THE POSSIBLY IMMINENT – AND DEEPLY IRONIC – DEMISE OF *CHEVRON* DEFERENCE

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CHEVRON DEFERENCE IS OFFICIALLY on the chopping block. The Supreme Court granted the petition for review in *Loper-Bright Enterprises v. Raimondo*,[1] which seeks the overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[2] That seminal decision, of course, requires federal courts to defer to a federal agency's reasonable interpretation of an ambiguous statute that the agency administers.

The betting odds for *Chevron*'s survival do not look good. Justices Clarence Thomas and Neil Gorsuch have repeatedly argued that *Chevron* is not only wrong, but unconstitutional.[3] Chief Justice John Roberts is a proponent of the so-called "major questions doctrine," which cabins *Chevron*'s application,[4] and he and Justice Samuel Alito do not believe that *Chevron* ap-

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[1] *See* Petition for Writ of Certiorari at i-ii, Loper-Bright Enters. v. Raimondo, No. 22-451 (U.S. Nov. 10, 2022), *cert. granted*, 143 S. Ct. 2429 (mem.) (May 1, 2023) (2nd Question Presented) ("Loper-Bright Pet.").

[2] 467 U.S. 837 (1984).

[3] *See*, *e.g.*, Michigan v. EPA, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

[4] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); King v. Burwell, 576 U.S.

plies to questions concerning the scope of an agency's authority.[5] Justice Brett Kavanaugh has expressed skepticism about the doctrine.[6] And, in their last terms on the Court, Justices Antonin Scalia and Anthony Kennedy questioned the doctrine's validity.[7] Under the circumstances, it is difficult to envision Justice Amy Coney Barrett riding to *Chevron*'s rescue.

If, as the *Loper-Bright* petitioners argue, *Chevron* is a judicial "monster,"[8] we appear to have reached the moment in the story where armed villagers are standing outside the monster's home, calling for its head. But in a plot twist worthy of an O'Henry short story, these villagers are the intellectual descendants of those who once cheered the monster on, and even helped to promote it. *Chevron* was a victory for the administration of President Ronald Reagan, a proponent of deregulation – and the agency rule that *Chevron* sustained was a product of that deregulatory philosophy. *Chevron* was also a defeat for the D.C. Circuit, then viewed as generally liberal and hostile to the Reagan Administration's deregulatory agenda. Early criticisms of *Chevron* came from liberal scholars and jurists,[9] while many conservative judges and lawyers championed the decision.[10]

The most prominent of these supporters, of course, was Justice Scalia. In a 1989 lecture, he argued that *Chevron* was correct notwithstanding its apparent tension with the judicial scope of review provision of the Admin-

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473, 486 (2015); West Virginia v. EPA, 142 S. Ct. 2587, 2607-09 (2022); Biden v. Nebraska, 143 S. Ct. 2355, 2372-74 (2023).

[5] City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting, with Kennedy & Alito, J.J., joining).

[6] *See* Brett M. Kavanaugh, Book Note, *Fixing Statutory Interpretation,* 129 HARV. L. REV. 2118, 2150-54 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[7] Pereira v. Sessions, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 108-10 (2015) (Scalia, J., concurring in the judgment).

[8] Loper-Bright Pet., *supra* note 1, at 35.

[9] *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465-69 (1987); CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) ("*Chevron*'s mandate is perplexing, because the rule of the case appears to violate separation of powers principles.").

[10] *See* Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 669-71 (2020) (citing various articles and judicial decisions).

istrative Procedure Act (APA).[11] As late as 2013, Justice Scalia described *Chevron*'s two-step formulation for determining when courts should defer to an agency's statutory interpretation as "canonical."[12]

Chevron did not come under sustained attack by conservatives for over 24 years – a period during which Republican Presidents ran the Executive Branch two-thirds of the time. During the Obama Administration, however, conservative criticisms of *Chevron* began to proliferate. The about-face was so sweeping and swift that, in 2018, Justice Alito described *Chevron* as a "frequently invoked, once celebrated, and now increasingly maligned precedent," and he wondered if it had been "overruled … in a secret decision that has somehow escaped my attention."[13]

Many judicial doctrines have been repudiated over time. But a doctrine's demise is not usually ushered in by the same wing of the Court that helped to enshrine it. Justice Owen Roberts changed his view about liberty of contract and *Lochnerism*, providing the famous "switch in time that saved nine." That change, however, was not preceded by a chorus of conservative judges and scholars denouncing *Lochner* over the course of several years.

But there is a deeper irony underlying the change of heart over *Chevron*. Conservative critics claim that the decision allows "executive bureaucracies to swallow huge amounts of *core* judicial … power,"[14] wresting from the courts "the ultimate interpretative authority to 'say what the law is,' and hand[ing] it over to the Executive."[15] In reality, when either a court or an agency confronts genuine statutory ambiguity – *i.e.*, an ambiguity that persists after all tools of statutory interpretation are exhausted – resolution of that ambiguity requires an exercise of policy-based, interstitial lawmaking. Far from a "core" attribute of Article III, the power of federal courts to make such interstitial law is highly restricted. What's more, Congress can

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[11] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, Lecture Before the Duke Law Journal Administrative Law Symposium (Jan. 24, 1989), *in* 1989 DUKE L.J. 511, 514 (1989) (the APA "seems to have been based on the quite mistaken assumption that questions of law would always be decided de novo by the courts").

[12] *City of Arlington*, 569 U.S. at 296.

[13] *Pereira*, 138 S. Ct. at 2121, 2129 (Alito, J., dissenting).

[14] *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) (emphasis added).

[15] *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

divest federal courts of this power by conferring lawmaking power on an administering agency, and such a grant of power is a precondition to *Chevron* deference. Thus, the attack on *Chevron* is an attempt to aggrandize the lawmaking power of federal courts – a power conservatives view with disfavor – and to do so where the justification for exercising such power – necessity – is absent.

An understanding of why this is so begins with an appreciation of the significant limit that so-called "*Chevron* Step One" places on the doctrine. This step requires a court to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[16] Ambiguity for purposes of *Chevron* (as in matters of statutory interpretation generally) requires more than a showing of definitional possibilities in a statute's text, or that a statutory phrase is indeterminate when read in isolation. Instead, to ascertain whether Congress has "directly addressed the precise question at issue," courts should employ the "traditional tools of statutory construction."[17] Indeed, the Court stressed this requirement in the closely related context of interpreting agency rules – stating that deference to an agency's interpretation of its own rules applies only if the relevant provision remains "*genuinely* ambiguous, even after a court has resorted to *all* the standard tools of interpretation."[18] Those tools, of course, include both the linguistic and substantive canons of construction.[19]

In situations where statutory text is "genuinely ambiguous" and there is no administering agency, courts must resolve the ambiguity by engaging in policy-based, interstitial lawmaking. As Professor John Manning, a prominent proponent of textualism, has explained:

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[16] *Chevron*, 467 U.S. at 842-43.

[17] *Id*. at 843 & n.9.

[18] Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (emphases added).

[19] *See*, *e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) ("the canon against reading conflicts into statutes is a traditional tool of statutory construction," and where that canon, "along with the other traditional canons .... supply an answer, '*Chevron* leaves the stage'") (quoting NLRB v. Alternative Entertainment, Inc., 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J.)).

> Ambiguous language necessarily vests judges with some degree of *policymaking discretion*, and in this context textualists feel free to consider the practical consequences and the broader policy considerations of competing interpretations. To that extent, textualists believe that federal judges *exercise an interstitial lawmaking function* within the boundaries set by a statute's terms.[20]

Justice Scalia likewise recognized that "no statute can be entirely precise," and that "some judgments involving policy considerations[] must be left to the officers executing the law and to the judges applying it."[21] Nor are Justice Scalia and Professor Manning are by no means alone in recognizing that the resolution of statutory ambiguity involves interstitial lawmaking.[22]

As a general rule, conservatives are hostile to judicial lawmaking – interstitial or otherwise. Conservative scholars argue that "law 'made' by the federal judiciary lacks the constitutional legitimacy of measures adopted pursuant to constitutionally prescribed lawmaking procedures."[23] And conservative justices often stress that the "function of weighing and appraising is more appropriately for those who write the laws, rather than for those who interpret them,"[24] or that "the power to make the law rests with those chosen by the people," while the role of the courts "is more confined – 'to say what the law is.'"[25] But, as Professor Manning and

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[20] John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1655 (2001) (emphases added) (footnotes omitted).

[21] Mistretta v. United States, 488 U.S. 361, 415 (Scalia, J., dissenting).

[22] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248-49 (1996) ("federal courts undoubtedly engage in interstitial 'lawmaking,' as part of the process of interpreting positive law," including federal statutes); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 190 (1992) ("under almost any theory of statutory interpretation," it overlaps with lawmaking) (footnote omitted); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332-34 (1980) ("[I]nterpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issue at hand attenuates."); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973) (courts engage in "judicial lawmaking" as "specific evidence of legislative advertence to the issue at hand attenuates").

[23] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism,* 79 TEX. L. REV. 1321, 1403 (2001).

[24] O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) (Scalia, J.) (cleaned up).

[25] *King*, 576 U.S. at 498 (Roberts, C.J.) (quoting Marbury, 5 U.S. (1 Cranch) at 177). This same

others acknowledge, federal courts engage in interstitial lawmaking to resolve genuine statutory ambiguity as a matter of necessity – because ordinary tools of statutory construction cannot provide a sufficiently clear understanding of Congress' intent.

This power to create interstitial law to resolve genuine statutory ambiguity is essentially indistinguishable from the power of federal courts to create federal common law. In the wake of *Erie Railroad Co. v. Tompkins*,[26] it is now understood that the latter power, like the former, exists only as a "necessary expedient"[27] – where, for example, Congress has not prescribed a norm necessary to resolve a dispute within the court's jurisdiction, and a state norm cannot be used because none is available or a federal interest makes it inappropriate to rely on state norms.[28] Indeed, a number of scholars and jurists have expressly equated the interstitial lawmaking necessary for statutory interpretation with the power to create federal common law.[29]

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reasoning led the Court, through its more conservative members, to repudiate the practice of implying private rights of action under statutes. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 n.3 (2001) (Rehnquist, C.J.) (explaining that the Court had "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," and "abandoned" the rationale of earlier cases that had done so) (citations omitted).

[26] 304 U.S. 64 (1938).

[27] County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 237 (1985) (cleaned up).

[28] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Texas v. New Jersey, 379 U.S. 674 (1965).

[29] *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890, 895 (1986) (defining federal common law as "any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments – constitutional or congressional," and explaining that, under this definition, "the same analytic process is used for all of [federal common law] rules, those that can be classified as interpretation as well as those that cannot") (footnotes and emphasis omitted); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 6, 33 (1985) (describing as federal common law "all federal rules of decision not mandated on the face of a federal text – that is, a federal statute or treaty of the Constitution," and giving, as an example, the need of courts to "fill" "'gaps' that appear in authoritative texts," either "as a result of the draftsmen's inattention to issues that arise as an inevitable consequence of a statutory scheme," or "in the sense of ambiguous or inconsistent provisions"); Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421 (1965) (characterizing the "normal judicial filling of statutory interstices" as an example of the kind of federal com-

Crucially, Congress can readily displace the power of federal courts to create federal common law. "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[30] Accordingly, "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law."[31] Instead, Congress can displace federal common law simply by empowering a federal agency to address an issue that would otherwise be governed by federal common law. Thus, for example, the Court concluded that the Clean Air Act displaced use of a federal common law nuisance claim to regulate carbon dioxide emissions from domestic power plants – not because the Act spoke directly to the question of those emissions and what limits should be set, but because the powers the Act conferred on the Environmental Protection Agency "provide[] a means to seek limits on" those emissions.[32]

It follows that Congress can use the same means to displace the power of federal courts to create interstitial law when interpreting genuinely ambiguous statutes. If Congress confers lawmaking power on an agency that administers a statute, that agency can engage in the interstitial lawmaking necessary to resolve genuine ambiguities. At that point, there is no longer any need for a federal court to engage in such lawmaking. The justification for judicial lawmaking – necessity – "disappears."[33]

As it happens, moreover, evidence that Congress has conferred lawmaking power on an agency is a precondition to *Chevron* deference. An agency's interpretation does not qualify for *Chevron* deference unless it is "apparent from the agency's generally conferred authority and other statu-

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mon law that federal courts could continue to create after *Erie*). *See also* Clark, *supra* note 22, at 1284 & n.7 (positing that, "[b]y hypothesis, at least, federal common lawmaking begins where interpretation ends," but acknowledging that, "[i]n practice, of course, the distinction between federal common lawmaking and statutory (or constitutional) interpretation is often difficult to discern").

[30] City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981).

[31] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011) (quoting *Milwaukee*, 451 U.S. at 317).

[32] *Am. Elec. Power Co.*, 564 U.S. at 424-25.

[33] *Milwaukee,* 451 U.S. at 314.

tory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[34] Where that precondition is satisfied, Congress is properly understood to have divested the federal courts of this limited lawmaking power.

Far from "turning *Marbury* on its head,"[35] therefore, *Chevron* deference is consistent with the longstanding recognition that federal courts should generally not make law or policy, except when necessity compels them to do so. *Chevron* critics stress Chief Justice John Marshall's famous statement that it is the duty of the courts "'to say what the law is."[36] But in order to say what a genuinely ambiguous statutory provision means, a court must engage in interstitial lawmaking. And it is generally *not* the province of the courts to exercise this power. The duty to do so can arise as a matter of necessity, but Congress can displace that duty by eliminating the necessity for judicial lawmaking.

This same recognition answers the charge that *Chevron* violates Article III because the "judicial power" "'requires a court to exercise its independent judgment in interpreting and expounding upon the laws,'" yet *Chevron* requires courts "to abandon what they believe is 'the best reading of an ambiguous statute.'"[37] Calling an interpretation of a genuinely ambiguous statute a court's "best reading" does not alter the fact that such a "reading" rests on an exercise of the court's interstitial lawmaking power. A court has a duty to use its independent judgment when necessity requires it to perform that lawmaking task. But that duty does not mean that it is the province of the courts *alone* to fill statutory gaps, and that Congress cannot displace the court's power to exercise that function.

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[34] United States v. Mead Corp., 533 U.S. 218, 229 (2001). "[C]ongressional authorizations to engage in the process of rulemaking or adjudication" are "very good indicator[s]" of such power, though other evidence can suffice. *Id.*

[35] Buffington v. McDonough, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting).

[36] Michigan v. EPA, 576 U.S. at 761 (Thomas, J., concurring) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

[37] *Id.* (quoting *Perez*, 575 U.S. at 119 (Thomas, J., concurring in judgment) and citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005)). *See also Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

Recognizing that the resolution of genuine statutory ambiguity requires policy-based, interstitial lawmaking also answers Justice Kavanaugh's objection to *Chevron*. In a 2016 law review article, then-Judge Kavanaugh argued that determining whether a statutory provision is sufficiently ambiguous to trigger deference under *Chevron* is too subjective and "indeterminate"; instead he argued, "in cases where an agency is … interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text," because "[j]udges are trained to do that, and it can be done in a neutral and impartial manner in most cases."[38] But even assuming that it can be done in the most "neutral and impartial manner" possible, policy-based lawmaking is something federal judges do only when necessary – and no such necessity exists when Congress has conferred lawmaking power on an administering agency.

In fact, while Justice Kavanaugh viewed the inquiry into whether a statutory provision is ambiguous as an "arbitrary" diversion,[39] that inquiry enhances political accountability. In *Chevron*, the Court noted that it was proper for agencies, rather than courts, to make the policy choices necessary to resolve statutory ambiguities: "While agencies are not directly accountable to the people," the Court explained, "the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."[40] By skipping the initial inquiry into statutory ambiguity, courts would mask when they were engaging in policy-based, interstitial lawmaking and when they weren't. Courts would simply announce their "best interpretation" of the statute at issue and treat the result as one ordained by Congress, even though, in the case of a genuinely ambiguous statute, the result would be the product of judicial lawmaking and a judicial policy choice.

The *Loper-Bright* case illustrates this. The issue there is whether the National Marine Fisheries Service can require commercial vessels that fish for Atlantic herring to pay for third-party observers who collect data for fishery conservation and management purposes. Both the petitioners and the government make a number of arguments based on the text, structure,

[38] Kavanaugh, *supra* note 6, at 2154.

[39] *See id*. at 2144.

[40] *Chevron*, 467 U.S. at 865.

history, and purpose of the relevant statute to show that Congress did, or did not, authorize such a requirement. But if the Court concludes that all of this evidence is inconclusive, and if it then dispenses with *Chevron* deference, it will confront a naked policy choice.

The petitioners argue that requiring industry to pay for third-party observers will harm small and family-owned vessels, reducing profits by as much as 20%, and that a lack of federal appropriations to collect the necessary data and monitor compliance with regulatory requirements is a critical constraint on overregulation that an agency should not be permitted to circumvent by mandating industry-funded monitoring.[41] The government, on the other hand, argues that the costs of paying for third-party observers "are no different from other costs clearly contemplated in the statutory scheme," and that vessel owners frequently "pay costs to third-parties for services or goods in order to comply with those and other regulatory requirements."[42] Whatever their merits, these are policy arguments. And the "function of weighing and appraising" such policy considerations is ordinarily not the job of the federal courts.[43]

By contrast, federal agencies with rulemaking powers can make binding policy choices. They have deep familiarity with the industries they regulate, which helps to inform such choices. And they are politically accountable for the choices they make. As Justice Elena Kagan explained in the recent student-loan debt case, if the head of an agency makes a bad policy choice, "there are political remedies – accountability for all the actors, up to the President, who the public thinks have made mistakes."[44]

Over the past several years, the Court has used the "major questions doctrine" to limit *Chevron* deference – in most instances, using it to overturn an agency's actions.[45] But if the Court overrules *Chevron*, there will be

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[41] Loper-Bright Pet., *supra* note 1, at 20-22.

[42] Br. in Opp'n at 21-22, Loper-Bright Enters. v. Raimondo, No. 22-451 (U.S. Feb. 16, 2023).

[43] *O'Melveny & Myers*, 512 U.S. at 89 (Scalia, J.).

[44] Biden v. Nebraska, 143 S. Ct. 2355, 2399 (2023) (Kagan, J., dissenting).

[45] *See* note 4, *supra*. The Court rejected the agency's position in three of these four cases. These outcomes are consistent with anti-regulatory rhetoric in much of the criticisms of *Chevron* deference. *See City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting) (referring to "hundreds of federal agencies poking into every nook and cranny of daily life," and stating that, while "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' … the danger posed by the growing power of the administrative state

no need for a "major-questions" carve-out: The Court will instead have the power to decide all policy questions – big and small – that arise from genuinely ambiguous statutes. In deciding those questions, moreover, the Court will not have to acknowledge that it is exercising interstitial lawmaking power and second-guessing the policy judgments of the politically accountable Executive Branch. Indeed, it will not even have to acknowledge that the statute before it is ambiguous. It can simply state that it is providing its best interpretation of the statutory language, and thereby imply that Congress is responsible for a policy choice that the Court has in fact made.

It may be that *Chevron* rests on a fundamental misunderstanding of the APA and should be overruled on that ground. That question, which others have debated,[46] is beyond the scope of this article. But *Chevron* should not be cast aside on the ground that it strips federal courts of a core judicial power and hands it to the Executive Branch, in violation of Article III. What is at stake in the debate over *Chevron* is the power to make policy-based interstitial law. This is not a "core" judicial power, but a highly restricted one that Congress can readily displace by conferring lawmaking power on an administering agency. It will be a crowning irony if, in its zeal to tame the powers of the administrative state, the Court arrogates this power to the judiciary.

cannot be dismissed"); *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) (*Chevron* creates a "problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible … but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day").

[46] *Compare*, *e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985-1001 (2017) (noting debate among scholars, but concluding that *Chevron* is inconsistent with § 706 of the APA), *and* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1641-57 (2019) (arguing that *Chevron* is consistent with § 706).