THE | C. BOYDEN | GRAY | CENTER

In the Wake of Chevron's Retreat

Catherine M. Sharkey

CSAS Working Paper 16-05
Rethinking Judicial Deference
June 2, 2016

Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University

IN THE WAKE OF *CHEVRON*'S RETREAT

Catherine M. Sharkey[*]

TABLE OF CONTENTS

INTRODUCTION **1**

I. TWO FORMS OF *CHEVRON*'S RETREAT **5**
A. SETTING CHEVRON ASIDE 5
1. King v. Burwell *6*
2. Distrust of the Administrative State *8*
B. MAKING ROOM FOR STATE FARM 10

II. THE *CHEVRON* STEP ZERO FRAMEWORK REVISITED **14**
A. IMPLIED DELEGATION TO THE RIGHT AGENCY 16
1. King v. Burwell Revisited *17*
2. Challenge Posed by Delegation to Multiple Agencies *19*
B. JUDGES AS POLICYMAKERS FOR "MAJOR QUESTIONS" 22

III. THE NEW *CHEVRON-STATE FARM* FRAMEWORK **24**
A. "REASONED DECISIONMAKING" DOCTRINAL CHECK ON AGENCIES 26
1. Michigan v. EPA Revisited *26*
2. King v. Burwell Revisited *29*
B. HOW AGENCIES RESPOND TO DOCTRINE 31
1. The Bright Side: Agencies' Regulatory Response *33*
2. The Dark Side: Uncertainty and the Unknown *36*

CONCLUSION **39**

[*] Crystal Eastman Professor of Law, New York University School of Law. Amanda Sterling (NYU 2016) provided excellent research assistance. I benefitted from comments received at the George Mason CSAS Revisiting Judicial Deference Roundtable on March 17, 2016. I also am grateful to Ron Cass, Judge Harry Edwards, Rick Hills, Ricky Revesz, and Christopher Walker for lively further discussion of these topics.

INTRODUCTION

It is time to take stock of *Chevron*'s retreat. The "*Chevron* two-step" framework for statutory interpretation asks first, whether Congress has answered the precise issue at hand,[1] and second, in the face of congressional silence or ambiguity, directs courts to defer to permissible or reasonable agency interpretations.[2] Recent U.S. Supreme Court opinions, eliding *Chevron* altogether or declining to defer for one reason or another, have led scholars to proclaim the "terminal" state of the venerable doctrine of agency deference in statutory interpretation.[3] Some have linked the Court's push-back to wider hostility toward the ever-encroaching administrative state, threatening individual liberty and democratic governance.[4] Knocking down *Chevron*, a pillar of the

---

[1] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). The *Chevron* Court elaborated upon Step One:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has spoken directly 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.

Id.

[2] And, Step Two, according to *Chevron*:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnotes omitted).

[3] Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015) ("[R]eports of *Chevron*'s death seemed to get significant confirmation at the end of the Supreme Court's 2014-2015 Term, when the Court decided three important cases that suggested that *Chevron*'s condition was, if not terminal, at least serious."); Philip Hamburger, Chevron *Bias* 2–3 (Columbia Pub. Law, Research Paper No. 14-417, 2014) ([T]he Supreme Court has revealed some hesitation about *Chevron*. . . . [Recent] decisions come close to announcing that *Chevron* is dead."); *see also* Jody Freeman, The *Chevron* Sidestep: Professor Freeman on *King v. Burwell* ("[T]his may be annus horribilus for *Chevron*."), http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/; Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 93–96 (2015) (observing that "*King* was . . . the latest in a series of opinions, several last Term alone, that call *Chevron*'s future into question"); Chris Walker, *The "Scant Sense" Exception to* Chevron *Deference in* Mellouli v. Lynch, YALE J. REG.: NOTICE & COMMENT (June 2, 2015), http://www.yalejreg.com/blog/the-scant-sense-exception-to-chevron-deference-in-mellouli-v-lynch-by-chris-walker ("[M]aybe, just maybe, [*Mellouli v. Lynch*] may . . . signal a further retreat from the once highly deferential approach under *Chevron* to judicial review of agency statutory interpretations.").

[4] *See* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. (forthcoming 2016); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP.

administrative state, deals a blow to over-exuberant regulators and promises to stem the tide of over-regulation of the economy and health and safety.

Whether the Court is just in fact chipping away at *Chevron* or signaling its longer-term demise, a question that has attracted much commentary,[5] what I probe here is the hitherto unexamined issue of what lies in the wake of *Chevron*'s retreat. Moreover, unlike traditional approaches, this inquiry entails disaggregating—and then sharply distinguishing—two different ways the Court has retreated.[6] The first,

---

CT. REV. (forthcoming 2016); *see also* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) (noting that "the Court's seizure of power ["that would normally have been the agency's due under *Chevron*"] aligned with its basic distrust of an active administrative state").

[5] In pursing this inquiry, there is a formidable baseline problem. In their classic empirical study of agency deference in statutory interpretation, William Eskridge and Lauren Baer demonstrate the uneven and unpredictable manner in which agency deference doctrines have been applied by the U.S. Supreme Court. William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008). Among several interesting findings of their study of 1014 statutory interpretation cases before the Court between 1984 (*Chevron*'s date) and 2006, are that *Chevron* deference was applied in only 8.3% of these cases and that the agency win rate in *Chevron* cases (76.2%) is only slightly higher than it is in *Skidmore* cases (73.5%). *Id.* at 1099 tbl.1.

Moreover, *Chevron*'s demise has been proclaimed in the past. *See* Linda D. Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 772 (2007); Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012) (exploring the retreat from *Chevron* in recent Supreme Court cases and arguing that the Court has reclaimed some of the interpretive authority that *Chevron* initially channeled to the executive branch).

There is a general scholarly consensus that there have been "earlier moves to scale back *Chevron*, including *MCI Telecommunications Corp. v. AT&T Co.* and *FDA v. Brown & Williamson Tobacco Corp*., which crafted the major questions rule, and *United States v. Mead Corp*., which held that *Chevron* deference would no longer be available for all agency interpretations of ambiguous language." Gluck, *supra* note 3, at 94; *see also* Steve R. Johnson, *The Rise and Fall of* Chevron *in Tax: From the Early Days to* King *and Beyond*, 2015 PEPP. L. REV. 19 ("[R]ecent cases [have] drain[ed] *Chevron* of vitality through an accumulation of exceptions rather than eviscerating *Chevron* with a single blow.").

[6] Scholars have typically grouped together the Court's separate lines of *Chevron* retreat. For example, Lisa Heinzerling has put forth a provocative thesis—namely that the Court's recent decisions (notably including *King v. Burwell* and *Michigan v. EPA*) constitute the emergence of new "power canons" of statutory interpretation, whereby "the Court took interpretive power from an administrative agency, power that would normally have been the agency's due under *Chevron*, and kept it for itself." Heinzerling, *supra* note 4, draft at 1. A notable exception to this trend is Ronald A. Cass, *Is Chevron's Game Worth the Candle?—Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57-69 (2016). Cass depicts the fragmentation of *Chevron* into different tests for different judges and posits that parts of the *Chevron* formula are in the process of being weakened, amended or abandoned. *See id.*

illustrated aptly by the Court's decision in *King v. Burwell*,[7] entails setting the *Chevron* framework aside, in that case under the so-called "major questions" exception. The move to dispense with *Chevron* altogether augments the authority of the *court* to decide whether regulation comports with congressional statutes, bypassing any need to engage with input from the underlying regulator. *Chevron*'s death by a thousand cuts— placing more questions outside *Chevron*'s domain at what has been termed the "*Chevron* Step Zero" inquiry[8]—is consistent with one view that links the Court's hostility toward the administrative state to a longer-term de-regulatory project.

But there is a second form of retreat that, as a conceptual matter, is fundamentally distinct. This seeming rollback of *Chevron* deference makes room for judicial scrutiny of agency policy-making discretion under the *State Farm* "hard look" review doctrine. Such a *Chevron* retreat thus entails not judicial usurpation of the agency's role in statutory interpretation, but instead judicial oversight of the reasoned decision-making of the underlying regulator. *State Farm* is, after all, a second pillar of the administrative state. Its relationship vis-à-vis *Chevron* is a source of longstanding disagreement—with some courts and scholars suggesting acoustic separation, with *State Farm* hard look review governing the "policy" sphere of agency actions and *Chevron* deference applying to the "legal" domain of statutory interpretation.[9] Another camp has observed that hard look review can be conceived of "as a kind of Step Three," by which courts will scrutinize the agency's exercise of policy-making authority after analyzing it under the two-step *Chevron* framework.[10] Still

[7] 135 S. Ct. 2480 (2015).

[8] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

[9] *Chevron* and *State Farm* are often presented as two pillars of administrative law in significant tension with one another—with *Chevron* ushering in an era of deferential review of agency legal interpretation, and *State Farm* one of robust review of agency policymaking.

One way to resolve the alleged tension is to insist upon an acoustic separation between agency legal interpretation and agency policymaking. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598–604 (2009) (arguing that courts should consider (1) whether the agency action "is 'based on a permissible construction of the statute'" (the single *Chevron* inquiry); and (2) whether the agency action represents reasoned decisionmaking (the *State Farm* inquiry) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984))); *cf.* Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015) ("[T]he large and growing body of decisions applying the *Chevron* framework reveals a steady oscillation between measuring agency initiatives against the language of the authorizing statute (positivism) and accepting agency interpretations that are compatible with statutory language and are developed in standard modes of administrative process (process)."). At that point, the question remains—how robust is *State Farm* judicial review? Adrian Vermeule emphatically embraces "thin rationality" review. *See infra* text accompanying note 50.

[10] *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 770 (2008).

other courts and scholars have argued persuasively that the analytical inquiry called for at *Chevron*'s Step Two—where, having found congressional silence or ambiguity, courts look to the agency's interpretation—is akin to *State Farm* "hard look" review of whether agency action is "arbitrary or capricious" under the Administrative Procedure Act.[11]

Michigan v. EPA[12] embraces this interplay between *Chevron* and *State Farm* in the statutory interpretation realm. The majority rejects an EPA regulation at *Chevron* Step Two—finding the agency's interpretation of "appropriate and necessary" statutory language unreasonable—while simultaneously relying on S*tate Farm* to bolster its determination that the EPA's failure to consider costs as part of its threshold decision to regulate was unreasonable.

---

[11] 5 U.S.C. § 706(2)(A) (2014); *see* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (arguing that arbitrary and capricious review should be imported into the *Chevron* framework, resulting in a two-step process that first inquires whether the agency's interpretation is reasonable and then applies arbitrary and capricious review); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); *see also* Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015) (arguing that *State Farm* "arbitrary and capricious" inquiry is a necessary supplement to *Chevron* in that agency actions that survive *Chevron*'s two steps must still be valid under the APA). Levin remains agnostic with respect to the stringency of judicial review and thus whether understanding *State Farm* hard look review as tantamount to *Chevron*'s Step Two would lead to more aggressive judicial review. Seidenfeld, by contrast, embraces more aggressive judicial review at Step Two. Seidenfeld, *supra*, at 128–30. And Cass argues that courts should walk back *Chevron* and engage in non-deferential review in cases in which the statutory conferral of agency authority is ambiguous, effectively returning to a pre-*Chevron* framework with respect to agency actions that are not plainly authorized by statute. Cass, *supra* at 1326–28.

Other scholars have argued that there should be a further collapsing of the various deference doctrines. Richard Pierce, having reviewed empirical studies that examined the rate at which the Supreme Court and courts of appeals affirmed agency action under *State Farm* (64%), *Chevron* (60–81.3%), *Skidmore* (55.1–73.5%), *Auer* (90%), substantial evidence standard (64–71.2%), and *de novo* (66%), concludes that—apart from *Auer*—deference doctrines appear to have little influence on the rates of affirmance. Pierce thus joins the call for the deference doctrines and standards of review to be collapsed into a single rule that a reviewing court may uphold any agency action so long as it is reasonable. *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011); *see also* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010). But, as Thomas Miles and Cass Sunstein point out, the frequency of agency validation—which they found nearly identical under *Chevron* and *State Farm* review—cannot establish the relative stringency of the standard of review: "Because litigants are likely to adjust their decisions in accordance with the intensity of review, our figures cannot be taken to answer the question of whether *Chevron* review is more rigorous than arbitrariness review, or vice versa." Miles & Sunstein, *supra* note 10, at 781.

[12] 135 S. Ct. 2699 (2015).

This second form of *Chevron* retreat—widening the space for the application of *State Farm*—is fundamentally distinct from setting *Chevron* aside. It acknowledges that the realms of discretionary agency action like rulemaking and agency statutory interpretation can be inextricably linked[13]—as is well illustrated by questions pertaining to the role of cost-benefit analysis in agency regulation.[14] Moreover, prospects for improved regulations, with agencies responding to the specter of heightened judicial scrutiny by taking actions to improve internal decision-making processes, lie in the wake of this type of *Chevron* retreat.

I. TWO FORMS OF *CHEVRON*'S RETREAT

King v. Burwell[15] and *Michigan v. EPA*[16]—decided within the same momentous week in June 2015—taken together, seem to augur the Supreme Court's retreat from the venerable *Chevron*. In both cases, the majority refuses to defer to the underlying agency's statutory interpretation. As such, both cases could fit a possible trend line of growing skepticism (or even hostility) toward the administrative state. I argue, however, that these cases must be distinguished. The significant distinction is not tied to the ultimate outcomes in the cases, with the Court in fact siding with the IRS's position in *King*[17] and rejecting the EPA's in *Michigan*.[18] It is a fundamental conceptual distinction, with important normative and doctrinal implications. *King* is a *Chevron* Step Zero case, whereas *Michigan* is a *Chevron* Step Two case—albeit a newly emergent model infused with a heavy dose of *State Farm*. Each might appear as a form of *Chevron* retreat, but—I want to insist—the conceptual frame matters: setting *Chevron* aside (as in *King*) is fundamentally different from making room for *State Farm* (as in *Michigan*).

A. Setting *Chevron* Aside

King v. Burwell fits the paradigm of a *Chevron* Step Zero determination that, given the enormous political and economic significance of the issue at stake, implied delegation to the agency should be resisted. Moreover, *King* expands this Step Zero "major questions" inquiry by suggesting that the agency before the court is not the right agency and thus

[13] *See, e.g.*, William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427 (observing that questions of statutory interpretation may intersect with questions of agency policy-making authority).

[14] *See, e.g.*, Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014) (discussing cost-benefit analysis and its role in the regulatory process).

[15] 135 S. Ct. 2480 (2015).

[16] 135 S. Ct. 2699 (2015).

[17] *King*, 135 S. Ct. at 2495–96.

[18] *Michigan*, 135 S. Ct. at 2712.

the court should proceed on its own to interpret the statute.[19] It thus represents a distinct form of a retreat from *Chevron*, one that could readily be deployed in service of a broader project to tighten the bounds on the ever-inflating administrative state. By aggressively applying *Chevron* Step Zero and setting *Chevron* aside in areas wherein regulatory agencies operate, the court removes those agencies from the realm of statutory interpretation, even where those questions are highly policy-dependent. The court thereby substitutes its interpretation for the agency's and, by default, becomes the relevant policy maker. Seen in this light, *Chevron* Step Zero totally undermines the allocation of issues of "law" to courts and issues of "policy" to agencies. And, at a broader level, the *Chevron* Step Zero debate implicates the legitimacy and appropriate scale of the administrative state.

1. King v. Burwell

King v. Burwell[20] is the Court's latest "*Chevron* Step Zero" decision[21] involving the so-called "major questions" exception to *Chevron* deference. In these "major questions" cases, the Court has set aside the *Chevron* framework on the ground that the statutory interpretation issue was an "extraordinary" question that carried too much economic and political significance for an agency to decide.[22]

King implicates an enormously high-stakes question of statutory interpretation involving several key provisions of the Patient Protection and Affordable Care Act (Act). Section 1311 of the Act instructs all states to create health insurance exchanges, which are government-run entities that facilitate the buying and selling of health insurance.[23] Section 1321 of the Act authorizes the Secretary of the U.S. Department of Health and Human

[19] *King*, 135 S. Ct. 2480; *see also* Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 497–506 (2015) (discussing *King* and its implications for *Chevron* Step Zero); Adam J. White, *Defining Deference Down*, YALE J. REG.: NOTICE & COMMENT (June 26, 2015), http://www.yalejreg.com/blog/defining-deference-down-by-adam-j-white (observing that "[a]fter *King v. Burwell*, the 'major questions' doctrine is emphatically a *Chevron* Step Zero question").

[20] *King*, 135 S. Ct. 2480.

[21] *See* sources cited *supra* note 8.

[22] *See* Abigail R. Moncrieff, *Reincarnation the Major Questions Exception to* Chevron *Deference as a Doctrine of Noninterference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008). Cass Sunstein has argued that *King* "entrenched" the exception to *Chevron* for questions with great "economic and political significance." Cass R. Sunstein, *The Catch in the Obamacare Opinion*, BLOOMBERG VIEW (June 25, 2015, 12:48 PM), http://www.bloombergview.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion (internal quotation marks omitted). According to Sunstein, *King* represents an assertion of judicial power that could significantly impact the Court's future application of *Chevron* and "establishes a principle that's likely to haunt future presidents." *Id.*

[23] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173–82 (2010) (codified at 42 U.S.C. § 18031 (2014)).

Services (HHS) to establish exchanges in states that decline to create an exchange.[24] Section 1401 of the Act added Section 36B to the Internal Revenue Code, which authorizes health insurance subsidies—in the form of new refundable tax credits—for individuals enrolled in coverage through "an Exchange established by the State under Section 1311."[25] The interpretive question was whether such tax credits were thereby limited to state exchanges created under Section 1311 or should also be made available to individuals covered by the federal exchanges established under Section 1321.[26] The Internal Revenue Service (IRS), within the Department of Treasury, said the latter.

More specifically, the IRS and Treasury Department issued a rule, following the notice-and-comment process, that authorized premium subsidies in both the state exchanges established in sixteen states and the District of Columbia (established pursuant to Section 1311), *and* in the federal exchanges created by HHS in the states that did not create their own exchanges (pursuant to Section 1321).[27] Plaintiffs challenged the IRS/Treasury interpretation on the ground that it exceeded the agency's authority and was contrary to the plain text of the Act, and thus that it failed at *Chevron* Step One.[28]

The U.S. Court of Appeals for the Fourth Circuit applied the conventional *Chevron* two-step framework to this statutory interpretation issue. At Step One, the court held that the statutory language was ambiguous.[29] At Step Two, the court deferred to the IRS's interpretation,

[24] § 1321 (codified at 42 U.S.C. § 18041 (2014)).
[25] § 1401(a) (codified at I.R.C. § 36B(b)(2)(A) (2014)).
[26] King v. Burwell, 135 S. Ct. 2480, 2488 (2015).
[27] Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).
[28] *See* Brief for Appellants at 48, King v. Burwell, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158).
[29] 759 F.3d 358. In reaching its conclusion that the definition of "established by the State" was ambiguous, the court looked to other aspects of the statute taken as a whole—including the facts that the Act allowed, but apparently did not require, that states create their own exchanges, and that federal and state insurance exchanges are subject to the same disclosure requirements. *See id.* at 367–72.

In rather sharp contrast, in *Halbig v. Burwell*, the majority of a panel of judges on the U.S. Court of Appeals for the D.C. Circuit held that the statutory language was clear (in the opposite direction, namely limiting tax subsidies to state-created exchanges), and thus resolved the case at *Chevron* Step One. 758 F.3d 390 (D.C. Cir. 2014). Judge Edwards, in dissent, found the language ambiguous. *Id.* at 414–15 (Edwards, J., dissenting). He thus proceeded to *Chevron* Step Two, at which he would give deference to the IRS and HHS joint determination to provide tax premium subsidies for those enrolled in state or federal exchanges. *See id.* at 425. The D.C. Circuit granted a petition for rehearing *en banc* and vacated the panel's decision. 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). The proceedings were stayed, however, pending the Supreme Court's decision in *King*. 2014 U.S. App. LEXIS 23434 (D.C. Cir. Nov. 12, 2014).

taking into account the agency's reliance on the policy objectives behind the law and the role of tax credits in effectuating those goals.[30]

The U.S. Supreme Court affirmed the Fourth Circuit, but on an alternative ground. In a 6-3 decision, the majority, per Chief Justice Roberts, set aside the *Chevron* framework in light of the "deep 'economic and political significance'" of the interpretive question at hand.[31] According to Chief Justice Roberts, the case was one of the "extraordinary case[s]" in which there is reason to doubt that statutory ambiguity represented an implicit delegation of interpretive authority to the agency.[32] Moreover, the *Chevron* framework was especially inappropriate here, Chief Justice Roberts remarked, given that it would have empowered an agency—the IRS—that had "no expertise in crafting health insurance policy" to decide questions that would have enormous policy implications.[33] While the Court ultimately concluded that the IRS's reading underlying the regulation was the correct interpretation of the statute, the majority was emphatic: "This is not a case for the IRS."[34]

2. Distrust of the Administrative State

It is not too surprising that Chief Justice Roberts would seize the opportunity in *King* to further a broader project of resisting the administrative state by cutting back on *Chevron*.[35] But what is somewhat mystifying is that the rest of the majority—including Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan (the latter four of whom typically

[30] 759 F.3d at 373 ("In answering this question in the affirmative we are primarily persuaded by the IRS Rule's advancement of the broad policy goals of the Act.").

[31] 135 S.Ct. at 2489 ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.").

[32] *Id.* at 2488–89 ("'In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation [to the agency]'. This is one of those cases."). According to the Chief Justice, this case fit the "extraordinary case" paradigm given the high political and economic stakes. *Id.* at 2489 ("The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.").

[33] *Id.* at 2489 ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.").

[34] *Id.*

[35] In this vein, *Chevron* can be seen as but one target of a broader-scale attack on the administrative state. *See* Sharkey, *supra* note 4 (manuscript at 9) ("In a set of administrative law decisions over the past five years—primarily addressing the scope of deference that courts should give to federal agencies' interpretations of congressional statutes (*Chevron* deference) and to agencies' interpretations of their own regulations (*Auer* deference)—the conservative core Justices have outlined a wide-scale attack on the administrative state. A series of opinions issued by the conservative core over the last decade demonstrate these Justices' deep skepticism of the theoretical underpinnings of the modern administrative state and illustrate their constant search for ways to shrink it."); *see also* Heinzerling, *supra* note 4; Sunstein & Vermeule, *supra* note 4.

are not aligned with their more conservative brethren in bemoaning regulatory expansion and the encroachment of the administrative state)—signed on to this proposition.[36]

The case that puts *King* in sharpest relief—and produces the strongest suggestion that Chief Justice Roberts may have a broader project in mind—is another case implicating the scope of *Chevron* deference, *City of Arlington v. FCC*.[37] In that case, the majority refused to employ *Chevron* Step Zero as a means to grant the Court sole authority to determine questions of agency jurisdiction.[38] Chief Justice Roberts (joined

[36] Two immediate possible rejoinders come to mind. First, *King*—conceived of as a straightforward application of the "major questions" exception to *Chevron*—applied here with particular force, given the truly high stakes of the decision, namely with the fate of the Act hanging in the balance. *See* Richard Lempert, *In* King v. Burwell, *An Easy Answer to the ACA's Definition of "Exchange,"* BROOKINGS (Mar. 3, 2015), http://www.brookings.edu/blogs/fixgov/posts/2015/03/04-king-burwell-aca-exchange-supreme-court-lempert (observing that the case "could torpedo the Affordable Care Act"). Moreover, given the truly "extraordinary" nature of the case, the more *Chevron*-friendly Justices could rest assured that *King* would be easily distinguishable down the road. For further discussion of the extent to which *King* signals an expansion of this *Chevron* exception, see *infra* Part III.A.

A second response hinges on the particular political stakes: namely that upholding the Act on *Chevron* grounds, giving deference to the IRS's interpretation of ambiguous statutory language, would mean that the Act would be susceptible to political unraveling down the road, should the IRS change its interpretation in a new administration. Indeed, Chief Justice Roberts raised this concern at oral argument. *See* Oral Argument at 76, *King*, 135 S. Ct. 2480 (No. 14-114) (expressing concern about the possibility that subsequent administrations might be able to change the operative definition of "Exchange" if the Court were to uphold the IRS's interpretation on grounds of *Chevron* deference). On this view, the Justices' signing on to this proposition involved an explicit political calculus rather than an expression of any skepticism regarding the broader administrative state.

[37] 133 S. Ct. 1863 (2013); *see also* Freeman, *supra* note 3 ("[E]nter the Chief Justice [in *King*]. His artful and bold move today breathes new life into *Brown & Williamson* . . . and rectifies his defeat in *Arlington*. That is a lot to accomplish in two paragraphs."); Heinzerling, *supra* note 4, draft at 14 ("It is not hard to see how the Court's roundabout route in King satisfies some of the Chief's larger goals as stated in his dissent in *City of Arlington*."); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56 (arguing that *King* represents the Court's cutting back on *Chevron* deference, particularly when viewed in light of the similarities between Chief Justice Roberts's majority opinion in *King* and dissent in *City of Arlington*); Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron's *Domain?*, 2015 PEPP. L. REV. 72 (suggesting that *King* might constitute a step in Chief Justice Roberts's "massive revision" to *Chevron*, and thereby follow on the heels of *City of Arlington*); Chris Walker, *What* King v. Burwell *Means for Administrative Law*, YALE J. REG.: NOTICE & COMMENT (June 25, 2015), http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker (characterizing the Court's assertion of authority in *King* as "a judicial power grab over the Executive in the modern administrative state," which could have significant implications for future challenges to administrative agency actions).

[38] Justice Scalia, writing for the majority, reasoned that it would be unworkable to distinguish between jurisdictional questions (i.e., does the agency have authority to act in this manner?) and non-jurisdictional questions (i.e., those secondary questions that arise

by Justices Kennedy and Alito) disagreed, and vociferously argued that it was entirely proper to reserve such "legal" determinations for the Court, considering the question independently: "Before a court may grant such deference, it must *on its own* decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue."[39]

At one level, *Chevron* Step Zero is thus the battleground for making distinctions between issues of "law" reserved to courts and issues of "policy" delegated to agencies. But, at a broader level, the *Chevron* Step Zero debate implicates the legitimacy and appropriate scale of the administrative state. Chief Justice Roberts' dissent in *City of Arlington* warned that "the danger posed by the growing power of the administrative state cannot be dismissed."[40] The Chief Justice's majority decision in *King*—setting *Chevron* aside on the basis that the agency before it is not relevant—enlarges *Chevron*'s Step Zero and thereby signals a potential avenue for challenging agency action.[41]

B. Making Room for State Farm

In *Michigan v. EPA*, the Court invalidated (and remanded to the agency) an EPA rule limiting power plant emissions of certain hazardous pollutants. In making a threshold determination to regulate, the EPA

---

when it is clear that the agency has authority to act in this manner). 133 S. Ct. at 1869–70. In sum, "[t]he reality, laid bare, is that there is no difference, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its "jurisdiction") and its exceeding authorized application of authority that it unquestionably has." *Id.* at 1870.

[39] According to the dissent, the lower court should not have accorded *Chevron* deference to the FCC's interpretation unless and until it had independently decided that Congress had delegated the authority to interpret the specific regulatory provision at issue. *Id.* at 1879–80 (Roberts, C.J., dissenting).

[40] *Id.* at 1879; *see also id*. (characterizing federal agencies' "poking into every nook and cranny of daily life").

[41] *Cf.* Freeman, *supra* note 3 ("At a minimum, this will add an extra step and an extra hurdle to the government's defense of every regulation with an arguably significant impact on the economy. And at worst, it will mean that more policy decisions fall outside the *Chevron* framework, and that agency regulations that might once have received deference will be struck down more of the time."); Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2015 CATO SUP. CT. REV. 35, 71 (noting how the Court, by setting *Chevron* aside, "g[ave] opponents of agency action a new arrow for their legal quivers"); Heinzerling, *supra* note 4, draft at 30 ("[T]hreatening to throw out the *Chevron* framework altogether when Congress is perceived to have chosen the wrong agency for the job may be highly disturbing to a wide variety of regulatory regimes."); *id.* at 35 ("The interpretive principle embraced in King did not, as it happens, upend the legislative work product at issue in that case, but it did plant a land mine for future cases.").

determined it was "appropriate and necessary" to regulate under the Clean Air Act without considering costs.[42]

Industry groups and twenty-one states challenged the emissions standards, arguing that the EPA's interpretation of the Clean Air Act was unreasonable and that the agency's ultimate decision that it was "appropriate and necessary" to regulate the emissions was arbitrary and capricious.[43] The D.C. Circuit rebuffed the challenges and upheld the regulations, applying *Chevron* and ruling that the EPA's interpretation was "clearly permissible."[44] In a narrow (5-4) decision, the U.S. Supreme Court reversed. Justice Scalia, writing for the majority, reasoned that while "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers," the EPA had "strayed far beyond th[e] bounds [of reasonable interpretation]" in concluding that it could ignore costs when making threshold determinations as to whether regulation would be appropriate.[45]

Michigan v. EPA stands for many things to different commentators. What is at first most remarkable about it is the extent to which there is broad agreement that (in the words of Justice Kagan, in dissent, no less) "sensible regulation requires careful scrutiny of the burdens that potential rules impose."[46] And the majority proclaims, with no need for any citation whatsoever: "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate."[47] The majority elaborates: "Against the backdrop of this established

[42] Section 112(n) of the Clean Air Act directs the agency to regulate, as "appropriate and necessary," hazardous air pollutants emitted by electricity-generating facilities. 42 U.S.C. § 7412 (2014). The EPA is to conduct a study on the remaining health hazards posed by these emissions after the implementation of other Clean Air Act provisions, and to consider the results of this study in deciding whether to regulate. § 7412(n)(1)(A).

[43] *See* Joint Brief of State, Industry, and Labor Petitioners, White Stallion Energy Ctr. v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) (No. 12-1100). The plaintiffs challenged various aspects of the EPA's action as arbitrary and capricious, and suggested (though did not explicitly argue) that the agency was not entitled to *Chevron* deference. *See id.* at 2–3, 33–34; *see also* Joint Reply Brief of State, Industry, and Labor Petitioners at 24–28, *White Stallion Energy Ctr.*, 748 F.3d 1222 (No. 12-1100) (countering the EPA's argument that its action was entitled to deference under *Chevron*).

[44] White Stallion Energy Center, LLC v. EPA, 748 F. 3d 1222, 1238 (D.C. Cir. 2014). The majority concludes that the word "appropriate" is ambiguous in isolation and that the EPA's reasonable interpretation of this ambiguous statutory term is permissible.

[45] Michigan v. EPA, 135 S. Ct. 2699, 2702 (2015) (citing Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014)). Justice Scalia likewise wrote the majority opinion in *Utility Air Regulatory Group*, concluding that the EPA's interpretation of the triggering event for the Clean Air Act's permitting requirement was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 134 S. Ct. at 2444. *Michigan*, following on the heels of *Utility Air Regulatory Group*, likewise denies the EPA deference at *Chevron* Step Two.

[46] Michigan, 135 S. Ct. at 2722 (Kagan, J., dissenting).

[47] *Id.* at 2707 (majority opinion).

administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost."[48] Cass Sunstein heralds the case as a "ringing endorsement of cost-benefit analysis by government agencies."[49] Jacob Gersen and Adrian Vermeule, however, resist this characterization. They insist on a narrower read of the decision as "principally an interpretive holding, about the meaning of the phrase 'appropriate and necessary' in a particular section of the Clean Air Act."[50]

But no one has yet highlighted what I see as the most intriguing feature of the case—namely, the citation of *State Farm* in the midst of the *Chevron* inquiry.[51] At the outset, the majority frames its analysis as follows:

> Federal administrative agencies are required to engage in "reasoned decisionmaking." Not only must an agency's decreed result be within the scope of its lawful authority, *but the process by which it reaches that result must be logical and rational*. It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." [*State Farm*][52]

After previewing its conclusion that the EPA's interpretation fails under *Chevron*,[53] the majority cites *State Farm* once again in the course of its statutory interpretation analysis, reasoning that "[a]lthough th[e] [statutory] term ['appropriate'] leaves agencies with flexibility, an agency may not

[48] *Id.* at 2708.

[49] Cass R. Sunstein, *Thanks, Justice Scalia, for the Cost-Benefit State*, BLOOMBERG VIEW (July 7, 2015); *see also* Robert L. Glicksman, Michigan v. Environmental Protection Agency, GEO. WASH. L. REV.: DOCKET (July 2, 2015), http://www.gwlr.org/michigan-v-environmental-protection-agency/ (observing that all nine Justices adhere to a presumption that cost is relevant to regulatory decision-making absent clear evidence of congressional intent to the contrary); Heinzerling, *supra* note 4, draft at 20 ("[I]n Michigan v. EPA, nine justices agreed that an administrative agency must—unless Congress provides otherwise—consider the costs of regulation before imposing regulatory standards."); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (fitting *Michigan v. EPA* into the pattern of the "rise of what some have called the 'cost-benefit state:' the convergence of executive, legislative, and judicially imposed requirements for agencies to analyze the costs and benefits of their regulations").

[50] Jacob Gersen & Adrian Vermeule, *Thin Rationality Review* (manuscript at 24) (Harv. Pub. Law Working Paper, Working Paper No. 15-15, 2015).

[51] Robert Glicksman did observe that it remains to be seen "whether the Court will move even further than the majority opinion does to merge *Chevron* step one and two analysis, and to merge step two analysis with decidedly non-deferential arbitrary and capricious review." Glicksman, *supra* note 49.

[52] 135 S. Ct. at 2706 (citation omitted) (emphasis added).

[53] *Id.*

'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate. [*State Farm*]."[54]

The full import of the Court's citations of *State Farm* is concededly cryptic. During oral argument, Justice Scalia offered a potentially far-reaching view: namely, that unless the statute prohibits considerations of cost, *State Farm* arbitrary and capricious review under the APA requires it.[55] This goes farther than I would.[56] However, where agencies perform cost-benefit analysis—as they are often obliged to do pursuant to executive order[57]—it is fair game for judicial review.[58]

What is most significant to me is how the importation of *State Farm* into *Chevron* Step Two sets the stage for a more robust form of judicial oversight, one particularly well suited to contexts in which agency policy-making determinations are directly relevant to the interpretations of statutes that they administer.[59] I have previously argued for a form of

---

[54] *Id.* at 2707.

[55] Transcript of Oral Argument at 14, *Michigan*, 135 S. Ct. 2699 (Nos. 14-46, 14-47, 14-49) ("I'm not even sure I agree with the premise that . . . when Congress says nothing about cost, the agency is entitled to disregard cost. I would think it's classic arbitrary and capricious agency action for an agency to command something that is outrageously expensive and . . . in which the expense vastly exceeds whatever public benefit can be . . . achieved. I would think that's . . . a violation of the Administrative Procedure Act.").

[56] *See* Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1617 (2014) ("An agency's failure to conduct a regulatory impact analysis pursuant to the executive order is not judicially reviewable. Nor are agencies expressly required to conduct cost-benefit analysis by the plain text of the arbitrary and capricious standard of section 706 of the APA.") [hereinafter, Sharkey, State Farm *"With Teeth"*].

[57] *See* Exec. Order No. 12,866, § 2(b), 3 C.F.R. § 640 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–03 (2012) (establishing cost-benefit analysis requirements that apply to many agency rulemakings).

[58] *See* Sharkey, State Farm *"With Teeth," supra* note 56, at 1618–19 ("[I]f agencies (be they executive or independent) do undertake a cost-benefit analysis, courts will review it. [Thus] regulatory impact analyses should—and as a practical matter do—play a role in substantive judicial review of the underlying regulation under *State Farm* arbitrary and capricious review."); *see also* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation* (manuscript at 44) ("[A]ny fact on which the agency relied in making its decision is subject to review under the 'arbitrary and capricious' standard of the [APA]. So, if an agency prepares a cost-benefit analysis, the quality of that analysis is fair game when the rule gets challenged in court, regardless of whether the cost-benefit analysis was undertaken voluntarily." (citing Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591 (2015))). *State Farm* is, moreover, a prime example, whereby the court reviewed NHTSA's cost-benefit analysis in connection with its decision to revoke a previous passive-restraint requirement. *See* Sharkey, State Farm *"With Teeth," supra* note 56, at 1618 n.125.

[59] Judge Kavanaugh, dissenting in *White Stallion Energy Center, LLC v. EPA* (which was overturned in *Michigan v. EPA*), remarked:

> In this case, whether one calls it an impermissible interpretation of the term "appropriate" at *Chevron* step one, or an unreasonable interpretation or application of the term "appropriate" at *Chevron* step two, or an unreasonable

"stepped-up" heightened judicial scrutiny of such agency determinations—in the context of cost-benefit analysis as well as preemption determinations—especially in situations where the agency's underlying analysis is not subject to executive oversight.[60] Here, I explicitly link that analysis to the *Chevron* framework—using *Michigan v. EPA* as an apt illustration of the new conceptual framework.[61]

II. THE *CHEVRON* STEP ZERO FRAMEWORK REVISITED

At *Chevron* Step Zero, courts make a threshold determination that a statute (or a precise portion of a statute) lies outside the corpus of statutes over which agencies have been given interpretive rights. In situations

---

> exercise of agency discretion under *State Farm*, the key point is the same: It is entirely unreasonable for EPA to exclude consideration of costs in determining whether it is "appropriate" to regulate electric utilities under the MACT program.

748 F.3d 1222, 1261 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part).

To my mind, the best way to conceptualize the inquiry is as the infusion of *State Farm* into *Chevron* Step Two. The advantage is to highlight the role of independent judicial scrutiny at Step Two (often held out as the thinnest of rationality review standards); moreover, it emphasizes the inter-relatedness of agency policymaking and interpretation when it comes to particular statutory interpretation issues (those involving cost-benefit analysis and preemption determinations being two prime examples).

[60] *See* Sharkey, State Farm *"With Teeth," supra* note 56.

[61] Jacob Gersen and Adrian Vermeule have criticized "*State Farm* with Teeth" (*see supra* note 56) as follows:

> To the extent that there is an implicit claim in Sharkey's proposal that courts should adopt a thin version of rationality review for agency decision that have been subject to OIRA review, we certainly agree. But to the extent that she advocates a thicker version of review for agencies that have not engaged in rigorous cost-benefit analysis, the idea is neither an accurate description of judicial practice, nor in our view a desirable shift in doctrine.

Gersen & Vermeule, *supra* note 50 (manuscript at 25). And, given their desire to fit *Michigan v. EPA* into a paradigm of "thin rationality review," I anticipate their opposition here, too. Gersen and Vermeule argue that *Michigan* "stands only for the unobjectionable proposition that rationality requires consideration of both the 'advantages *and* disadvantages of an agency decision.'" *Id.* (manuscript at 24) (quoting Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015); *see also id.* ("So read, *Michigan v. EPA* is entirely compatible . . . with thin rationality review generally."); *id*. (manuscript at 15 n.53) ("*Michigan v. EPA* is best understood to stand for the narrow, indisputable, and indeed nearly tautological proposition that at every stage of the administrative process, an agency decisionmaker must always consider the pros and cons of whatever course of action the decisionmaker undertakes."). Conspicuously absent from their account is any acknowledgement of the Court's citations of *State Farm* within its *Chevron* analysis, let alone how unique that is. Acording to Gersen and Vermeule, "[t]he days of systematically aggressive hard look review, as in the D.C. Circuit's decisions from the 1970s and early 1980s, are mostly behind us." *Id.* (manuscript at 10). Today, they claim, "[i]n the run of cases, arbitrary and capricious review entails a predictably and sensibly deferential review of agency policy judgments." *Id.* (manuscript at 6). Even if true, the question remains: does the Court's citation of *State Farm* in *Michigan* bear mention? Could it in fact signal a new approach?

where Congress has not been clear regarding delegated authority to agencies (*i.e.*, most of the time), *Chevron* Step Zero puts this decision squarely and exclusively in the hands of courts.[62] While it is legitimate to ask whether an agency in fact has legal authority or implied delegation from Congress to answer a particular question arising under a statute, it is important that courts pose this question not in the abstract, but with relevant input from the regulating agency.

At *Chevron* Step Zero, courts have asked a range of questions of the following sort: Is this a really big question?[63] Does the agency have the relevant expertise?[64] Is this a novel or atypical move by the agency?[65] While these are important questions to ask, they do not strike me as inherently "legal" (or purely legal). Instead, they are questions whose answers can and should be informed by the underlying agency's statement of basis and purpose and accompanying administrative record. In other words, there is a heavy dose of policy-making inherent to these determinations.[66] The Step Zero construct not only presents a worrisome

[62] The rise of textualism might also be seen as another force constricting the domain of agency power. To the extent that judges resolve issues at *Chevron* Step Zero, there is no room for agency interpretation or policy-making to influence outcomes. *See, e.g.*, Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994); *see also* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 224–34 (1994). Justice Scalia, for example, was known as a strong resister of explicit limits on the scope of *Chevron* (for example, dissenting in *Mead*; rejecting the expansion of *Chevron* Step Zero for jurisdictional questions in *City of Arlington*), while simultaneously expanding the scope of *Chevron* Step One using the textualist cannon of statutory interpretation. *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 773 (2014) ("The solution to the "fox-in-the-henhouse syndrome," according to Justice Scalia, was for courts to strictly enforce statutes at *Chevron*'s Step One."). I largely leave this debate to one side—although I recognize that courts could deploy tactics to resist agency involvement by widening the scope of *Chevron* Step One. In the face of truly ambiguous language, however, it will be more difficult to accomplish this, and thus taking *Chevron* Step Zero off the table would be significant.

[63] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2483 (2015); *see also supra* note 19 and accompanying text (discussing *King* and the Step Zero exception to *Chevron* deference).

[64] *See* Sunstein, *supra* note 8, at 206 (discussing the role that agency expertise questions plays in Step Zero determinations).

[65] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (suggesting that the *Chevron* framework might not be appropriate "where an unusually basic legal question is at issue").

[66] There is a fascinating parallel to draw with the internal changes within agencies wrought by *Chevron*, which transferred policy-making from lawyers to agency policy experts. *See, e.g.*, Elliott, *supra* note 105, at 14 ("One result of this *Chevron* induced shift of power to agencies within the Executive Branch . . . is that agency experts are making more policy decisions rather than agency lawyers and federal courts."); *see also id.* at 13 ("*Chevron* is significant for reducing the relative power of lawyers within EPA and other agencies and for increasing the power of other professionals."); *id.* at 12 ("[I]t is good that *Chevron has increased the weight given to the view of* air pollution experts in the air program office relative to the lawyers in OGC."). Donald Elliott, former EPA General Counsel, describes the pre-*Chevron* world as follows:

usurpation by courts of agencies' role, it is all the worse because a court acting at Step Zero can assert policy pronouncements while expressly ignoring any administrative record—a record it has deemed irrelevant.[67]

Apart from invoking the major questions doctrine, *King* highlighted the need—at *Chevron* Step Zero—to make sure that there has been delegation to the right agency, that is, delegation to the agency that is actually doing the regulating and is before the court. By failing to acknowledge that there were *two* relevant agencies—HHS as well as IRS—and failing to explore the ways they may have coordinated in the policy domain,[68] *King* seems to have effectuated a different type of expansion of *Chevron* Step Zero under the guise of the "major questions" exception.

In this Part, I advocate revising the *Chevron* Step Zero framework in light of two significant risks of misapplication that I explore in turn: courts failing to consider a range of coordinate agency activity before determining the relevant agencies, and the risk of judges making policy calls.

A. Implied Delegation to the Right Agency

Subsequent *Chevron* cases—most prominently *United States v. Mead*—have clarified that not all statutes grant implied delegation; only

---

> [T]he pre-*Chevron* conception of a statute was as a prescriptive text having a single meaning, discoverable by specialized legal training and tools. This "single meaning" conception of statutes created a very powerful role for lawyers and OGC within agencies. The privileged role for lawyers in defining what the statute required on every issue in turn led to a great deal of implicit policy-making by lawyers in OGC. They may have in all good faith believed that they were divining the one true and correct meaning of the statute, but intentionally or unintentionally, they may have smuggled a great deal of their policy preferences into their legal advice.

Id. at 11. According to Elliott, "*Chevron* opened up and validated a policy-making dialogue within agencies about what interpretation the agency should adopt for policy reasons, rather than what interpretation the agency must adopt for legal reasons." *Id.* at 12.

> Moreover, Elliott's normative conclusion could apply with equal force here: Normatively, I contend that the increased role of expertise in administrative decision-making, in addition to the interpretation of complex environmental statutes, is preferable to the covert judicial policymaking that occurs when agencies are not given a seat at the statutory table.

Id. at 18.

[67] *Cf.* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) ("The Court in *King* took it on itself—rather than leave it to the agency—to deal with the ACA's imperfections. The opinion implicitly also seemed to adopt . . . a more robust role for courts (rather than agencies) in dealing with statutory messes.").

[68] *See supra* notes 121–127 and accompanying text.

those statutes that direct administrative agencies to execute the statute's provisions grant implied delegation.[69] It is indeed important for courts to inquire whether the agencies before it have interpretive rights to construe a particular statutory provision.

In *King*, the Court's implied delegation analysis hinged on the relevant expertise of the agency. The Court's insistence of relative expertise is reminiscent of one aspect of the Court's decision in *Gonzales v. Oregon*:[70]

> In that case, the Attorney General of the United States had interpreted the Controlled Substances Act to preclude doctors' prescription of drugs to facilitate assisted suicide. The Controlled Substances Act gave interpretive authority to the Department of Health and Human Services in addition to the Department of Justice. The Supreme Court thus faced the issue of what level of deference to accord an agency's interpretation of a statute that gives authority to multiple agencies. The Court held that deference should be given to the agency that has the relevant expertise, which the Court decided was the Secretary of Health and Human Services, not the Attorney General: "The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment." This holding suggests that relevant expertise should be a factor in assessing deference in a shared space, contrary to the traditional view.[71]

1. King v. Burwell *Revisited*

Reading the Supreme Court decision in *King*, one is left with the impression that the only relevant agency is the IRS. Recall Chief Justice Roberts' summation: "This is not a case for the IRS."[72]

But, as Judge Edwards recognized in his dissent in *Halbig v. Burwell*—the D.C. Circuit opinion addressing the same issues as the Fourth

[69] 533 U.S. 218 (2001).

[70] 546 U.S. 243 (2006). Lisa Heinzerling likewise notes that "[t]he perceived expertise of the interpreting agency also had some basis in prior precedent [namely, *Gonzales v. Oregon*]." Heinzerling, *supra* note 4, draft at 17. According to Heinzerling, "In King, in contrast, Congress had explicitly given the Department of Treasury the authority to 'prescribe such regulations as may be necessary' to implement tax provisions, including the Affordable Care Act's provisions on tax credits." *Id.* at 17 (citing Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 79).

[71] Sharkey, *supra* note 84, at 342 (quoting *Gonzales*, 546 U.S. at 259).

[72] King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

Circuit in *King*—HHS and its actions are relevant here, too. In *Halbig*, the panel majority held that the statutory language was clear, and thus resolved the case at *Chevron* Step One.[73] Judge Edwards, however, found the language ambiguous, and thus proceeded to *Chevron* Step Two.[74] At that juncture, he would have given deference to the IRS for its determination, in coordination with HHS, to provide tax premium subsidies for those enrolled in state or federal exchanges.[75] According to Judge Edwards, the Act delegates authority to HHS and IRS, which acted jointly in administering certain tax provisions of the Act.[76]

There are thus *two* relevant agencies to consider and respective rulemaking records to probe. IRS apparently recognized that HHS had relevant agency expertise on the matter. During the course of its rulemaking, the IRS reached out to HHS so that HHS, in its exchange regulation, could clarify the statutory ambiguity by "deeming HHS exchanges to be exchanges established by states."[77] HHS issued a notice of proposed rulemaking to include in the definition of "Exchange," "an Exchange established or operated by the Federal government if a State does not establish an Exchange."[78] IRS and Treasury then incorporated the HHS definition of exchange into their proposed and final premium tax credit rules.[79]

---

[73] 758 F.3d 390 (D.C. Cir. 2014). *See supra* note 29.

[74] *Id.* at 414–15 (Edwards, J., dissenting).

[75] *See id.* at 425.

[76] Halbig v. Burwell, 758 F.3d 390, 413 (2014) (Edwards, J., dissenting) ("Because IRS and HHS have been delegated authority to jointly administer the ACA, this case is governed by the familiar framework of [*Chevron*]."); *id.* at 415 ("*Chevron* applies because IRS and HHS are tasked with administering the provisions of the ACA in coordination. . . The IRS's rule defines 'Exchange' by reference to the HHS's definition, which provides that subsidies are available to low-income taxpayers purchasing insurance on an Exchange 'regardless of whether the Exchange is established and operated by at State . . . or by HHS.").

[77] JOINT REPORT, *supra* note 122, at 18. The House Committees, in an in camera review of deliberative materials relevant to the IRS rule, uncovered evidence of IRS officials reaching out to HHS officials on this issue. As the report details:

> IRS employees . . . sent an email to several HHS officials [including the Deputy Administrator at the Centers for Medicare and Medicaid Services, Deputy Director of the Center for Medicaid and CHIP Services, and Deputy Director for Policy and Regulations at the Center for Consumer Information & Insurance Oversight] asking that HHS remedy the problem by deeming HHS exchanges to be exchanges established by states in HHS's exchange regulation.

Id.

[78] Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,868 (July 15, 2011); *see also* 77 Fed. Reg. 18,310 (Mar. 27, 2012) (codified at 45 C.F.R. pts. 155–157). HHS offered its view as a regulatory interpretation of Section 1321 of the Act—which gave HHS authority to set up exchanges in states that did not create an exchange. 42 U.S.C. § 18041 (2014).

[79] Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931 50,932 (Aug. 17, 2011) ("Exchange has the same meaning as in 45 CFR 155.20."); *see also* 77 Fed. Reg. 30,377,

In inquiring whether it had the right agency before it, the Court should have considered the relevance of HHS (and its rulemaking record) in addition to the IRS.[80] The question whether the Act in fact delegates joint authority to HHS and IRS is a difficult one; for my purposes, it matters less what the correct answer to this question is as opposed to when and how it is best to structure the inquiry. The core point is that the question of implied delegation—especially when more than one agency is involved—is one that might be better made in connection with the court's scrutiny of the agency's administrative record.

Chief Justice Roberts might still have been able to set aside *Chevron* for such an "extraordinary" case, but he certainly could not have bolstered this determination on the ground that the agency before it "has no expertise in crafting health insurance policy of this sort."[81] For HHS is precisely that agency. And the administrative record suggests joint policy-making determinations on the part of IRS and HHS.[82]

2. Challenge Posed by Delegation to Multiple Agencies

Statutes increasingly implicate delegations to more than one agency. As Chief Justice Roberts acknowledged in his *City of Arlington* dissent, it is increasingly "the norm, rather than exception" for "statutes [to] parcel out authority to multiple agencies."[83] Chief Justice Roberts has hinted that this trend bolsters the argument for removing *Chevron*

30,378 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 206) ("[T]he term Exchange has the same meaning as in 45 CFR 155.20, which provides that the term Exchange refers to a State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange.").

[80] Lisa Heinzerling makes a related point:

> *King*'s insistence that Congress choose the right agency for the interpretive job is also subjective. Although the Court does not acknowledge it, in fact it needed to do important interpretive work even in deciding that the IRS was not the right agency for this job. In choosing to focus on agency expertise, the Court needed to choose a substantive frame for the Affordable Care Act: was it a health-care statute, ill-suited to the IRS's skill set, or was it a tax-revenue statute, well within the IRS's wheelhouse? The best answer was probably that it was both—an exceedingly complex regulatory regime that contained many different elements, calling on a variety of forms of agency expertise. But the Court's search for the correct interpretive agent pressed it to identify just one characterization of the Affordable Care Act. This was not a neutral—or even sensible—anterior interpretive decision.

Heinzerling, *supra* note 4, draft at 33.

[81] 135 S. Ct. at 2489.

[82] *See* Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. at 41,866 ("The Departments of Health and Human Services, Labor, and the Treasury (the Departments) are working in close coordination to release guidance related to Exchanges in several phases."); Health Insurance Premium Tax Credit, 76 Fed. Reg. at 50,932 ("The Departments of Health and Human Services and Treasury are working in close coordination to release guidance related to Exchanges, in several phases.").

[83] 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting).

deference altogether.[84] In *City of Arlington*, the Chief Justice saw this as a reason for increasing the *Chevron* Step Zero space—as he would have done with respect to jurisdictional questions.[85]

King might have provided the Chief Justice an opportunity to solidify such a holding—namely, the Act jointly authorized IRS and HHS to administer various sections of the statutes,[86] sometimes in tandem.[87] Thus, no one of them should be granted *Chevron* deference. But the Chief Justice did not seize this chance and instead simply concluded that the IRS had no relative expertise and thus deserved no deference.[88]

To be sure, as the Chief Justice recognized in *City of Arlington*, unanticipated complexities arise from according *Chevron* deference to

---

[84] There is a line of authority in the D.C. Circuit for withholding *Chevron* where there is joint regulatory authority. *See, e.g.*, Rapaport v. U.S. Dep't of Treasury, 59 F.3d 212 (D.C. Cir. 1995). *But see* Jacob E. Gersen, *supra* note 96, at 222 (criticizing "an exclusive jurisdiction canon" by which, in the face of statutes implemented by multiple federal agencies, "courts go to great length either to conclude that no agency was given law-interpreting authority . . . or to conclude that *only one* agency was given law-interpreting authority"); Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. L.F. 329, 353–56 (proposing a model of "judicial review as agency coordinator" whereby, when faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies and, to the extent that there is agreement among them, would accord *Chevron* deference); *see also* DeNaples v. Comptroller of the Currency, 706 F.3d 481, 488 (D.C. Cir. 2013).

[85] Whereas the majority held that a court should apply *Chevron* to an agency's determination of its own jurisdiction, the dissent insisted that "whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue." *Id.* at 1881. Chief Justice Roberts invoked the increasing norm of statutes authorizing rulemaking by multiple agencies (such as Dodd-Frank) to illustrate the need for a more particularized inquiry by the courts. *Id.* at 1883–84.

[86] *See supra* notes 23–26 and accompanying text.

[87] *See* 42 U.S.C. § 18082(a) (2014) (giving the IRS and HHS the authority to coordinate in implementing certain components of the Affordable Care Act's tax program).

[88] In this way, the determination is reminiscent of the Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006):

> In that case, the Attorney General of the United States had interpreted the Controlled Substances Act to preclude doctors' prescription of drugs to facilitate assisted suicide. The Controlled Substances Act gave interpretive authority to the Department of Health and Human Services in addition to the Department of Justice. The Supreme Court thus faced the issue of what level of deference to accord an agency's interpretation of a statute that gives authority to multiple agencies. The Court held that deference should be given to the agency that has the relevant expertise, which the Court decided was the Secretary of Health and Human Services, not the Attorney General: "The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment." This holding suggests that relevant expertise should be a factor in assessing deference in a shared space, contrary to the traditional view.

Sharkey, *supra* note 84, at 342 (quoting *Gonzales*, 546 U.S. at 259).

multiple agencies' assertions of jurisdiction.[89] But, at the same time, there is a danger that the Court, in making this determination at Step Zero without a deep dive into the administrative record, could fail to appreciate some of these same complexities, as appears to be the case in *King*. To my mind, this argues in favor of the court's careful assessment of various forms of coordinated agency action—which might run the gamut from informal consultation, to cross-referencing respective policy determinations in rulemakings, to joint rulemaking—in order to determine which is (or are) the relevant agency (or agencies) with expertise to resolve the statutory ambiguity.

How should Congress's grant of concurrent regulatory authority affect *Chevron* analysis? This seems like an inquiry best for courts to resolve in conjunction with its review of the administrative records from the agencies claiming relevance and authority. The court would still make a judicial determination of implied delegated authority—but this determination would be informed by agency input and a detailed examination of the administrative record.

How might the analysis proceed? In *King*, as discussed above, the Court would have reviewed the rulemaking records of *both* the IRS and HHS. But there is no denying that the Court would still have had to confront a difficult legal issue: namely, did the extent of coordination between the IRS and HHS suffice to give the IRS authority to issue the rule that it did? How far would the bounds of such authority extend? Could it support an HHS exercise of regulatory authority under the Internal Revenue Code?

These are difficult questions. But note how the Court's ability to elide them altogether at Step Zero exacerbates the danger of judicial usurpation of the agencies' policy prerogatives. Instead, the Court should review how agency coordination takes place and, in the process, reach answers to questions of how implied authority is delegated when multiple agencies are involved.[90]

---

[89] *See, e.g.*, Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (discussing the complications that arise in the multiple-agencies context).

[90] Consider *Gonzales* again. David Wagner criticized the decision as judicial usurpation of agency power. David M. Wagner, Gonzales v. Oregon*: The Assisted Suicide of* Chevron *Deference*, 2007 MICH. ST. L. REV. 435 ("*Gonzales v. Oregon* continue[d] the Court's trend of stripping agencies of policymaking power and political accountability."). Jacob Gersen, in contrast, held it up as an example where the Court rightly took expertise into account when deciding whether to accord *Chevron* deference. *See* Gersen, *supra* note 84, at 225 ("When one agency has greater expertise than another agency, it is not ludicrous to suggest that courts should defer to the more expert one."). But, what if, in *Gonzales*, the IRS had in fact conferred and consulted with HHS?

B. Judges As Policymakers for "Major Questions"

At *Chevron* Step Two, the premise is that, if Congress did not make a decision on the exact question at issue, it is understood to have impliedly delegated the authority to make that decision to the relevant agency.[91] *Chevron* thereby vested agencies with new interpretive and policy-making power. Agencies, not courts, would make policy decisions in the gaps left by congressional silence.[92]

Some Justices view this as an inappropriate transfer of power from courts to the executive. Justice Thomas's challenge to *Chevron* deference in *Michigan v. EPA* is best understood through this lens. He characterizes agencies' Step Two actions as follows:

> [A]gencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as *Chevron* itself acknowledged, they are engaged in the "formulation of policy." Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.[93]

Indeed, according to Justice Thomas, such agency policy judgments are often completely untethered from statutory text, and thus cannot credibly be called "interpretation" in any respect:

> What EPA claims for itself here is not the power to make political judgments in implementing Congress' policies . . . . It is the power to decide . . . which policy goals EPA wishes to pursue. Should EPA wield its vast powers over electric utilities to protect public health? A pristine environment? Economic security? We are told that the breadth of the word "appropriate" authorizes EPA to decide for itself how to answer that question.[94]

But what is Justice Thomas's suggested alternative, and is it any better? In his view, should *judges* (rather than agencies) be making such policy calls? Nor is Justice Thomas' retort—"*Chevron* deference precludes judges from exercising that [independent] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous

[91] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[92] *See id.*; *see also* Herz, *supra* note 3, at 1873 (describing the court-agency power dynamic that arises based on deference at *Chevron* Step Two)
[93] Michigan v. EPA, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., dissenting).
[94] *Id.* at 2713.

statute' in favor of an agency's construction"[95]—directly responsive, at least to situations where the ambiguity must be infused with policy analysis to resolve it one way or another.[96]

I want to suggest that the reciprocal quandary results from adherence to Justice Thomas's view; namely, judges actually making policy determinations under the guise of "legal" interpretations.[97] This is a quandary that is as likely to occur at *Chevron* Step Zero as at Step Two. In *Mead*, the Court suggested: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."[98] But, as Breyer's concurrence in *City of Arlington* makes clear, there are often numerous factors relevant to this inquiry: "[T]he existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant."[99] This context-specific analysis often implicates policy-laden factors; it would thus behoove courts to conduct this analysis with the benefit of input from the relevant agency.

King is not the first instance in which the Court has modified the *Chevron* Two-Step in the face of a so-called "major question." In *FDA v. Brown & Williamson Tobacco Corp.* (cited in *King*), the majority proclaimed: "We are confident that Congress could not have intended to delegate a decision of such economic and political significance [as regulating tobacco] to an agency in so cryptic a fashion."[100] Seen in that light, to be sure, the political and economic stakes of the question before the Court in *King* cannot be gainsaid.[101]

Brown & Williamson is nonetheless distinguishable. There is a near scholarly consensus that the case fits the paradigm of *Chevron* Step

---

[95] *Id.* at 2710.

[96] Justice Thomas's response would likely be to resurrect the non-delegation doctrine. *See id.* at 2713 (implicitly referencing the non-delegation doctrine).

[97] *Cf.* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 821-22 (2010).

[98] City of Arlington v. FCC, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring).

[99] Justice Breyer looked to at least ten factors relevant to divining Congressional intent, concluded that the provision at issue "leaves a gap for the FCC to fill" and, on that basis supported the FCC's interpretation. *Id.* at 1875–77.

[100] 529 U.S. 120, 160 (2000).

[101] According to the House Committees' Joint Report:

> Because the population of the 34 states that decided not to create their own exchanges equals roughly two-thirds of the nation's total population, the IRS's decision to extend subsidies in federal exchanges potentially created spending that may exceed $500 billion dollars over 10 years relative to a strictly textual interpretation of the law.

JOINT REPORT, *supra* note 122, at 9.

One, whereby the Court found the congressional meaning of the disputed statutory text clear on the basis of the law's structure, context, and history.[102] Moreover, as Lisa Heinzerling notes, "The Court had, in the *Chevron* era, never before put the *Chevron* framework entirely to the side in the circumstances presented in *King*: an interpretation of a statute deemed ambiguous, arrived at after notice-and-comment rulemaking, by the agency charged by statute with making rules to implement the provision interpreted."[103]

My analysis here calls into question the very existence of the "major questions" exception. The alternative to agencies making policy calls of great economic and political significance is judges' doing so under the guise of legal statutory analysis.[104]

III. THE NEW *CHEVRON-STATE FARM* FRAMEWORK

Michigan v. EPA hints at a new *Chevron-State Farm* conceptual framework. The *Chevron-State Farm* conceptual framework emphasizes that whether an agency's interpretation is upheld depends on how strong its reasons are. The idea of injecting *State Farm* review into the *Chevron* Two-Step is to direct courts to look to the administrative record—the preamble justifying the agency's interpretation and, specifically, the factual support and policy justification for the agency's choices. This apparatus will apply to a host of statutory interpretation contexts; namely, wherever

[102] *See, e.g.*, Cass, *supra* note 6, at 7 ("Justice O'Connor's opinion for the Court . . . appears consistent with a typical 'traditional tools' approach to *Chevron*'s Step One: an interpretation of the statute by the Court using the traditional tools of statutory construction, here concluding that there was no ambiguity respecting the issue before the Court and no intention to grant the agency discretion to regulate a substance and product outside its authority."); Heinzerling, *supra* note 4, draft at 10 ("In [*Brown & Williamson*], the Court cited the significance of the issue at hand as but one factor in its decision, and the Court concluded that the underlying regulatory scheme—including statutes passed after the passage of the statute the FDA was interpreting there—clearly precluded the agency's interpretation. The Court held, in other words, that the underlying statute was clear at *Chevron*'s step one.").

[103] Heinzerling, *supra* note 4, draft at 16.

[104] Abbe Gluck has an interesting take on the "new doctrinal move" wrought by *King*. According to Gluck, it is the principle that "not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency," leading to a new doctrinal framework in which *Chevron* applies "only for mundane or confined questions that do not implicate the functionality of the overall statutory structure." Gluck, *supra* note 3, at 96. From my perspective, this leads to a brave new world wherein courts wall themselves off from agency input on questions dramatically calling for agencies' policy expertise—*i.e.*, those implicating the "functionality of the overall statutory structure." *See id.* It is also at seeming odds with the finding from Gluck and Lisa Bressman's comprehensive survey of 137 congressional drafters that drafters consider agencies, not courts, to be their main partners in statutory interpretation. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

the agency's policy choices, backed by empirical support, guide its interpretation of an ambiguous statute.[105] *Michigan v. EPA* demonstrates that the court might in fact have adopted this conceptual framework in the context of evaluating the EPA's choice to disregard costs when making a threshold determination of whether it was "appropriate" to trigger the regulatory process.[106]

State Farm's advance in the wake of *Chevron*'s seeming retreat—and the conceptual framework it embodies—provides an opportunity to revisit the normative debate surrounding hard look review. Sunstein has been a leading proponent of the view that hard look review serves as a check on the administrative state.[107] What is missing thus far from this robust debate is any sustained focus on agencies' response in the shadow of more aggressive judicial review. If, "[a]t the margins, agency decisions after *Chevron* reflect more weight on policy choices and less on legalistic interpretations," that effect would be augmented with the infusion of *State Farm* type review. Moreover, if *Chevron* has already had some effect in terms of "reduc[ing] the relative power of lawyers within agencies and strengthen[ing] the voices of officials in other disciplines,"[108] the infusion of *State Farm* review should augment this trend. I have argued previously that *State Farm* is information-forcing; its advance into the *Chevron* Two-Step will enhance this effect. Internal changes that have been wrought within the EPA and SEC provide vivid illustrations of this quality-forcing change on regulations that are promulgated in the shadow of this heightened form of judicial scrutiny.

This Part imagines a world in which such a conceptual framework takes hold. First, I revisit *Michigan v. EPA*—for while it embodies the *Chevron-State Farm* conceptual framework, the Court did not spell out how it should be applied. Next, I take up the potentially far-reaching implication for statutory interpretation and administrative law: the rise of more robust *State* Farm "hard look" review.

---

[105] In this regard, consider how Donald Elliott argued that "*Chevron* moved the debate from a sterile, backward-looking conversation about Congress' nebulous and fictive intent to a forward-looking, instrumental dialogue about what future effects the proposed policy is likely to have." E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILLANOVA ENVTL. L.J. 1, 13 (2005).

[106] *See supra* notes 51–58 and accompanying text.

[107] Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51 (1984).

[108] Elliott, *supra* note 105, at 2.

A. "Reasoned Decisionmaking" Doctrinal Check on Agencies

1. Michigan v. EPA *Revisited*

Michigan v. EPA suggests a new conceptual framework where *State Farm* enters the *Chevron* Step Two analysis. But, the decision, in order to be faithful to this framework, should have acknowledged, at *Chevron* Step Two, and pursuant to *State Farm*, that OIRA had already scrutinized and approved the cost-benefit analysis underlying the EPA's rule.[109] As I have argued, this would have appropriately led to more deferential judicial review at this stage.[110]

EPA conducted a Regulatory Impact Analysis (RIA) of the regulation—as it was required to do under the Executive Order—which was subject to OIRA review.[111] This is amply supported in the regulatory record that the Supreme Court reviewed.[112] Indeed, it is referenced in the

[109] *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9441 (Feb. 16, 2012) (explaining that the rule was subject to OIRA review).

[110] *See* Revesz, *supra* note 58 (manuscript at 49) ("[I]f more stringent review is appropriate for agencies that do not undergo Executive Branch review, it reasonably follows that those that are subject to such vetting deserve more deferential review. Sharkey embraces this view and advocates 'that a court should take into account whether OIRA has given its imprimatur to the agency's cost-benefit analysis when calibrating the level of scrutiny it directs to the task at hand.'" (quoting Sharkey, *supra* note 56)); Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Respondents, Michigan v. EPA, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-46_amicus_resp_ipinyu.authcheckdam.pdf (arguing that agencies and OIRA are well-equipped to conduct cost-benefit analysis of regulations and that "when courts can refer to such analysis and executive branch review, there is less need to second-guess the agency's analytical process" (citing Sharkey, *supra* note 56)).

For a provocative counter-argument, see Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014). Heinzerling served as Senior Climate Policy Counsel to the EPA Administrator and Associate Administrator of the Office of Policy at the EPA. According to Heinzerling, OIRA "actively pressed EPA to interpret its governing statutes to allow cost-benefit analysis, even where EPA had a long history of interpreting them not to allow it." *Id.* at 350. Heinzerling argues that agencies' statutory interpretations should not be subject to *Chevron* deference "when an interpretation is foist upon [the relevant agency] by OIRA." *Id.*

[111] *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. at 9441.

[112] *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial-

majority decision.[113] Justice Kagan makes the most explicit argument in her dissent: "EPA knew that, absent unusual circumstances, the rule would need to pass . . . cost-benefit review in order to issue."[114] Indeed, based on the agency's cost-benefit analysis (which had received OIRA's imprimatur), Justice Kagan states that the outcome here would be "a rule whose benefits exceed its costs by three to nine times."[115] Justice Kagan thus framed the central question as: "whether EPA can reasonably find it 'appropriate' to trigger the regulatory process based on harms (and technological feasibility) alone, given that costs will come into play, in multiple ways and at multiple stages, before any emission limit goes into effect."[116]

But—as Justice Scalia responds—EPA did not make these potentially powerful arguments put forth by Justice Kagan.[117] Indeed, before the Court, "EPA concede[d] that the regulatory impact analysis

---

Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24,976, 25,072–78 (May 3, 2011) (proposed rule); 77 Fed. Reg. at 9305–06, 9424–32 (final rule).

[113] Michigan v. EPA, 135 S. Ct. 2699, 2705–06 (2015) ("In accordance with Executive Order, the Agency issued a 'Regulatory Impact Analysis' alongside its regulation. This analysis estimated that the regulation would force power plants to bear costs of $9.6 billion per year. . . . [T]he regulatory impact analysis took [ancillary benefits] into account, increasing the Agency's estimate of the quantifiable benefits of its regulation to $37 to $90 billion per year.").

[114] *Id.* at 2721 (Kagan, J., dissenting) (citing Exec. Order No. 12,866, 3 C.F.R. § 638 (1993)). Justice Ginsburg also highlighted this fact at oral argument:

> [C]an you clarify for me why this [fact that the rule imposes high costs] is . . . at this stage something that we should be concerned about because there is this regulatory impact assessment and that . . . has said that the benefits vastly exceed the costs, and that's . . . an impact analysis and has gone through the [OIRA] process and [OIRA] concluded that EPA appropriately calculated the costs.

Transcript of Oral Argument at 39-40, *Michigan*, 135 S. Ct. 2699 (Nos. 14-46, 14-47, 14-49). And it came up in an interchange between Justice Scalia and Solicitor General Donald Verrilli, as well:

> JUSTICE SCALIA: General Verrilli, let me . . . ask a question about costs. There . . . are economic costs. There are other costs. Is it . . . the Agency's position that no cost can be taken into account? . . .
>
> GENERAL VERRILLI: . . . I think that cost would be taken into account in the OIRA regulatory impact analysis.
>
> JUSTICE SCALIA: But not for the listing.
>
> GENERAL VERRILLI: But . . . not for the listing.
>
> JUSTICE SCALIA: Not for the listing. That's right.

Id. at 70.

[115] 135 S. Ct. at 2722.

[116] *Id.* at 2717.

[117] *Id.* at 2710 (majority opinion) ("This line of reasoning contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action. When it deemed regulation of power plants appropriate, EPA said costs were irrelevant to that determination—not that cost-benefit analysis would be deferred until later. . . . What it said is that cost is irrelevant to the decision to regulate." (citing SEC v. Chenery Corp., 318 U.S. 80, 87 (1943))).

'played no role' in its appropriate-and-necessary finding."[118] It is important, then, to keep in mind that the majority did not determine that the EPA's action was indefensible.[119]

It is likely that, on remand, EPA will be able to justify its current regulation. Seen in this light, EPA chose a risky litigation strategy (a strategy unlikely to be employed again)—namely, one that repeatedly disclaimed any reliance whatsoever on costs at the threshold stage.[120] And

---

[118] *Id.* at 2706 (quoting Brief for Federal Respondents at 14, *Michigan*, 135 S. Ct. 2699 (Nos. 14-46, 14-47, 14-49)); *see also id.* at 2711 ("The Government concedes . . . that 'EPA did not rely on the [regulatory impact analysis] when deciding to regulate power plants,' and that '[e]ven if EPA had considered costs, it would not necessarily have adopted . . . the approach set forth in [that analysis].'" (quoting Brief for Federal Respondents, *supra*, at 53–54)).

[119] *Id.* at 2711 ("It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.").

[120] *See also* White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1263 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) ("EPA's official position in this Court is that the costs identified in the Regulatory Impact Analysis should have '*no bearing on*' the determination of whether regulation is appropriate." (emphasis added)).

EPA's actions might be further explained given the regulatory history of this particular emissions rule. EPA made its first "necessary and appropriate" finding in 2000. *See* Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000). At that time, EPA argued that the Clean Air Act *prohibited* it from considering costs. In 2005 (after a change of political administrations), EPA made a delisting determination, which was overturned by the D.C. Circuit. *See* 748 F.3d at 1232. EPA's 2012 (after another change in political administration) "necessary and appropriate" finding was thus a confirmation of its earlier 2000 finding. *Id.* This history is recounted in the lower court opinion—and gives some context to understanding why the EPA might have found themselves in a tricky position in 2015, attempting to straddle the line between their earlier and current interpretations of the statute. *Compare, e.g.*, 76 Fed. Reg. 24,976, 24,988 (May 3, 2011) ("We further interpret the term 'appropriate' to not allow for the consideration of costs"), *with* 77 Fed. Reg. 9304, 9327 (Feb. 16, 2012) ("Cost does not have to be read into the definition of 'appropriate.'"). *Cf.* Heinzerling, *supra* note 4, draft at 40 ("The Supreme Court acknowledged no part of this legal context in Michigan v. EPA. Rather than understanding, and working with, the unwaveringly strict scheme created by section 112 and elaborated on in numerous cases in the D.C. Circuit, the Court majority created an interpretive principle that cast doubt on the very rationality of such a scheme.").

Consider the following exchange at oral argument where the Justices pressed Solicitor General on EPA's position regarding consideration of costs:

> CHIEF JUSTICE ROBERTS: . . . You concede, don't you, that EPA could have interpreted the statutory language to allow them to consider costs?
>
> GENERAL VERRILLI: I think EPA read it as—read the best interpretation of the statute was it didn't provide for the consideration of costs at the listing stage—
>
> CHIEF JUSTICE ROBERTS: But under *Chevron*, if you adopted a regulation that said appropriate and necessary allows us to consider cost, you think that would be appropriate?
>
> GENERAL VERILLI: I think the phrase appropriate and necessary doesn't, by its terms, preclude the EPA from considering cost. But under *Chevron* what

Michigan v. EPA stands far removed from the classic situation whereby an agency's action would not withstand *State Farm* review at *Chevron* Step Two. Disagreement with its ultimate holding—failing to uphold the emissions regulation at issue—should by no means foreclose an embrace of the *Chevron-State Farm* framework or cloud sober evaluation of it.

2. King v. Burwell *Revisited*

The IRS rulemaking record contains little to show that it engaged in a reasoned decision-making process before articulating its interpretation of "Exchange" as the term appears in the Affordable Care Act (ACA).[121] The U.S. House of Representatives Joint Report of the Committee on Oversight and Government Reform and Committee on Ways and Means seems justified in concluding that the IRS actually gave scant attention to the issue and simply asserted a legal position.[122] In promulgating the final

---

> the EPA has got to do is explain the justification for its reading of the statute, and that's what it did.
>
> CHIEF JUSTICE ROBERTS: Right. But since you're dealing with the term, I think this says as capacious as appropriate, and since you could have issued a regulation allowing the consideration of costs as appropriate, you're saying that the agency deliberately tied its hands and said we're not going to consider something. We're going to issue a rule saying we can't consider something that we could consider otherwise. . . .
>
> JUSTICE KENNEDY: I have the same question as the Chief Justice. Could this agency reasonably have considered costs at stage one?
>
> GENERAL VERRILLI: I don't think the statutory text unambiguously forbids them from considering costs. . . .

Transcript of Oral Argument at 42–43, *Michigan*, 135 S. Ct. 2699 (Nos. 14-46, 14-47, 14-49).

[121] *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).

[122] The Joint Report concludes:

> The evidence gathered by the Committees indicates that neither IRS nor Treasury Department conducted a serious or thorough analysis of the [Act] of the law's legislative history with respect to the government's authority to provide premium subsidies in exchanges established by the federal government. IRS and Treasury merely asserted that they possessed such authority without providing the Committees with evidence to indicate that they came to their conclusion through reasoned decision-making.

JOINT STAFF OF H. COMM. ON WAYS & MEANS & H. COMM. ON GOV'T REFORM, 113TH CONG., ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW'S TAXES AND SUBSIDIES 3–4 (2014) [hereinafter JOINT REPORT]; *see also id.* at 11 ("IRS and Treasury arrived at the decision to extend premium subsidies to federal exchanges without a thorough or proper analysis."); Adler & Cannon, *supra* note 41, at 69–72 (arguing that, by sidestepping *Chevron* deference, the Court avoided thorny problems that would have arisen had the IRS been forced to defend its "cursory and conclusory justification for its interpretation"); Jonathan H. Adler, *Did the IRS Engage in Reasoned Decision Making?*, WASH. POST (March 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/01/did-the-irs-engage-in-reasoned-decision-making/; Michael F. Cannon, *Seven Things You Should Know About the IRS Rule Challenged in* King v. Burwell, NAT'L REV. (Mar. 4, 2015,

rule, the IRS flagged the disagreement as to the clarity of the statutory provision under which it claimed authority to regulate (§ 36B) and then summarily stated that its interpretation was consistent with the statute taken as a whole.[123] There is, moreover, some evidence—brought to light by the House Joint Report—that the agency was guided in its actions by the future prospect of *Chevron* deference, and more than a suggestion that this led it to be overly complacent with respect to providing the basis for its conclusory legal interpretation.[124] The House Committees, however, limited their attention to the IRS.[125]

Under the newly conceived *Chevron-State Farm* framework, the Court should look particularly to the relevant agenc(ies) for policy-relevant analysis (*not* their view of the best legal interpretation on the basis of legislative history, reading the text of the statute, etc.). Consider, in this regard, the critique of the Joint Report, echoed by Jonathan Adler, that the IRS (and Treasury) fell short in terms of "reasoned decisionmaking" on account of the fact that they did not "conduct[] a serious or thorough analysis of the [Act] of the law's legislative history with respect to the government's authority to provide premium subsidies in exchanges established by the federal government."[126] This is *not* the type of policy-relevant evidence that I am suggesting the agency needs to provide to the

---

4:00 AM), http://www.nationalreview.com/article/414809/seven-things-you-should-know-about-irs-rule-challenged-king-v-burwell-michael-f).

[123] *See* 77 Fed. Reg. at 30,378.

[124] JOINT REPORT, *supra* note 122, at 7 ("Six months prior to the publication of the . . . final rule, Treasury officials . . . began looking into whether courts would determine that the statute was ambiguous and defer to the agencies' interpretation, a doctrine known as *Chevron* Deference. Two members of the initial IRS working group could not remember ever working on a previous rule where *Chevron* was discussed, with one member stating that considering *Chevron* prior to the promulgation of a final rule was extremely unusual.").

Christopher Walker's work sheds light on this phenomenon of agency officials acting in the shadow of *Chevron*, and suggests that it is common for agency officials to consider the prospect of subsequent judicial review when drafting rules. Based on a survey of more than one hundred federal agency officials, Walker reports that 46% agreed or strongly agreed (and another 35% somewhat agreed) that the agency's expectations as to deference affects the way that the agency drafts its rules. Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 82 FORDHAM L. REV. 703, 722–23 (2014). Moreover, more than four out of five officials agreed, strongly agreed, or somewhat agreed that an expectation of *Chevron* deference will increase an agency's willingness to adopt an aggressive statutory interpretation. *Id.* at 723–24. On the basis of his analysis of the survey data, Walker concludes: "If the rule drafters surveyed are representative of the regulatory state generally, then the bureaucrats clearly listen to the courts. And these findings strongly suggest that three decades of *Chevron* and its accompanying evolution have permeated statutory interpretation inside the regulatory state." *Id.* at 721.

[125] According to the Joint Report, "[t]he focus of the Committees' investigation was whether IRS and Treasury conducted an adequate review of the statute and legislative history prior to coming to its conclusion that [the Act's] premium subsidies would be allowed in federal exchanges." JOINT REPORT, *supra* note 122, at 3.

[126] *See supra* note 125.

Court. Instead, the agency should focus on the empirical consequences of making various policy choices that inform the agency's legal interpretation of the statute. The Court would then scrutinize these policy-making determinations under *State Farm*—perhaps a more robust form of review, given that the IRS rule did not appear to garner executive oversight by the Office of Information and Regulatory Affairs (OIRA).[127]

B. How Agencies Respond to Doctrine

A longstanding argument in favor of robust "hard look" judicial review is its quality-improving effect in terms of leading to better, more effective, regulations.[128] There are some theoretical accounts of this effect.[129] The core of the argument is that agencies are incentivized to collect and analyze sufficient data, which the court can consult when reviewing the agency's actions. Agencies are thereby forced to engage in more reasoned decision-making so that they are equipped to demonstrate to the courts that they considered all of the relevant policy variables—rather than simply parroting conclusory statements of their legal authority to act.[130] Moreover, the specter of judicial review has an effect on

[127] *Compare* Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. at 41,908 (stating that the HHS regulation was subject to OIRA review), *with* Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931 (making no mention of such a review process).

[128] There are other arguments in favor of more robust judicial review. For example, in relatively early work, Sunstein defended hard look review as "a legitimate and salutary development" that promotes agency accountability, facilitates private ordering, tests potential regulations, and serves separation of powers principles. *See* Sunstein, *supra* note 107. And Jim Rossi defends hard look judicial review of agency action based on deliberative democratic theory. *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763.

[129] The most sophisticated theoretical account is provided by Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753 (2006) (providing an account whereby more stringent judicial review leads to better regulatory records, less action by agencies overall, and increased average expected value associated with those actions that agencies do undertake); *see also* James R. Rogers & Georg Vanberg, *Resurrecting* Lochner*: A Defense of Unprincipled Judicial Activism*, 23 J.L. ECON. & ORG. 442 (2007) (arguing that, even if judicial review of agency action is driven by judges' personal ideologies, the review mechanism nonetheless improves the quality of agency decision-making); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (arguing that hard look review exerts a quality-forcing effect on administrative agency rulemaking).

[130] *See* Sharkey, *supra* note 56; *see also* Andrew M. Grossman, Michigan v. EPA*: A Mandate for Agencies to Consider Costs*, 2015 CATO SUP. CT. REV. 281, 305–06 (suggesting that what *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), and *Michigan v. EPA*, 135 S. Ct. 2699 (2015) have in common is that they "methodically check that the agency did its homework, ensuring that all relevant costs and benefits have been considered with respect to each aspect of agency action, without second-guessing the agency's determinations and weighing of the evidence").

agencies' internal structures and regulatory choices.[131] There is thus an empirical turn in the argument, with a focus on ways that the doctrine shapes agencies.[132]

Michigan v. EPA[133] continues the path of heightened judicial review of agency rulemaking, and, in particular, agency consideration of costs and benefits that was first forged by *Business Roundtable v. SEC*.[134] If *Business Roundtable* was a wake-up call to the SEC and other financial services regulators, then *Michigan v. EPA*, notwithstanding the environmental context in which it was decided, sounds a second alarm. As Ricky Revesz notes:

> Ironically, the *Michigan v. EPA* decision is unlikely to have much impact on environmental regulations because open-ended terms like "appropriate and necessary" are rare in the federal environmental laws. In contrast, these terms are commonplace in statutes that delegate rulemaking authority to financial regulators, rendering their rules potentially vulnerable absent consideration of costs and benefits.[135]

Cass Sunstein elaborates:

> Congress enacts many laws that use words such as "appropriate" or "reasonable," or direct agencies to consider "efficiency" when taking action. After [*Michigan v. EPA*], there is a good argument that, whenever Congress uses such words, agencies are bound to balance costs and benefits.
>
> This might well make a difference for the SEC, which has sometimes been reluctant to assess costs and benefits—and has occasionally gotten into legal trouble for it. It may also change things for the Occupational Safety

[131] *See infra* Section III.B.1.

[132] Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012) (highlighting three ways in which *State Farm* hard look review affects agency decisionmaking: (1) incentivizing agencies to retain outside experts; (2) influencing the way that agencies perceive themselves; and (3) shaping the way that agencies divide labor, establish procedures, develop authority structures, and train personnel).

[133] 135 S. Ct. 2699 (2015).

[134] Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011). For the argument that *Business Roundtable*—a D.C. Circuit decision that overturned the SEC's proxy access rule on "arbitrary and capricious grounds"—fits the paradigm of heightened hard look review, see Sharkey, State Farm "*With Teeth*," *supra* note 56, at 1624-1631). *See also id.* at 1620 ("In the wake of the *Business Roundtable* decision, there is emerging evidence in support of [its] information-forcing role at federal banking agencies."); *id.* at 1593 (suggesting *Business Roundtable* might be a "harbinger of a new administrative law model that . . . allows judges to calibrate the stringency of their review of an agency's cost-benefit analysis by taking into account OIRA's prior scrutiny"

[135] Revesz, *supra* note 58 (manuscript at 3-4).

> and Health Administration, which has said that its governing law (which contains the words "reasonably necessary or appropriate") doesn't require it to demonstrate that the benefits of its regulations justify its costs.
>
> More importantly, the court has now given a strong signal to independent regulatory agencies such as the FTC, the FCC, the Commodity Futures Trading Commission and the Federal Reserve. If they don't weigh costs against benefits, they might find themselves in legal jeopardy. For those who seek rational regulation and who are concerned about unjustified economic burdens, that is a major step forward.[136]

As a more general matter, to the extent that *Michigan v. EPA* embraces a new conceptual framework for the infusion of a robust *State Farm* hard look review into the *Chevron* Two-Step, it could have even wider ramifications even beyond the financial services regulators.[137] It is time to evaluate the costs and benefits of this new approach.[138]

1. The Bright Side: Agencies' Regulatory Response

Evidence regarding agencies' positive regulatory response in the face of "hard look" review is accumulating from various insider accounts, which provide qualitative accounts of responses within agencies.[139]

---

[136] Sunstein, *supra* note 49.

[137] Philip A. Wallach, Michigan v. EPA*: Competing Conceptions of Deference Due to Administrative Agencies*, BROOKINGS (June 29, 2015, 5:00 PM), http://www.brookings.edu/blogs/fixgov/posts/2015/06/29-michigan-v-epa-administrative-deference-wallach ("By involving courts more deeply in the practice of cost-benefit analysis, that would be a big change.").

[138] *See* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591 (2015) (examining the prospective benefits and drawbacks of a robust system of judicial review of agency cost-benefit analysis).

[139] These accounts are reminiscent of those that emerged to evaluate the effect of *Chevron* on agency decisionmaking. *See* Elliott, *supra* note 105. Elliott takes up the topic of "how the *Chevron* doctrine as a whole has affected the relationships of courts and agencies, particularly in the environmental area." *Id.* at 1 n.1. More specifically, Elliott sheds light on "how *Chevron* changed EPA's internal dynamics." *Id.* at 3. He recounts:

> *Chevron* broadens and enriches the policy dialogue within agencies by shedding the legal formalism that had previously dominated agencies.
>
> Why is that a good thing? Principally, it is a good thing because an increased input by experts into the policy-making process at the margins is likely to result in better policy. Few would argue that an ambient air quality standard grounded more in solid science and less on administrative guesswork is a bad thing.

Id. at 16.

a. EPA

First, given that EPA is an executive branch agency, it is worth pointing out that "OIRA's regulatory oversight"' has been "information forcing" in the sense that "[o]ver the years, agencies responded to these cost-benefit analysis requirements by hiring additional economists and generally focusing more attention on creating a robust regulatory record of the net benefits of proposed rules."[140] Most scholars agree that the EPA has made great strides in building up its internal capacity for economic research and analysis.[141] And the EPA has, moreover, a long history of beefing up its cost-benefit analysis.[142]

Explicit judicial attention to the agency's regulatory impact analysis may nonetheless be warranted, at least in certain circumstances. Sunstein, for example, noted an issue with respect to the EPA regulation of particulates in early 2000s:

> The problem is that in its justification, EPA made little use of [the RIA]. Indeed, the RIA was written by a contractor, not by EPA personnel, and it had little or no influence on the ultimate decision. Some of the benefits calculations appear to have been rejected by EPA itself. Nonetheless, RIA

It is fascinating to compare Elliott's account with that of William Pederson, formerly EPA's Office of General Counsel, from more than twenty-five years earlier (and pre-dating OIRA centralized review):

> The effect of such detailed factual review [of regulations] by the courts on the portion of the agency subject to it is entirely beneficial. It is a great tonic to a program to discover that even if a regulation can be slipped or wrestled through various layers of internal or external review without significant change, the final and most prestigious reviewing forum of all—a circuit court of appeals—will inquire into the minute details of methodology, data sufficiency and test procedure and will send the regulations back if those are lacking. The effect of such judicial opinions within the agency reaches beyond those who were concerned with the specific regulations reviewed. They serve as a precedent for future rule-writers and give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not.

William F. Pederson, Jr., *Formal Records and Informal Rulemaking,* 85 YALE L.J. 38, 59–60 (1975) (footnotes omitted).

[140] Sharkey, *supra* note 56, at 1622.

[141] *See, e.g.*, Revesz, *supra* note 58 (manuscript at 42) ("Today, EPA's economic analysis capacity is formidable. In fact, 'there are probably more economists working on environmental issues employed at the EPA than at any other single institution in the world.' The EPA has more economists than OIRA's total staff. Its NCEE, which employs over twenty-five Ph.D. economists, sits within the Office of Policy at EPA, which 'has been characterized as a "mini-OMB" within the agency' for its contributions to the analysis of the impacts of regulations.").

[142] *See* Livermore, *supra* note 14.

> provides the only systematic discussion of the consequences of the approach chosen and of alternative approaches.[143]

Moreover, the information-forcing function of judicial review extends beyond cost-benefit analysis. In a fascinating recent empirical study, Elizabeth Fisher, Pasky Pascual, and Wendy Wagner examine the effect of judicial review of agency analysis of scientific data.[144] They examine challenges to the scientific analysis that the EPA conducted in promulgating its National Ambient Air Quality Standards (NAAQS).[145] They report that courts have engaged in increasingly robust review of scientific analysis, which has prompted greater analytical rigor within the agency itself.[146] The authors characterize this productive dialogue between the courts and the EPA with respect to NAAQS as a "strengthening of inside-out accountability processes":[147]

> [O]ur study reveals the possibility of a much more constructive institutional relationship between law and science in the NAAQS process. Generalist courts presiding over expert battles—at least when operating at their best—may actually improve the rigor of science-intensive decisions by insisting on agency-generated yardsticks while in turn benefitting from those improved yardsticks in reviewing agency action.[148]

In other words, better decisions resulted from forcing agencies to give reasons for their actions. The authors conclude that their findings "suggest a more positive contribution of judicial review to an area of agency practice—the integration of science into regulation—where the prevailing view has been that courts are likely to do more harm than good."[149]

There is another dimension of their study worth highlighting. The authors detail how the courts have come to rely on the EPA's internal yardsticks—a concession that courts lack expertise in reviewing science,

---

[143] CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 110 (2002).
[144] Elizabeth Fisher et al., *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681 (2015).
[145] *Id.* at 1681.
[146] *Id.* at 1712.
[147] *Id.*
[148] *Id.* at 1715.
[149] *Id.* at 1715–16. The authors do not go so far as to assert a causal relationship between heightened judicial review and improved regulation. *See id.* at 1715 ("The symbiosis we uncover does not necessarily suggest judicial review is, on balance, a net positive within the larger administrative law landscape, even for the EPA's NAAQS-setting process; perhaps the Agency's advances would have occurred without the courts or may have been even more expeditious or complete if judicial review were removed from the Agency's external constraints, for example.").

but can still play a productive information-forcing role.[150] This provides a response to those who doubt that hard look review can function given the inherent limitations of courts.[151]

b. SEC

The impending threat of hard look review—especially in light of *Business Roundtable* coupled with *Michigan v. EPA*—will likely have an even greater effect on independent agencies, which are not subject to OIRA review.[152]

According to Bruce Kraus, the "SEC's response to successful challenges to its rules has produced real progress in the SEC's rulemaking process."[153] The impending threat of hard look review has encouraged the participation of experts in developing regulation.[154] More specifically, Kraus has documented improvements in quantification with the Division of Economic and Risk Analysis at the SEC as well as various additional institutional changes, such an enhanced integration of the economists into the policymaking processes.[155]

2. The Dark Side: Uncertainty and the Unknown

Heightened standards of judicial review have a downside to consider as well. Most fundamentally, robust judicial review may impose inefficiency and may harm (rather than enhance) the quality of agency regulations.[156] Some have argued that, heightened judicial review would not survive a cost-benefit analysis of itself.[157] Others have suggested that

[150] *Id.* at 1690–91.
[151] *See, e.g.*, Gersen & Vermeule, *supra* note 50 (manuscript at 2–3) (arguing that courts cannot possibly deploy hard look review in a productive way given their inherent lack of expertise).
[152] See Grossman, *supra* note 130, at 282–83 (claiming that *Michigan v. EPA* portends no great change for executive-branch agencies but could represent "a sea change" for independent agencies); *see also id.* at 298–99 ("*Michigan*'s most visible impact may be to more effectively 'encourage'—under the real threat of invalidation of regulatory actions—independent regulatory agencies to consider costs when issuing regulations.").
[153] Bruce R. Kraus, *Economists in the Room at the SEC*, 124 YALE L.J. FORUM 280 (2015).
[154] *Id.* at 302–04.
[155] *Id.* at 281, 302–03.
[156] *See* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 251–58 (2009) (describing and addressing this critique).
[157] *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1044–57 (2000) (arguing that the "marginal increase in regulation quality" that heightened judicial scrutiny ostensibly would produce is not worth the "substantial decrease in quantity" that might also result from this sort of review and could, in combination, lead to "an overall decrease in the quality of regulation").

it is an exercise in futility,[158] or at least one that does not take stock of the enormous practical limitations that agencies face.[159]

a. Regulatory Void

We have seen that the regulatory void that might occur with an expansion of *Chevron* Step Zero[160] might actually not occur if that particular form of *Chevron*'s retreat instead paves the way for an infusion of *State Farm* hard look review.

But what if, in fact, more aggressive judicial review leads to ossification? Might that just create the same regulatory void after all?[161]

This ossification debate is actually longstanding. It is, moreover, long on theory and short on empirics.[162] Perhaps the risk is more pointed, however, in the new conceptual framework I advance, given the centrality of agency cost-benefit analysis to arbitrariness review.[163]

---

[158] *See* Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. 171 (2015) ("The compilation of a thick, fact-intensive, intricately detailed administrative record is a monument to futility if the real reasons for an agency decision are, say, that the President believes in reproductive choice (or doesn't) or prefers clean air (or doesn't).").

[159] *See* Gersen & Vermeule, *supra* note 50.

[160] *See, e.g.*, Sunstein, *supra* note 8, at 194 (observing that strong-form applications of *Chevron* Step Zero might "encode . . . a strong antiregulatory 'tilt'").

[161] *Cf.* Heinzerling, *supra* note 4, draft at 33 (discussing *Michigan v. EPA* and remarking that "Justice Scalia had long copped to his anti-regulatory leanings, particularly in the environmental domain").

[162] As a general matter, ossification is a significant concern in the theoretical debate, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (drawing attention to the ossification of informal agency rulemaking, brought on, in part, by *State Farm*'s hard look review). But, it is far less established on empirical grounds; indeed, on the whole the picture that emerges is one is which federal agencies develop and promulgate a relatively large volume of regulations without facing undue burdens or delays. *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. (2000) (concluding, on the basis of empirical study of rulemaking remands issued by the D.C. Circuit between 1985 and 1995, that hard look review "generally did not significantly impede agencies in the pursuit of their policy goals"); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (concluding, on the basis of an empirical examination of administrative agency rulemaking, drawing upon the semi-annual *Unified Agenda of Federal Regulatory and Deregulatory Actions* published between 1983 and 2003, "that the administrative state is not greatly ossified"); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012) (concluding, based on analysis of federal agency regulations promulgated by the Department of the Interior between 1950 and 1990, that the ossification hypothesis is supported by "mixed and relatively weak" evidence).

[163] Painting a particularly bleak picture:

I resist the idea, however, that cost-benefit analysis is inherently pro-industry and the instrument of de-regulation. In his 2002 book, *The Cost-Benefit State*, Cass Sunstein distinguished the "antiregulatory" and "technocratic" strands of cost-benefit analysis.[164] Since arguing that "cost-benefit analysis can often show, and has shown, that government action is worthwhile—and indeed that government should do more," Sunstein has, in the intervening fourteen years, been joined by a plethora of scholars of different ideological stripes who similarly advocate the infusion of cost-benefit analysis into the regulatory state.[165]

Sunstein has led the charge in advocating cost-benefit analysis as default rules because "they embody the technocratic strand, enlisting policy analysis in the service of better regulation."[166] But, he has hedged on the desirability of judicial review serving as an information-forcing kicker in service of these same goals. Moreover, Sunstein has raised particular worries regarding whether aggressive judicial review could in fact backfire, leading to ossification of rulemaking and thus put the brakes on the regulatory state:

> A serious problem with intense judicial review of agency action is that it creates delay—and hence ensures a bias in favor of the status quo. In light of the inevitable scientific uncertainties, it should [be] exceptionally easy for a skilled advocate to challenge almost any national standard as either too high or too low.[167]

He argued "because of the harmful side effects of aggressive judicial review, courts should play only a secondary and catalytic role. The central point is that EPA should undertake such inquiries on its

---

> With more agency cost-benefit analyses, a *State Farm* standard that might forbid regulations whose costs substantially outweigh their benefits, and the possible preclusion of ancillary benefit consideration, the path to valid regulation may be narrowed significantly. Thus, if *Michigan* is read broadly, it could spur a series of developments that would thwart agency efforts to pursue enterprising public-health and environmental initiatives.

Clean Air Act—Cost-Benefit Analysis—Michigan v. EPA, 129 HARV. L. REV. 311, 320 (2015).

[164] SUNSTEIN, *supra* note 143, at 57. According to Sunstein, "[t]he antiregulatory form is illegitimate, a form of judicial hubris. But it should not be denied that both strands are playing a role in the cases." *Id.*

[165] *See, e.g.*, Livermore, *supra* note 14 (evaluating the potential benefits of agency cost-benefit analysis); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (discussing the value of cost-benefit analysis); Revesz, *supra* note 58 (arguing that agencies ought to be given the resources to conduct cost-benefit analysis in the interest of regulatory quality). *But see* Heinzerling, *supra* note 4, draft at 21 ("[T]he appropriate role of costs in regulatory policy has been one of the most contentious issues in defining the scope and limits of the contemporary administrative state.").

[166] SUNSTEIN, *supra* note 143, at 57.

[167] *Id.* at 125 (footnote omitted).

own."[168] In particular, Sunstein argued that in "highly technical area[s], courts should generally adopt a posture of deference, requiring agencies only to produce a reasonable explanation for their choice and to show a degree of consistency."[169]

Sunstein's more recent writings, however, suggest that his views on this point have evolved and that he recognizes the positive incentive effects on agency rulemaking triggered by increased judicial scrutiny.[170]

b. Political Bias

It is intriguing to ponder whether judges' political predilections are more likely to infiltrate *Chevron* or *State Farm* analysis.[171] In their classic empirical study *of State Farm* review—relying on studies of EPA and NLRB rulemakings between 1996 and 2006—Thomas Miles and Cass Sunstein conclude that judges' policy preferences drive judicial decisions as to whether a particular action is arbitrary within the meaning of the APA.[172] They tentatively argue in favor of a softened form of hard look review on that basis.[173] However, Miles and Sunstein also found in an earlier study that judicial policy positions tend to play a similar role in review under the *Chevron* framework:[174] courts upheld agency actions at virtually identical rates under the two doctrines,[175] which might mitigate concerns as to the possibility that my proposed *Chevron-State Farm* framework would unleash a new regime of politically driven judicial review.

CONCLUSION

[168] *Id.* at 95.
[169] *Id.* at 83.
[170] *See, e.g.*, Sunstein, *supra* note 49.
[171] *See, e.g.*, Cross, *supra* note 157 (arguing that ideologically driven judicial decisionmaking would undermine any quality-forcing effect that increased judicial scrutiny might otherwise have).
[172] Miles & Sunstein, *supra* note 10.
[173] *Id.* at 813–14; *see also* Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110 (1995) (arguing that substantive review seems to be guided in large part by the policy preferences of the judicial panel considering an agency action).
[174] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006).
[175] *See* Miles & Sunstein, *supra* note 10, at 780.