissenting).

[64] *Id.* (internal quotations omitted).

[65] SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

Justice Stephen Breyer has been previously noted by Metzger as supporting *Chevron* deference.[66] Indeed Breyer dissented in *Iancu* that he does not believe *Chevron* mandates courts "to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision."[67] Rather, Breyer "understand[s] *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have."[68] However, Metzger has noted that Justice Clarence Thomas, who concurred in *Iancu*'s majority,[69] finds *Chevron* to be unconstitutional.[70] Thomas believes, "[w]e seem to be straying further and further from the Constitution without so much as pausing to ask why."[71]

Like the *Chevron*-fueled speculation that surrounded Justice Gorsuch, President Trump's newest Supreme Court appointee, Justice Brett Kavanaugh, has drawn similar media attention.[72] Roughly one-third of Kavanaugh's decisions on the United States Court of Appeals for the District of Columbia Circuit concern administrative law.[73] In May 2017, Kavanaugh, dissented, in *United States Telecom Association v. Federal Communications Commission,* stating, "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an ambiguous grant of statutory authority is not

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[66] Gillian Metzger, *Symposium: Minimalism with radical potential,* SCOTUSBLOG (June 22, 2018), www.scotusblog.com/2018/06/symposium-minimalism-with-radical-potential/.

[67] Iancu, 138 S. Ct. at 1364.

[68] *Id.*

[69] *Id.* at 1352 (concurring in Gorsuch's opinion with Chief Justice Roberts, Justice Kennedy, and Justice Alito).

[70] Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 26 (2017) (noting, however, Justice Thomas' previous agreement invocation of *Chevron* holding *Chevron* framework applied in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005)).

[71] Elizabeth Price Foley, *The Court Needs Another Clarence Thomas, Not a Scalia*, THE NEW YORK TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/opinion/the-court-needs-another-clarence-thomas-not-a-scalia.html.

[72] Jonathan H. Adler, *Will Kavanaugh Curb Sloppy White House Deregulation?*, THE NEW YORK TIMES (July 16, 2018), https://www.nytimes.com/2018/07/16/opinion/brett-kavanaugh-supreme-court-administrative-state.html.

[73] *Id.*

enough."[74] He further stated that "Congress must clearly authorize an agency to take such a major regulatory action."[75] It appears that Kavanaugh yearns for a statutory authority more concrete than *Chevron*'s deference under permissibility and reasonableness.[76] Among (then Judge) Kavanaugh's offered examples of relevant administrative exercise for expansive regulatory authority in *Telecom* were: tobacco regulation, regulation to ban physician-assisted suicide, elimination of requirements for telecommunication rate-filling, and greenhouse gas emissions regulation.[77] President Trump's judicial nomination and appointments of Rao, as well as the appointments of both Gorsuch and Kavanaugh, indicate a goal of the current administration to curb *Chevron*'s administrative elasticity.[78]

Metzger has perceived suspicion of administrative deference in top governmental agencies because of "growing attacks on the administrative state and plaintive complaints about uncontrolled

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[74] U.S. Telecom Ass'n v. F.C.C., 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[75] *Id.*

[76] *Id.* at 417-435.

[77] *Id.*

[78] Cass R. Sunstein, *Gorsuch's Rejection of a Politicized Executive Branch*, BLOOMBERG (Oct. 02, 2017), https://www.bloomberg.com/opinion/articles/2017-10-02/gorsuch-s-rejection-of-a-politicized-executive-branch; John Yoo, *Kavanaugh on Supreme Court is a win for Trump, GOP and America*, FOX NEWS (Oct. 06, 2018), https://www.foxnews.com/opinion/kavanaugh-on-supreme-court-is-a-win-for-trump-gop-and-america; Ilya Somin, *Overturning Chevron Would Not Gut the Administrative State—but It Would Strengthen the Rule of Law*, REASON (Aug. 13, 2018), https://reason.com/volokh/2018/08/13/overturning-chevron-would-not-destroy-th; Joan Biskupic, *What the case of a killer whale tells us about Brett Kavanaugh*, CNN (Aug. 25, 2018), https://www.cnn.com/2018/08/25/politics/brett-kavanaugh-killer-whale-chevron-regulations/index.html; Andrew Kragie, *Trump's New Kavanaugh for the U.S. Court of Appeals*, THE ATLANTIC (Nov. 25, 2018), https://www.theatlantic.com/politics/archive/2018/11/trump-nominates-rao-replace-kavanaugh-dc-court/576535/; Aryeh Younger, *Gorsuch's Views On Administrative Law Could Spell Trouble For the Executive Branch*, HUFFINGTON POST (Oct. 23, 2017), https://www.huffingtonpost.com/entry/gorsuchs-views-on-administrative-law-could-spell-trouble_us_59ee21d7e4b031d8582f5708; Ilya Somin, *Gorsuch is right about Chevron deference*, THE WASHINGTON POST (Mar. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/ gorsuch-is-right-about-chevron-deference/?noredirect=on&utm_term=.02b6f103c616.

bureaucrats from the court's conservative wing."[79] Moreover, she has suggested that the Trump Administration will follow "the footsteps of Reagan and subsequent Presidents . . . to seek to achieve deregulation from within the executive branch, as it already has started to do."[80] Among the doctrine's criticisms is that *Chevron* deference defies the rule of law by giving agencies too much power, which allows agencies to side-step Congress and "undermines the court's duty to say what the law is."[81] Among the flaws that other scholars have identified with regard to agency law, is that agencies may "stretch their authority to meet new challenges" or become forced to "await clear instruction in new statutes passed by Congress."[82] Additionally, agencies suffer an "absence of clear directives."[83] These issues are compounded, as "Congress so rarely updates major regulatory statutes, many agencies are stuck implementing outdated laws and are hamstrung . . . in dealing with the challenges of a modern economy and society."[84] Nonetheless, in spite of *Chevron* deference's well-documented flaws, Metzger believes *Chevron* "shouldn't be overturned because the constitutional attacks on it are unfounded" and "because those who attack it really exaggerate what impact it has . . . and ignore the extent to which *Chevron* . . . is simply a legal framework that will wax and wane over time."[85]

Metzger is skeptical of criticisms that allege continual executory

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[79] Metzger, *supra* note 66.

[80] Metzger, *supra* note 70.

[81] Shannon Roddel, *Why the Chevron Deference matters in the Age of Trump*, NOTRE DAME NEWS (Feb. 06, 2017), https://news.nd.edu/news/why-the-chevron-deference-matters-in-the-age-of-trump/.

[82] Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 565 (2018) (Freeman is the Archibald Cox Professor of Law and the founding director of the Harvard Law School Environmental Law and Policy Program).

[83] Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 373 (2011) (Sharpe is an Assistant Professor of Law and Richard W. and Marie L. Corman Scholar, University of Illinois College of Law).

[84] Freeman, *supra* note 82.

[85] *Podcast Transcript: Should Chevron be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/podcast-transcript-should-chevron-be-overturned.

expansions and maintains that opponents often concede to some extent by "generally accept[ing] the constitutionality of presidential efforts to oversee agency decision making."[86] She believes that exclusion of delegation mechanisms "that enhance rather than check presidential oversight reflects an unjustifiably narrow conception of internal separation of powers."[87] Moreover, Metzger generally criticizes separation of powers analysis for its preoccupation with presidential power, a subject upon which "the Constitution says rather little."[88] Metzger has stated that "[a]gency actions are frequently challenged for not complying with governing procedures," or because "the agency failed to use notice and comment procedures at all;" thus, when an agency action acts inconsistently with the statute or procedure, it risks failure.[89] In addition to the statute serving to check the expansiveness of deference, some scholars have opined that "shifting political commitments" affect the judicial credibility of agencies and risk an agency conceivably creeping into violation of the political question doctrine.[90]

Ultimately, Metzger has concerns about cutting back agency deference to the power of the courts, as she has stated that "courts have gradually occluded the APA's openings for internal administrative law"[91] and, furthermore, by "requiring agencies to structure their

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[86] Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 436 (2009).

[87] *Id.* at 433.

[88] *Id.* at 426.

[89] Gillian Metzger, *The Administrative Procedure Act: An Introduction*, AMERICAN CONSTITUTION SOCIETY, BRENNAN CENTER FOR JUSTICE, POVERTY & RACE RESEARCH ACTION COUNCIL, AND AARP FOUNDATION (2017), https://prrac.org/pdf/APA.summary.ProfMetzger.pdf.

[90] Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1062 (2007)(With regard to the doctrine, the theory of justiciability–under the U.S. Supreme Court's Political Question Doctrine–finds its genesis in Chief Justice John Marshall's opinion *Marbury v. Madison*, 5 U.S. 137, 153 (1803). *Marbury* stands in part for the proposition that "the discretion of a court always means a found, legal discretion, not an arbitrary will," for "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170).

[91] Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1245 (2017).

discretion through notice-and-comment rulemaking, the courts have deviated significantly from the APA."[92] Nonetheless, urging the judicial conference to see a forest through the trees, Metzger rallied for consideration of "key features of internal administration—internal policies, procedures, practices, oversight mechanisms, and the like," that "are rarely viewed as part of administrative law."[93] Metzger, has stressed a "need to link administration and administrative law," and has credited the work of Elizabeth V. Foote, who has written upon the preoccupations of post-*Chevron* statutory interpretation.[94] Foote has stated that modern administrative law is continually "turning nearly every challenge on judicial review into a question of law as a matter of 'statutory interpretation.'"[95]

The third panelist at the conference was Professor Christopher J. Walker of the Ohio State University Moritz College of Law.[96] Walker, who has dedicated his scholarship to studying *Chevron*, noted that in the Federal Circuit Courts there is a demonstrated application of *Chevron* deference 74% of the time.[97] When applied, *Chevron* has a 77% agency success rate.[98] However, he noted discrepancies among Circuits with regard to *Chevron* application (e.g., 86% of the time in the D.C. Circuit versus 60% of the time in the Sixth Circuit).[99] Walker referenced his recent *Michigan Law Review* article "*Chevron* in the Circuit Courts," which he co-authored with Kent Barnett.[100] Walker's premise,

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92 *Id.*

93 *Id.*

94 *Id.* (citing Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 677 (2007) for the proposition that "Chevron misunderstands public administration as statutory interpretation.").

95 Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 677 (2007).

96 *2018 Conference*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Oct. 20, 2018), itinerary and notes in possession of the author.

97 Christopher J. Walker et al., *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 29 (2017).

98 *Id.* at 6.

99 *Id.* at 7.

100 *Id.* at 1.

affirming statements previously made by Metzger, is that too much attention is given to *Chevron* at the Supreme Court level, when in reality the circuit courts are where the important law is continually made; a rather fitting point for this Federal Judicial Circuit Conference, and well-taken at that.[101] Walker's article stated that the findings are "meaningful for agencies and litigating parties because circuit courts review far more agency statutory interpretations than the Supreme Court."[102] Ultimately, he feels that the "Supreme Court needs to provide better guidance to lower courts if it seeks to create a stabilizing doctrine."[103]

David Boundy of Cambridge Technology Law, who practices Intellectual Property and Administrative Law, served as moderator of the *Chevron* panel.[104] He acknowledged the difficult instances under *Chevron* in which judicial action and gap filling may turn upon an issue of mere semantics, such as whether a university medical resident is a medical student or a medical doctor.[105] Boundy noted that under section 533 of the Administrative Procedure Act,[106] agencies are able to exercise gap filling and such action is therefore contrastable from "creating law out of thin air."[107] Moreover, he cited the Supreme Court case of *Encino Motorcars, LLC v. Navarro*, in which Justice Anthony Kennedy wrote on behalf of the Court that "[w]hen Congress authorizes an agency to proceed through notice-and-comment rulemaking, that 'relatively formal administrative procedure' is a 'very good indicator' that Congress intended the regulation to carry the force of law, so Chevron should apply."[108] In *Encino*, the Court held that "*Chevron* deference would not be applied to [a] Department of Labor (DOL) regulation" because "deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by

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101 *Id.* at 1, 14, 18.

102 Walker, *supra* note 97 at 70-71.

103 *Id.*

104 *Attorneys*, CAMBRIDGE TECHNOLOGY LAW, http://cambridgetechlaw.com/about-us/attorneys/ (last visited Oct. 24, 2018).

105 David Boundy, *The PTAB is Not an Article III Court: A Primer on Federal Agency Rule Making*, LANDSLIDE (Dec. 2017), at 9.

106 5 U.S.C. § 553 (2017).

107 § 553(a).

108 Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).

failing to follow the correct procedures in issuing the regulation."[109] Nonetheless, since the time of both *Encino* (2016) and the D.C. conference in March 2018, *Encino's* author, Justice Kennedy, has stepped down from the Court and left concern as to whether notice-and-comment rulemaking is still relatively formal enough for administrative agencies henceforth.[110]

Ultimately, with regard to whether *Auer* or *Chevron* could be overturned or limited, Professor Walker does not see discussions on limiting or modifying deference as "break[ing] major new ground."[111] He has noted that barely half of agency rule drafters even know of *Auer* deference by name.[112] According to Walker, for those drafters who actually know of *Auer*, it likely serves as an impetus to "attempt to avoid drafting ambiguous regulations;" or, perhaps "Auer is so deferential to an agency's interpretation of its own regulation," it may alleviate "worry about being clear and precise, as [drafters] can always clarify and clean up in subsequent guidance."[113] As believed by Walker, with Justice Kavanaugh's confirmation having filled Kennedy's vacancy, *Auer* deference "is much more likely to go," and "[Walker] would be surprised if it's not eliminated in the next year or two."[114] Of the present Court, Walker has noted that Justices Alito and Thomas both "indicated an interest in overruling *Auer* deference."[115] Consequently, "[o]verturning Auer deference would constrain the . . . power to reinterpret regulations without going through notice-and-

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[109] *Id.* at 2117-20.

[110] Jacob Pramuk, *Anthony Kennedy retiring from Supreme Court*, CNBC (June 27, 2018), https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html.

[111] Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103, 105 (2018).

[112] Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1062 (2015).

[113] *Id.*

[114] Jennifer A. Dlouhy, Todd Shields, Christopher Flavelle and Greg Stohr, *Kavanaugh Could Usher In Even More Business-Friendly Era on Supreme Court*, BLOOMBERG (July 10, 2018), https://www.bloomberg.com/news/ articles/2018-07-10/kavanaugh-could-usher-in-business-friendly-era-on-supreme-court.

[115] Christopher J. Walker, *(Incrementally) Toward a More Libertarian Bureaucracy*, LAW AND LIBERTY (Feb. 08, 2016), https://www.lawliberty.org/liberty-forum/incrementally-toward-a-more-libertarian-bureaucracy/.

comment rulemaking."[116] Regardless, Walker criticizes that "Chevron deference encourages members of Congress to delegate broad lawmaking power to federal agencies."[117] He cautions, however, that considerations of revising the deference doctrine should avoid preoccupation with the U.S. Supreme Court.[118]

Rao is reportedly on President Trump's short list for a Supreme Court nomination in the event that Justice Ruth Bader Ginsburg retires amid this administration.[119] On March 13, 2019, the Senate confirmed Rao's appointment, by a vote of 53-46.[120] Nevertheless, prior thereto, Rao faced fervent opposition to her nomination for the U.S. Court of Appeals for the District of Columbia Circuit.[121] According to the Wall Street Journal, she was being "Kavanaughed"–seemingly, this era's renaissance of "Borked."[122] Among the reasons for pushback, Rao has

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[116] *Id.*

[117] Justin S. Daniel, *Scrutinizing Deference to Administrative Agencies*, THE REGULATORY REVIEW (Nov. 27, 2017), https://www.theregreview.org/2017/11/27/daniel-scrutinizing-deference/.

[118] Walker, *supra* note 115.

[119] Eliana Johnson and Gabby Orr, *Trump White House urging allies to prepare for possible RBG departure*, POLITICO (Jan. 10, 2019), https://www.politico.com/story/2019/01/10/trump-white-house-urging-allies-to-prepare-for-possible-rbg-departure-1096102; see also, Philip Klein, *Latest hit on Trump DC Circuit court pick Neomi Rao is opening salvo in battle over Ruth Bader Ginsburg's Supreme Court seat*, THE WASHINGTON EXAMINER (Jan. 15, 2019), https://www.washingtonexaminer.com/opinion/latest-hit-on-trump-d-c-circuit-court-pick-neomi-rao-is-opening-salvo-in-battle-over-ruth-bader-ginsburgs-supreme-court-seat.

[120] Ariane de Vogue and Ted Barrett, *Senate confirms Neomi Rao, controversial judicial nominee, to fill Brett Kavanaugh's former seat,* CNN (Mar. 13, 2019), https://www.cnn.com/2019/03/13/politics/neomi-rao-confirmed-by-senate/index.html

[121] Philip Klein, *Latest hit on Trump DC Circuit court pick Neomi Rao is opening salvo in battle over Ruth Bader Ginsburg's Supreme Court seat*, THE WASHINGTON EXAMINER (Jan. 15, 2019), https://www.washingtonexaminer.com/opinion/latest-hit-on-trump-d-c-circuit-court-pick-neomi-rao-is-opening-salvo-in-battle-over-ruth-bader-ginsburgs-supreme-court-seat.

[122] Editorial Board, *Neomi Rao Gets Kavanaughed*, WALL STREET JOURNAL (Jan. 28, 2019), https://www.wsj.com/articles/neomi-rao-gets-kavanaughed-11548722089; *Bork*, MERRIAM-WEBSTER ONLINE DICTIONARY (2019), https://www.merriam-webster.com/dictionary/bork (Jan. 27, 2019) (citing the

previously stated that judicial deference to agencies "allowed for the expansion of the administrative state outside the checks and balances of the Constitution."[123] She has advocated for a "more robust review of regulatory action in the courts," as she believes that "courts can provide more meaningful checks on agency action and authority, enforcing both statutory and constitutional due process."[124] Rao has acknowledged the difficulty of revising agency deference is partly because "independent judgments and judicial review are kind of a complex matter" and "very hard to sort of spell out."[125] She has stated, "I do think *Skidmore* and *Chevron* present different standards," as *Skidmore* "leave[s] more power with the courts."[126] However, Rao has demonstrated a hostility towards deference that runs deeper than Court precedent, stating, "if Congress actually wants regulatory action, then they may have to make some changes."[127]

Likewise, Metzger cautions against blaming *Auer* for flaws in administrative law, as "the fault may lie more in other administrative common law doctrines—such as judicial elaboration of the APA's notice and comment requirements—than with Auer deference itself."[128] She advances the "common law character" of *Auer*, cautioning that "[c]ourts should not pretend that overturning Auer is constitutionally or statutorily compelled."[129] As to *Chevron*, however, once again, Metzger

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etymology of the word that Robert Bork's unsuccessful "nomination to the Supreme Court in 1987 was harshly criticized").

[123] Steven Mufson, *Trump's pick for rules czar would hand more power to Trump*, THE WASHINGTON POST (Apr. 20, 2017), https://www.washingtonpost.com/business/economy/trumps-pick-for-rules-czar-is-expected-to-hand-over -more-power-to-trump/2017/04/19/8b33b176-206f-11e7-a0a7-8b2a45e3dc84_story.html?utm_term=.df8ac63c12b3.

[124] Ellis Kim and C. Ryan Barber, *Neomi Rao, Trump's Deregulatory Leader, Gets DC Circuit Nod to Replace Kavanaugh*, THE NATIONAL LAW JOURNAL (Nov. 13, 2018), https://www.law.com/nationallawjournal/2018/11/13/ neomi-rao-trumps-deregulatory-leader-gets-dc-circuit-nod-to-replace-kavanaugh/.

[125] Examining Agency Use of Deference Part II, *supra* note 18.

[126] *Id.*

[127] *Id.*

[128] *Auer as Administrative Common Law, by Gillian Metzger*, YALE JOURNAL ON REGULATION (Sept. 21, 2016), yalejreg.com/nc/auer-as-administrative-common-law-by-gillian-metzger/.

[129] *Id.*

anticipates a "narrower sphere" of *Chevron* but not a complete overturn.[130]

In closing, while *Auer*'s future may be quite uncertain, *Chevron* will likely live on, albeit subject to possible limitations in the near future, and Metzger is nonetheless vigilant of *Chevron*'s overturn, should the Roberts Court be "inclined to move in that direction in the future."[131] With Justice Kennedy retired, and Justice Kavanaugh having taken the mantle, the possibility has increased for stricter applications by the Roberts Court to curb administrative deference in the era of Trump.

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[130] *Should Chevron Be Overturned?*, *supra* note 27.

[131] Metzger, *supra* note 66.