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NARROWING *CHEVRON*'S DOMAIN

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ABSTRACT

Chevron *deference has become increasingly controversial. Some Justices on the Supreme Court have stated that they would overrule* Chevron*, and others have urged that it be curtailed. If* Chevron *were merely modified rather than overturned, it is unclear what that modified* Chevron *would look like. This Article argues that the time has come to narrow* Chevron*'s domain by limiting* Chevron *deference to interpretations announced in rulemaking and not those announced in adjudication.*

Under the classic formulation of Chevron*, a court should defer to an agency's reasonable interpretation of ambiguous statutory language. This formulation is grounded in the notion that Congress, at least implicitly, signals a preference for agency rather than judicial decisionmaking when it delegates broad policymaking discretion as part of charging an agency with implementing and administering a statute. In* United States v. Mead Corp.*, the Supreme Court began defining what has come to be known as* Chevron*'s domain—holding that Congress did not intend courts to defer to every agency resolution of statutory ambiguity, but rather only to those articulated in agency actions that carry legal force and thus reflect the exercise of delegated power. As a consequence of the* Mead *Court's analysis, courts typically*

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defer under the Chevron *standard to interpretations offered in notice-and-comment rulemakings and in formal adjudications, and apply the less deferential* Skidmore *standard in reviewing those advanced through less formal formats like interpretative rules and policy statements. Meanwhile, interpretations announced via informal adjudications represent a gray area for* Mead*'s analysis.*

With the benefit of hindsight, we believe that Mead *did not go far enough in curtailing* Chevron*'s reach. Applying* Chevron *to interpretations announced through adjudication has proven problematic in practice and has fueled a great deal of the anti-*Chevron *criticism. Meanwhile,* Chevron*'s claim to stare decisis in the context of adjudications is surprisingly weak. Using a novel dataset of cases, this Article shows that the Supreme Court has applied* Chevron *only rarely in evaluating agency adjudications. We submit that this relative dearth of precedent is best explained by the fact that* Chevron *makes the most conceptual sense when applied to agency rulemakings. Accordingly, if the Court is looking for a way to address deference short of eliminating it, the soundest way to revisit* Chevron *is by narrowing its domain to exclude most if not all agency adjudications.*

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INTRODUCTION

Administrative law today finds itself in a state of commotion.[1] With the additions of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to the Supreme Court, many expect the Court to rethink longstanding doctrines governing the administrative state. Indeed, the Court has already begun to do so. Since 2019, the Court has narrowed *Auer*[2] deference[3] and looked beyond the four corners of an agency decision for perhaps the first time in history.[4] Five Justices now have called for a reinvigoration of the nondelegation doctrine.[5] Based on what the Justices have already said, this trend seems likely to continue.[6]

As part of this rethinking, the Court seems to be taking a more jaundiced view of *Chevron*[7] deference.[8] Simultaneously, a new wave of

1. *See, e.g.*, Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 166 (2019); Gillian E. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 49–50 (2017); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 853, 854–55 (2020).

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

3. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019) (narrowing *Auer*, 519 U.S. 452).

4. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2578 (2019) (rejecting the agency's asserted rationale as pretextual).

5. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (calling for the aggressive use of nondelegation); *id.* at 2031 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring) (endorsing Gorsuch's *Gundy* dissent); *see also* Nicholas Bagley, Opinion, *'Most of Government Is Unconstitutional,'* N.Y. TIMES (June 21, 2019), https://nyti.ms/2Y7UsXg [https://perma.cc/2HE8-EDB8] (expressing alarm about the Justices' enthusiasm for nondelegation).

6. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (expressing skepticism about aspects of modern administrative law); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136–38 (2016) (same); Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94, 100–02 (2015) (same); David Feder, *The Administrative Law Originalism of Neil Gorsuch*, YALE J. REGUL.: NOTICE & COMMENT (Nov. 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch [https://perma.cc/A8PU-KTU5] (same).

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

8. *See, e.g.*, Dino Grandoni, *The Energy 202: Republicans Want To Know if Environmental Groups Are Really Foreign Agents*, WASH. POST (Sept. 6, 2018, 8:53 AM), https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/09/06/the-energy-202-

anti-*Chevron* scholarship has emerged,[9] and members of Congress are pursuing legislation purporting to overturn the *Chevron* standard.[10] Whether prompting or prompted by these voices, or perhaps both, the Court seems inclined to go along with the crowd. Chief Justice John Roberts has gone out of his way to invite further litigation over *Chevron*.[11] And Justice Gorsuch, writing for a majority of the Court, twice has suggested that *Chevron* may not be long for this world.[12] At a minimum, the Justices seem more willing to find clarity using traditional tools of statutory interpretation, thereby avoiding *Chevron* deference altogether.[13]

Going further, Justice Kavanaugh has argued that the *Chevron* framework itself is flawed and that exceptions to it should be understood broadly.[14] Justices Gorsuch and Clarence Thomas have

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republicans-want-to-know-if-environmental-groups-are-really-foreign-agents/5b9007281b326b3f31919f99 [https://perma.cc/U7N6-GRXK] ("Brett M. Kavanaugh hinted he may want to revisit if confirmed a doctrine important to environmental regulations called *Chevron* deference."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring) (similar).

9. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 997–1000 (2017). To be clear, *Chevron*'s critics vary in their objections. Some object to deference in general. *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1227 (2016). Others argue merely that *Chevron* should be replaced with a less deferential standard. *See, e.g.*, Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 843–50 (2010); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 49–56 (2017).

10. *See, e.g.*, Kristin E. Hickman, *SOPRA? So What?* Chevron *Reform Misses the Target Entirely*, 14 U. ST. THOMAS L.J. 580, 587–88 (2018) (documenting different versions of the Separation of Powers Restoration Act passed by the House of Representatives in 2016 and 2017 that sought to overturn *Chevron* legislatively).

11. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part and in the judgment) (joining the Court's decision to uphold *Auer* deference but specifically noting that his vote does not extend to *Chevron* deference).

12. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1629 (2018) ("No party to these cases has asked us to reconsider *Chevron* deference."); SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) ("[W]hether *Chevron* should remain is a question we may leave for another day.").

13. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1629; *SAS Inst.*, 138 S. Ct. at 1358; Jonathan Adler, *Shunting Aside* Chevron *Deference*, REGUL. REV. (Aug. 7, 2018), https://www.theregreview.org/2018/08/07/adler-shunting-aside-chevron-deference [https://perma.cc/55S3-ZN2K] ("*Chevron* deference was raised in defense of agency interpretations of statutory language in five cases this past term, and in all five cases a majority of the Court rejected the agency's plea.").

14. *See, e.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The FCC's net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful."); Kavanaugh, *supra* note 6, at 2150 ("*Chevron* encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.").

questioned the very constitutionality of *Chevron* deference.[15] Justice Stephen Breyer, for his part, has never liked the *Chevron* standard.[16] And Chief Justice Roberts and Justice Samuel Alito also have sought openly to water down the doctrine.[17] Hence, today, the Court may have enough votes to step back from *Chevron*.[18] In one of his last opinions, Justice Anthony Kennedy maintained that the time has come to reexamine *Chevron*.[19] Reflecting this zeitgeist, seasoned lawyers now invoke *Chevron* with trepidation.[20] In short, although not (yet?) abandoned to the anticanon, the message is clear: *Chevron* is on thin ice.

This hostility has prompted alarm among *Chevron*'s defenders.[21] These defenders argue that when a statute administered by an agency is ambiguous—and thereby arguably confers a certain amount of policymaking discretion to the interpreter—politically accountable agency officials should have interpretative primacy.[22] Some defenders also express concern about judges assuming too great a policymaking

15. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (highlighting "the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* conflicts with Article III's duty to say what the law is).

16. *See e.g.*, *SAS Inst.*, 138 S. Ct. at 1364 (Breyer, J., dissenting) ("I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364–65 (1986) (similar).

17. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 323–27 (2013) (Roberts, C.J., dissenting, joined, *inter alia*, by Alito, J.) (advancing a narrower theory of *Chevron*).

18. *See, e.g.*, Asher Steinberg, *Does Anyone on the Supreme Court Believe in* Chevron *Anymore? A Squib on* Chevron *in* SAS Inst., NARROWEST GROUNDS (Apr. 26, 2018), https://narrowestgrounds.blogspot.com/2018/04/does-anyone-on-supreme-court-believe-in.html [https://perma.cc/TBZ5-3BLQ] (counting votes).

19. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.").

20. *See, e.g.*, Daniel Hemel, *Argument Analysis: Hating on* Chevron, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), http://www.scotusblog.com/2018/11/argument-analysis-hating-on-chevron [https://perma.cc/7EXR-TPNT] (discussing an argument in *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019), where BNSF counsel stated "I hate to cite it, but I will end with *Chevron* . . . .").

21. *See, e.g.*, Metzger, *supra* note 1, at 17 (noting "attacks"); *cf.* Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 20–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154 [https://perma.cc/Y39M-KM4U] (expressing concern that the Supreme Court will invalidate the intelligible principle standard and describing the same as "radical stuff").

22. *See, e.g.*, Cass R. Sunstein, *Beyond* Marbury: *The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006).

role absent *Chevron*, given Congress's longstanding habit of delegating authority.[23] Others advance historical arguments for *Chevron* deference.[24] In response, however, skeptics increasingly question whether *Chevron* is lawful, as either a statutory or a constitutional matter,[25] and whether the doctrine creates bad incentives.[26] Suffice it to say, these are big fights that will no doubt continue to command much attention.

Whatever one's view of *Chevron* generally,[27] it is especially important now for the bench and bar to recall that not every agency interpretation is eligible for *Chevron* deference. In *United States v. Mead Corp.*,[28] the Court categorically limited "*Chevron*'s domain"—the contexts in which such deference is available[29]—to agency actions carrying the force of law.[30] The Court also recognized that *Chevron* deference is particularly fitting for interpretations adopted using formal procedures.[31] Courts, therefore, generally use the *Chevron* standard in evaluating interpretations of ambiguous statutes offered by

23. *See, e.g.*, Nicholas Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1455–56 (2017).

24. *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 951–53 (2011); Cass R. Sunstein, Chevron *As Law*, 107 GEO. L.J. 1613, 1652–56 (2019).

25. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (questioning whether *Chevron* is statutorily authorized); Bamzai, *supra* note 9, at 912–19 (questioning whether *Chevron* is historically justified).

26. *Compare generally, e.g.*, Philip Hamburger, Chevron *On Stilts: A Response to Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77 (2018) (challenging *Chevron*), *and* Charles J. Cooper, *The Flaws of* Chevron *Deference*, 21 TEX. REV. L. & POL. 307 (2017) (similar), *with* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937 (2018) (defending *Chevron*).

27. For what it is worth, one of us believes that *Chevron* (or something much like it) is inevitable so long as Congress delegates policymaking discretion to agencies, *see, e.g.*, Bednar & Hickman, *supra* note 23, at 1460, while the other is more skeptical but agrees that some efforts to limit *Chevron* create difficult line-drawing problems and that doctrinal coherence is valuable, *see, e.g.*, Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 54–55 (2010).

28. United States v. Mead Corp., 533 U.S. 218 (2001).

29. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 858–63 (2018) (expanding on the formulation of *Chevron*'s domain); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017) (noting that "scholars have focused on *Chevron*'s domain—that is, when *Chevron* applies in judicial review").

30. *Mead*, 533 U.S. at 226–27.

31. *See id.* at 229–30.

agencies in notice-and-comment rulemakings and in formal adjudications. By contrast, courts typically apply the less deferential *Skidmore v. Swift & Co.*[32] standard[33] to interpretations advanced through informal mediums, like interpretative rules and policy statements.[34] Meanwhile, agency interpretations announced through informal adjudication represent a gray area for *Chevron*'s scope.[35]

The *Mead* Court's decision to narrow *Chevron*'s domain offers the Justices a path forward. Despite the noise, the Supreme Court is unlikely to overrule *Chevron* outright. Last year, in *Kisor v. Wilkie*,[36] the Justices declined to overrule *Auer* deference, which applies to agency interpretations of their own regulations, despite its lack of theoretical justification.[37] Stare decisis played a substantial role in the Court's retention of *Auer* deference, which is unsurprising because the Court had not previously provided much of a theoretical basis for *Auer*.[38] By contrast, the Court has articulated and defended *Chevron*'s theoretical underpinnings on the merits,[39] and the Chief Justice, although arguing for a less robust *Chevron*, has not called for it to be overruled altogether.[40] Yet as in *Kisor*, even if the Justices are unwilling

32. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

33. *Id.* at 140.

34. *See, e.g.*, *Mead*, 533 U.S. at 227–28.

35. *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (6th ed. 2018) (detailing how *Mead* is applied).

36. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

37. *See, e.g.*, Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring) ("Our cases have not put forward a persuasive justification for *Auer* deference."); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 100 (2015) (documenting *Auer*'s "unrestrained expansion . . . untethered from its origins without any meaningful explanation as to why").

38. In *Kisor*, Justice Elena Kagan attempted to provide a theoretical basis for *Auer* deference and cited a number of cases that addressed aspects of the doctrine in support of that analysis. *Kisor*, 139 S. Ct. at 2410–11. Her effort, however, did not command a majority. *See id.* at 2425 (Roberts, C.J., concurring) (casting the deciding vote on stare decisis grounds without joining the theoretical discussion); *cf.* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (explaining why the theoretical justifications given for *Chevron* have wrongly been unthinkingly applied to *Auer*).

39. *See, e.g.*, *Mead*, 533 U.S. at 229 (discussing the Court's understanding of congressional expectations upon delegating policymaking discretion); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (justifying *Chevron* deference on grounds of delegation, expertise, and political accountability); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–19 (discussing justifications for *Chevron*).

40. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring) (contending that the Court's decision in *Kisor* does not prevent the Court from reconsidering *Chevron*, but not taking a

to overrule *Chevron*, they still may want to curtail it.[41] If so, the Justices need a coherent way to cut back on *Chevron* without jettisoning it altogether.

Building on *Mead*, this Article argues that the best way to curtail *Chevron* going forward is to further narrow its domain. Specifically, the Court should eliminate, or at least reduce, deference to agency adjudications. Three justifications support this position.

First, narrowing *Chevron*'s domain is more consistent with the doctrine's theoretical underpinnings: delegation, expertise, and accountability. Again, the Court has held that *Chevron* first and foremost requires a delegation from Congress to an agency of the power to act with the force of law.[42] Whether Congress has delegated the authority to adopt legally binding rules and regulations is readily ascertainable from statutory text.[43] By contrast, which interpretations announced in adjudications carry the force of law has proven much harder to discern. In fact, counterintuitively, some lower courts now apply *Chevron* and defer to agencies' own assessments of whether Congress intended them to use formal adjudication procedures. This approach enables agencies essentially to bootstrap their own way into *Chevron* deference under the *Mead* standard.[44] Removing most adjudications from *Chevron*'s domain returns to Congress the decision of which agency interpretations are *Chevron*-eligible. Also, rulemaking is open to the public, meaning that agencies can benefit from the greater knowledge and wider perspectives that come from public comments and engagement with many groups, thus strengthening political legitimacy.[45] Adjudication, by contrast, typically involves a

position regarding whether *Chevron* should be overturned); City of Arlington v. FCC, 569 U.S. 290, 314–17 (2013) (Roberts, C.J., dissenting) (critiquing the Court's application of *Chevron* doctrine but not arguing that the doctrine itself should go).

41. *Kisor*, 139 S. Ct. at 2408 ("*Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits.").

42. *See Mead*, 533 U.S. at 226–27.

43. *See, e.g.*, *City of Arlington*, 569 U.S. at 293 (identifying the FCC's statutory authority to adopt legally binding regulations).

44. *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 18–19 (1st Cir. 2006); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989); *see also infra* Part II.B. (documenting this issue).

45. *See, e.g.*, Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1603 (2018) (arguing that "the participation of individuals and minorities" in modern government occurs through "the notice and comment rulemaking process and the petitions required by the APA").

narrow set of parties and, consequently, substantially less public input and data. If the purpose of *Chevron* deference is to allow more politically accountable agencies to bring their expertise to bear, it follows that agencies should be transparent and informed. Rulemaking, more than adjudication, advances that purpose.

Second, narrowing *Chevron*'s scope would go a long way toward answering some of the most weighty fairness objections levelled against *Chevron*, such as those advanced by Justice Gorsuch.[46] Unlike adjudication, which is retroactive in that it evaluates and assigns present legal consequences to past actions, rulemaking is prospective in character.[47] The Court's renewed focus on principles of foundational "fair warning"[48] thus also counsels in favor of a narrower domain for *Chevron*.

Third, narrowing *Chevron*'s reach will also result in a more predictable and consistent application of the doctrine by the courts. A narrower doctrine is a simpler one. As it is now, courts regularly struggle to determine whether an interpretation announced in adjudication should receive deference under *Mead*. *Mead* itself is hardly a model of clarity on this important point.[49] This confusion makes litigation much more expensive and complicated. When all of these justifications are considered together, the case against *Chevron* in the adjudicative context becomes quite strong.

Stare decisis is the obvious objection to this proposal. Yet, even if stare decisis preserves *Chevron* from outright repudiation, it should not prevent narrowing *Chevron*'s domain in the way this Article proposes.

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46. On the Tenth Circuit, then-Judge Gorsuch authored two important opinions about *Chevron*. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1168 (10th Cir. 2015). In 2005, a federal court concluded that the attorney general had discretion to adjust the status of certain immigrants. *See* Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1301 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2006). In the wake of that decision, Alfonzo De Niz Robles and Hugo Rosario Gutierrez-Brizuela came forward to petition for relief. *Gutierrez-Brizuela*, 834 F.3d at 1144; *De Niz Robles*, 803 F.3d at 1168. Yet later, the Board of Immigration Appeals concluded that, in fact, such relief was unlawful, and then applied that interpretation retroactively to those who petitioned for relief. *De Niz Robles*, 803 F.3d at 1167 (citing *In re* Briones, 24 I. & N. Dec. 355 (B.I.A. 2007)). Gorsuch pointedly objected, with considerable normative force, to the unfairness of that retroactivity. *See Gutierrez-Brizuela*, 834 F.3d at 1145–48; *De Niz Robles*, 803 F.3d at 1175–80.

47. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1998).

48. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

49. *See, e.g.*, United States v. Mead, 533 U.S. 218, 229–31 (2001) (offering different considerations to weigh in particular cases).

First, the stare decisis weight of *Chevron* for adjudications may be much less hefty than one might expect given the doctrine's prominence. *Chevron* itself involved rulemaking, as have a substantial majority of *Chevron* cases to reach the Justices, especially after *Mead*. A review of every Supreme Court case citing *Chevron* through the 2019 term demonstrates that the Court has actually extended *Chevron* deference only rarely outside of the rulemaking context. Most of those cases were decided before *Mead* with no or little analysis as to why *Chevron* was the right evaluative standard. Much of the Court's rhetoric regarding deference outside of the rulemaking context thus is, at best, dicta. Second, the Court has already held that the scope of a deferential standard of review can be narrowed without offending stare decisis; it did so twenty years ago in *Mead* and even more recently in *Kisor*.[50] Finally, for the pragmatists, narrowing *Chevron*'s domain poses fewer stare decisis concerns than overruling the doctrine outright, which is also on the table.

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The Article proceeds as follows. Part I examines *Chevron*, with particular focus on how *Chevron*'s domain fits with the Administrative Procedure Act's ("APA's") procedural framework for different types of agency action. Part II explains why *Chevron*'s domain should be narrowed to exclude some or all agency adjudications. Part III addresses the stare decisis implications of narrowing *Chevron*'s domain. As part of that analysis, the Article reviews every case decided by the Supreme Court through the 2019 term that cites *Chevron* to illustrate that the Court infrequently applies *Chevron* in the adjudication context. Based on that review, the Article concludes that principles of stare decisis allow the sort of revision proposed here.

I. *CHEVRON*'S DOMAIN IN THEORY

The *Chevron* doctrine is one of the most familiar aspects of administrative law, but it is also complex and increasingly

50. *See, e.g.*, Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), http://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine [https://perma.cc/WT2C-GAM7] (detailing how *Auer* has been narrowed).

review to those adjudications.[269] At a minimum, the Supreme Court should endorse that line of cases.

Finally, to the extent the Court is reluctant to reject *Chevron* for agencies to which it has granted *Chevron* deference in the past in the context of adjudication, the Court could at least mitigate some the above-stated concerns by adopting a more robust approach to retroactivity analysis. Justice Kagan's recognition in *Kisor* of the danger of "unfair surprise" is a good step in that direction, one that the Court could take for *Chevron* too.[270]

We believe that each of these options is better than the status quo. Yet we also believe that for the reasons set forth above, it would make even more sense to eliminate *Chevron* from the adjudication context altogether. These narrower narrowings, in other words, are better than nothing, but do not address all of the concerns with *Chevron* and adjudication.

III. STARE DECISIS AND *CHEVRON*'S DOMAIN

So, what about stare decisis? When the Supreme Court has decided a question of law, it should not lightly cast that decision aside.[271] Here, the Court has already applied *Chevron* to interpretations announced in adjudications. Indeed, in *Mead*, the Court announced a presumption that legal interpretations announced through formal adjudications receive *Chevron* deference.[272] And even for informal adjudications, the Court suggested that *Chevron*

269. *See* HICKMAN & PIERCE, *supra* note 35, § 3.6.

270. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019) ("[A] court may not defer to a new interpretation . . . that creates 'unfair surprise' to regulated parties." (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007))).

271. *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (explaining that "[o]verruling precedent is never a small matter" and "*stare decisis* means sticking to some wrong decisions"); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 n.49 (2005) (explaining that all of the Justices have demonstrated respect for stare decisis, at least in some contexts).

272. *See Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of . . . adjudication that produces . . . rulings for which deference is claimed."); *see also* Edelman v. Lynchburg Coll., 535 U.S. 106, 123 (2002) (O'Connor, J., concurring) (quoting *Mead* for the proposition of *Chevron* deference for notice-and-comment rulemaking and formal adjudication).

sometimes applies.[273] Given all of this, how could the Court retreat from *Chevron* deference for agency adjudications now?

We have three responses. First, adjudication's claim to *Chevron* deference on stare decisis is actually surprisingly weak. Its rhetoric notwithstanding, the Supreme Court has applied *Chevron* in evaluating adjudications only rarely, particularly post-*Mead*. Other doctrinal developments further undermine *Chevron*'s claim to stare decisis in the adjudication context. Second, the Court already has concluded not only in *Mead* but also in *Kisor* that it does not violate stare decisis to narrow a deference doctrine, which is all we advocate here. Finally, if the Court cannot identify a principled way to reduce the incidence of *Chevron* deference in circumstances that raise some of the above-acknowledged concerns, a majority of the Justices could decide to overrule *Chevron* altogether.

A. A Weak Stare Decisis Claim

Stare decisis is an important part of the law.[274] But employing traditional stare decisis analysis in the context of adjudication, *Chevron* is not entitled to much precedential weight. First, dicta notwithstanding, the Supreme Court only rarely has used *Chevron* in evaluating agency adjudications, particularly post-*Mead*. Additionally, other doctrinal developments, already noted above, undermine *Chevron*'s claim to precedential force with respect to agency adjudications.

1. *Infrequent Application. Chevron* is a doctrine oriented, first and foremost, toward agency rulemaking. The quintessential *Chevron* case is notice-and-comment rulemaking, as *Chevron* itself concerned such an interpretation.[275] The rulemaking context also best matches the theoretical justifications for *Chevron* on its own terms. Although

273. *See Mead*, 533 U.S. at 230–31 (citing as an example *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co*., 513 U.S. 251, 256–57 (1995), concerning a Comptroller of the Currency informal adjudication).

274. *See, e.g.*, Kristin E. Hickman, *Contemplating a Weaker* Auer *Standard*, YALE J. REGUL.: NOTICE & COMMENT (Sept. 23, 2016), https://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman [https://perma.cc/63VH-Q3VW] (noting the importance of stare decisis); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–59 (2018) (noting similar).

275. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 858–59 (1984) ("These conclusions were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October.").

agency adjudications far outnumber agency rulemakings,[276] contemporary agencies more often use rulemaking when making significant interpretive pronouncements.[277] A substantial majority of cases in which the Justices have afforded deference involve rulemaking.

By comparison, the Court squeezed agency adjudications into the *Chevron* framework almost as an afterthought. As a theoretical matter, the Court's extension of *Chevron*'s domain to formal adjudications almost certainly derives from its conclusion in *Chenery II* that an agency with both rulemaking and adjudication powers may choose between the two formats when exercising policymaking discretion. The Court has never said so explicitly, although *Chevron* itself did cite *Chenery II* as favoring some amount of deference to agency interpretations reflecting policy choices.[278] Regardless, although the Court rhetorically embraced *Chevron* for some subset of agency adjudications, its actual decisions do not reflect that rhetoric.

From the *Chevron* decision itself through the end of the October 2019 term, the Supreme Court cited *Chevron* in 238 cases.[279] Many of those cases, however, do not reflect actual applications of *Chevron*. For example, the Court cited *Chevron* frequently for the proposition that it "reviews judgments, not opinions,"[280] or when drawing analogies to agency cases.[281] The Court also cited *Chevron* on numerous occasions where it expressly declined to apply the standard. In many of those cases, the Court opted to apply a different standard, such as

276. *See* HICKMAN & PIERCE, *supra* note 35, § 6.1 (observing that "[f]ederal agencies conduct millions of adjudications each year" and "dwarf courts in terms of the proportion of adjudications resolved by the two types of institutions").

277. *See id.* § 4.8 (explaining the preference).

278. *Chevron*, 467 U.S. at 844–45.

279. Cases were identified by searching the Supreme Court database in Westlaw for "467 U.S. 837" and by keyciting the *Chevron* decision, also in Westlaw. *See* Appendix (offering additional details regarding methodology and listing cases).

280. *See, e.g.*, Jennings v. Stephens, 574 U.S. 271, 274 (2015) (citing *Chevron* in asserting that "[t]his Court, like all other federal appellate courts, does not review lower courts' opinions, but their *judgments*"); Camreta v. Greene, 563 U.S. 692, 716 (2011) (Kennedy, J., dissenting) (quoting *Chevron* in stating that the Court only reviews judgments, not opinions); Ohio v. Robinette, 519 U.S. 33, 51 n.9 (1996) (Stevens, J., dissenting) (same); Michigan v. Lucas, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting) (same).

281. *See, e.g.*, Teva Pharm. U.S.A. Inc. v. Sandoz, Inc., 574 U.S. 318, 351 (2015) (Thomas, J., dissenting) (analogizing determining patent indefiniteness to the first step in *Chevron* analysis); Williams v. Taylor, 529 U.S. 362, 387 n.13 (2000) (asserting that Congress has not delegated power to state courts in the same manner that it has delegated power to agencies).

Skidmore.[282] In others, the Court expressly declined to decide whether *Chevron* applied.[283] In yet another subset of cases, the majority opinion was silent altogether regarding deference doctrine while a concurring or dissenting opinion raised the possibility of *Chevron* deference.[284] Finally, a small subset of *Chevron* citations came in dissents or other statements accompanying memorandum orders denying certiorari.[285]

Particularly challenging to categorize were cases in which a majority opinion noted that the agency claimed *Chevron* deference or a lower court applied *Chevron*, and a concurring or dissenting opinion also suggested that *Chevron* deference was warranted, but the majority opinion was less clear regarding its own view of *Chevron*'s applicability, typically because the majority found the statute clear. In some of these cases, the Court strongly implied that it used the *Chevron* framework, even if the Court did not say so expressly or defer to the agency.[286] In others, the Court's rhetoric was much more equivocal.[287]

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282. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006) (applying *Skidmore* rather than *Chevron* to Department of Justice interpretative rule); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111 n.6 (2002) (applying *Skidmore* rather than *Chevron* to EEOC guidelines); Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (applying *Skidmore* instead of *Chevron* to interpretations of the Rehabilitation Act by several agencies).

283. *See, e.g.*, Freeman v. Quicken Loans, Inc., 566 U.S. 624, 631 (2012) (ruling that determination of *Chevron*'s applicability to present case was unnecessary); Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) (same); Calif. Dental Ass'n v. FTC, 526 U.S. 756, 765–66 (1999) (same); Dunn v. CFTC, 519 U.S. 465, 479 n.14 (1997) (same); Est. of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992) (same).

284. *See, e.g.*, Lawson v. FMR LLC, 571 U.S. 429, 476–78 (2014) (Sotomayor, J., dissenting) (arguing that *Chevron* deference should have been granted to Department of Labor rulings); Dada v. Mukasey, 554 U.S. 1, 29 n.1 (2008) (Scalia, J., dissenting) (citing *Chevron*'s holding that an agency need only adopt a reasonable interpretation of a statute to warrant deference); Melendez v. United States, 518 U.S. 120, 136 (1996) (Breyer, J., concurring) (same); Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring) (same).

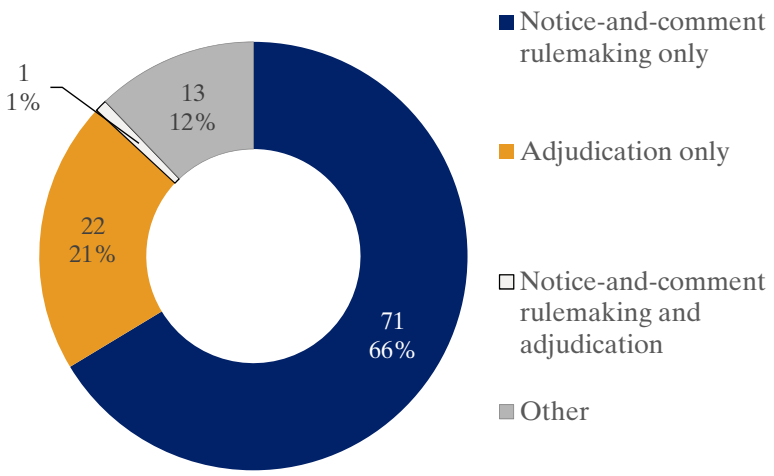
285. *See, e.g.*, VF Jeanswear LP v. EEOC, 140 S. Ct. 1202, 1204 (2020) (Thomas, J., dissenting from the denial of certiorari) (Mem.) (arguing that *Chevron* deference should not apply to EEOC regulation not promulgated under agency's statutory interpretation authority); Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 789–90 (2020) (statement of Gorsuch, J.) (Mem.) (finding *Chevron* deference inappropriate for a regulation from Bureau of Alcohol, Tobacco, Firearms, and Explosives); Baldwin v. United States, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from denial of certiorari) (Mem.) (criticizing *Chevron*'s role in modern jurisprudence).

286. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 284 (2001) (citing *Chevron* in describing authoritativeness of agency's statutory interpretation without applying full *Chevron* framework); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130 (1990) (rejecting the Interstate Commerce Commission's claim that its interpretation required deference under *Chevron*).

287. *See, e.g.*, United States v. LaBonte, 520 U.S. 751, 762 n.6 (1997) (deciding that the Court need not reach the question of *Chevron* deference); Dole v. United Steelworkers of Am., 494 U.S.

Ultimately, of the 238 cases that cited *Chevron* in some manner, the Court arguably applied the *Chevron* standard to evaluate an agency legal interpretation in 107 cases.[288] Only 23 of those cases concerned agency adjudications.[289]

FIGURE 1: *CHEVRON* IN THE SUPREME COURT: ADJUDICATION VS. RULEMAKING, ALL APPLICATIONS



Of course, when contemplating the stare decisis effect of the cases in which the Court claimed to apply the *Chevron* standard in evaluating agency adjudications, a few additional points are worth noting. First, at what point can an agency claim that stare decisis applies to entitle it to *Chevron* deference: when the Court says it is applying the *Chevron* standard to evaluate the agency's adjudication, or when the Court actually defers? The agency won only 72 of the 107 cases identified as applying *Chevron*. And in the entire history of *Chevron*, the Court has deferred to agency interpretations advanced in adjudications a mere 14 times—just 6 percent of the 238 cases in which the Court cited *Chevron*,

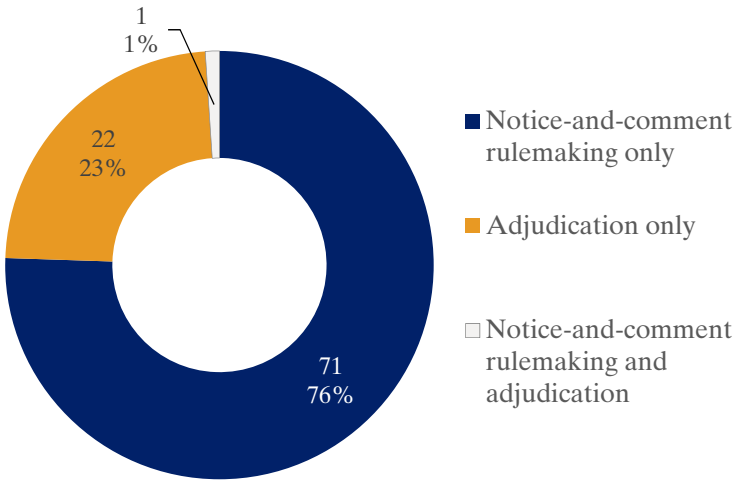
26, 42–43 (1990) (declining to extend *Chevron* deference); Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989) (same).

288. *See* Appendix (listing applicable cases).

289. To be precise, 22 cases concerned agency interpretations adopted in adjudications only, 71 cases concerned agency interpretations adopted through notice-and-comment rulemaking, and 1 case—*Arkansas v. Oklahoma*, 503 U.S. 91 (1992)—concerned both, while 13 cases concerned agency interpretations adopted using other formats. *See* Appendix (listing cases).

13 percent of the 107 cases in which the Court actually applied *Chevron*, and 19 percent of the 72 cases in which the Court applied *Chevron* and the agency won.[290]

FIGURE 2: *CHEVRON* IN THE SUPREME COURT: RULEMAKING VS. ADJUDICATION, AGENCY WINS BECAUSE OF DEFERENCE



Second, and perhaps more importantly, a judicial declaration that one agency's adjudications are *Chevron*-eligible arguably should not carry over to those of another agency, especially given the tremendous variability in adjudication procedures from agency to agency and *Mead*'s context-specific analysis that affords deference to some adjudication procedures but not to others. The cases involving agency adjudications in which the Court either claimed to apply or expressly deferred under the *Chevron* standard involved a very small number of agencies, with just two agencies representing more than half of the adjudications in question.

290. *Id.* Although distinguishing *Chevron* Step Two cases from *Chevron* Step One cases is often difficult, in one of the fourteen cases in which the Court applied *Chevron* to evaluate an agency interpretation advanced in adjudication and the agency won, the Court found the meaning of the statute clear—arguably reducing the instances of *Chevron* deference to agency adjudications further to thirteen cases. *See* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991) (concerning an Interstate Commerce Commission interpretation).

TABLE 5: *CHEVRON* IN THE SUPREME COURT: ADJUDICATIONS BY AGENCY

Agency	Applied	Deferred
Board of Immigration Appeals/ Immigration & Naturalization Service	8	4
National Labor Relations Board	6	3
Comptroller of the Currency	2	2
Federal Labor Relations Authority	2	2
Interstate Commerce Commission	2	1
Pension Benefit Guaranty Corp.	1	1
Commerce Department	1	1
Environmental Protection Agency	1	0

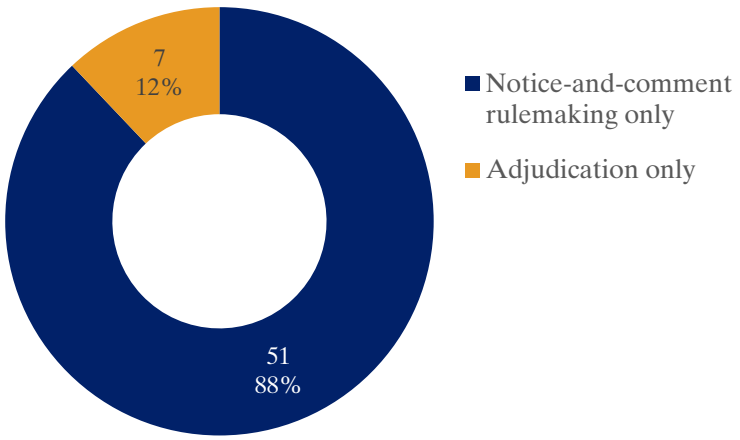
The numbers are even more stark when one considers only the cases since the Court narrowed *Chevron*'s scope in the *Mead* decision. From the time the Court decided *Mead* through the end of the October 2019 term, the Court cited *Chevron* in 106 cases.[291] Of those 106 cases, only 23 concerned agency adjudications at all. Of those 23 cases, the Court clearly and unequivocally applied the *Chevron* standard to evaluate agency interpretations in only 7, and the Court actually deferred in only 3.[292] By comparison, the Court clearly and unequivocally applied the *Chevron* standard to evaluate agency interpretations adopted through notice-and-comment rulemaking in 32 post-*Mead* cases and actually deferred to the agency in 24 of those cases.[293]

291. This number does not include the *Mead* decision itself.

292. *See* Scialabba v. Cuellar de Osorio, 573 U.S. 41, 56–57, 76 (2014) (plurality opinion) (applying and deferring under *Chevron*); Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012) (same); United States v. Eurodif S.A., 555 U.S. 305, 316–22 (2009) (same); *see also* Appendix (listing cases in each category).

293. *See* Appendix.

FIGURE 3: *CHEVRON* IN THE SUPREME COURT: ADJUDICATION VS. RULEMAKING SINCE *MEAD*



Irrespective of whether the agency won or lost, of the 7 adjudications to which the Court purported to apply the *Chevron* standard, 6 involved a single agency—the Board of Immigration Appeals—again, with the agency winning some and losing others.[294] The only post-*Mead*, non-BIA case in which the Court clearly applied and deferred under *Chevron* to an agency adjudication, *United States v. Eurodif S.A.*,[295] also exemplifies why lower courts continue to struggle with which adjudications might be *Chevron*-eligible. *Eurodif* involved a Commerce Department antidumping determination under the Tariff Act of 1930.[296] The statute authorized the imposition of antidumping duties on sales of "foreign merchandise" but not on sales of services, and the case concerned the Commerce Department's conclusion that a particular set of transactions fell into the former

294. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018); Mellouli v. Lynch, 575 U.S. 798, 798 (2015) (deciding that BIA interpretation did not receive *Chevron* deference because it was unreasonable); *Scialabba*, 573 U.S. at 56–69 (plurality opinion) (holding that BIA interpretation warranted *Chevron* deference); *Martinez Gutierrez*, 566 U.S. at 591 (same); Negusie v. Holder, 555 U.S. 511, 516–21 (2009) (holding the BIA's interpretation would be accorded deference on remand); *see also* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567–72 (2017) (finding the meaning of the statute clear, so declining to decide whether the rule of lenity would apply rather than *Chevron* to resolve statutory ambiguity in similar circumstances).

295. United States v. Eurodif S.A., 555 U.S. 305 (2009).

296. *Id.* at 308.

rather than the latter category.[297] The Court applied *Chevron* and deferred to the agency's interpretation of the statute, citing *Mead*.[298] Briefing in the case based the government's claim to *Chevron* on two criteria: (1) the Federal Circuit's prior characterization of the agency's procedures as "relatively formal" and its decisions as "self-executing," and (2) the Tariff Act's call for judicial review of the agency's factual findings using the substantial evidence standard.[299] Another brief characterized the adjudication at issue as "on-the-record."[300] But no claim was made that the agency used actual Type A, APA formal adjudication, and the Court failed to explain whether all, some, or none of the noted characteristics prompted its decision to extend *Chevron* deference to this agency's adjudications but not others. At the very least, this case stands out for the parties' efforts to justify *Chevron* deference to what appears to have been a Type B, if relatively formal, adjudication.

Regardless, whether viewed through a pre-*Mead* or post-*Mead* lens, when one considers Type A, Type B, and Type C adjudications, the Court's consideration of the circumstances in which agency adjudications are *Chevron*-eligible has been astonishingly limited. Essentially all of the major *Chevron* cases, especially after *Mead*, arise in the rulemaking context. This is not surprising, however, because the theoretical justifications for *Chevron* deference fit best with rulemaking.

2. *Traditional Stare Decisis Analysis.* The fact that the Supreme Court most often applies *Chevron* in the rulemaking context has important implications for stare decisis. Although the Court takes stare decisis seriously, it also describes stare decisis as a "principle of

297. *Id.*

298. *Id.* at 316.

299. Brief for the United States at 24, *Eurodif S.A.*, 555 U.S. 305 (Nos. 07-1059, 07-1078), 2008 WL 2794014, at *24 (quoting Pesquera Mares Autrales Ltda. v. United States, 266 F.3d 1372, 1381–82 (Fed. Cir. 2001)).

300. Brief for Petitioners USEC Inc. & U.S. Enrichment Corp. at 27, *Eurodif S.A.*, 555 U.S. 305 (Nos. 07-1059, 07-1078), 2008 WL 2794015, at *27.

policy"[301] rather than "an inexorable command."[302] Consequently, the Court has identified several factors that it considers relevant in deciding whether to honor stare decisis, including the quality of the Court's reasoning in support of that precedent, the impact that overruling the precedent would have on legitimate reliance interests, and the workability of the rule or standard that precedent establishes.[303] A full explication of stare decisis and *Chevron* is beyond the scope of this Article. Nevertheless, given these general parameters, a few points are worth noting.

First, a threshold question should be acknowledged. Although the Court applies the same factors across a variety of legal contexts, it does not evaluate them in the same way in all circumstances. The Court has described the force of stare decisis as "enhanced" when the precedent interprets a statute, and Congress can reverse the Court;[304] "reduced" when it involves procedural or other rules that do not guide primary behavior, where reliance interests are much lower;[305] and "at its weakest" in constitutional cases, because constitutional amendment is so difficult.[306] By this understanding, the entire *Chevron* framework may be entitled only to relatively weak stare decisis support under any circumstances, not just for adjudications.

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301. Hohn v. United States, 524 U.S. 236, 251 (1998) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

302. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009); *cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (making the same point but opting to shape rather than overturn *Auer* deference).

303. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2178 (2019) ("We have identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.'" (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2478 (2018))).

304. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) ("Indeed, we apply statutory *stare decisis* even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014))); Watson v. United States, 552 U.S. 74, 82–83 (2007) (describing "long congressional acquiescence" as enhancing statutory stare decisis). *But see* Gamble v. United States, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring) (questioning this policy).

305. *Knick*, 139 S. Ct. at 2179 (noting in reference to potential reliance interests that "the force of *stare decisis* is 'reduced' when rules that do not 'serve as a guide to lawful behavior' are at issue" (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995))).

306. *See Janus*, 138 S. Ct. at 2478 ("The doctrine [of *stare decisis*] 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997))).

Tremendous disagreement exists over exactly what type of legal doctrine *Chevron* represents. Judicial opinions and academic literature variously describe *Chevron* as a standard of review, a canon or method of statutory interpretation, and a rule of decision.[307] How one characterizes *Chevron* may affect its entitlement to stare decisis.[308] For example, stare decisis arguably has little, if any, force for canons or methods of statutory interpretation, which generally are considered nonprecedential.[309] Although the Court traditionally has treated *Chevron*, much like *Auer*,[310] as a doctrine that the courts must apply when certain conditions are satisfied,[311] some scholars argue that *Chevron* is better understood as a canon or method of statutory interpretation, and thus that stare decisis should not apply to it at all.[312] At any rate, the Court's own precedent on precedent—most notably, *Mead* and *Kisor*—confirms that in the specific context of deference, some modification is allowed without offending stare decisis.

Second, turning to the traditional factors, because *Chevron* was conceived in the context of judicial review of agency rulemaking and has been applied mostly in rulemaking cases, the Court's analysis of why *Chevron* ought to apply to agency adjudications as well is comparatively limited. Presumably because of *Chenery II*, the Court almost reflexively mentions formal adjudications alongside notice-and-comment regulations as agency actions that carry the force of law and thus are entitled to *Chevron* deference under the analysis of *Mead*. Yet, as Asimow's work and this Article demonstrate, real-world adjudications do not fall neatly into categories of formal and informal adjudications. And the Court has offered next to no analysis or

307. *See generally* Kristin E. Hickman & David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611 (2020) (describing the different ways in which courts and scholars have categorized *Chevron* and arguing, where it matters, for thinking of *Chevron* as a standard of review).

308. *Id.* at 650–55.

309. *Id.* at 653–54.

310. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (describing the agency's interpretation as "controlling," and further observing that the agency's interpretation "is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack" and "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question").

311. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000) (explaining *Chevron* deference as a mandatory doctrine).

312. *See, e.g.*, Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1152–61 (2019); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1807–11 (2010).

guidance as to which procedures make an adjudication formal enough or how courts should discern when Congress has authorized an agency to act with the force of law through adjudication. The result is a lack of theoretical support, beyond *Chenery II* in the background, for applying *Chevron* to adjudication as well as rulemaking.

Third, *Chevron* generally does not present especially strong reliance interests in the context of agency adjudications.[313] Rulemaking is already favored in the law.[314] Regulations often stay on the books for quite some time. An opportunity for widespread public participation is an expectation of the procedural requirements for rulemaking.[315] Agencies as well as private parties are bound by them. By contrast, adjudications occur more frequently and are more limited in their participation and scope. Also, the interpretations they advance commonly have a shorter shelf life. Agencies may treat their adjudications as having quasi-precedential effect[316] and may not deviate from past adjudications without some explanation.[317] But the Court has recognized that adjudications offer agencies flexibility that regulations lack. Indeed, this point was one of the reasons for the Court's general endorsement in *Chenery II* of adjudication as a policymaking format.[318]

Moreover, if the Court were to change the deference scheme as this Article suggests, past cases evaluating agency interpretations of statutes would not have to be revisited, as the primary precedential effect of those cases concerns statutory interpretations that the Court either upheld or rejected, not whether the Court relied on *Chevron* deference in reaching those conclusions.[319] The only change would be

313. Justice Gorsuch has argued that *Chevron* itself has not created reliance interests. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157–58 (10th Cir. 2016) (Gorsuch, J., concurring). Our argument does not depend on this broader point.

314. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947).

315. *See* 5 U.S.C. § 553(b)–(c) (2018).

316. *See, e.g.*, Stephenson & Pogoriler, *supra* note 231, at 1494 (explaining that an agency adjudicative order "may state a broad interpretive principle that would clearly affect many other cases").

317. HICKMAN & PIERCE, *supra* note 35, § 11.6 (documenting the courts' reluctance to accept unexplained departures from agency precedent).

318. *See, e.g.*, *Chenery II*, 332 U.S. at 202–03 (offering as a justification for "case-by-case evolution of statutory standards" via adjudication that "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule").

319. *Cf.* CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.").

how courts and agencies approach their analysis of agency interpretations of statutes advanced in *future* adjudications.

Finally, as described in Part II above, applying *Chevron* to agency adjudications raises questions and concerns that either do not exist or at least do not present similarly in the rulemaking context. Put simply, *Chevron* and agency adjudications are an awkward fit, like putting a square peg in a round hole. Whatever concerns *Chevron*'s critics have with respect to its workability for judicial review of agency rulemaking, those issues are magnified substantially in the adjudication context. To date, the Court has seen fit mostly to ignore those issues, contributing to the "undertheorization" of *Chevron* and adjudication. In fact, the Court's general failure to address the problems raised by applying *Chevron* in the adjudication context more robustly should give the Court at least a somewhat freer hand to revise its own handiwork.

3. *Changed Circumstances.* Meanwhile, other doctrinal developments have emerged that further cast doubt on *Chevron*'s applicability to adjudications, additionally undermining the force of stare decisis.[320] In particular, since the Supreme Court decided *Mead*, at least three important doctrinal developments, taken together, have altered the legal landscape—giving rise to significant fairness and bootstrapping concerns that did not exist when the Court decided *Mead* and raising questions about the wisdom of continuing to apply *Chevron* to agency adjudications. Under the law of precedent, these changes matter.

One important development is the Supreme Court's decision in *Brand X*, in which the Court concluded that agencies using *Chevron*-eligible formats could overturn contrary circuit court interpretations of ambiguous statutes.[321] Like so many of the Court's key *Chevron* decisions, *Brand X* involved notice-and-comment rulemaking as the FCC adopted an interpretation contrary to that of the Ninth Circuit. As Justice Gorsuch has recognized, *Brand X* potentially creates bizarre effects in the context of adjudication, especially when a party has relied

320. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1695 (2019) (declining to follow an earlier case because an intervening case had "undercut both pillars of [the earlier case's] reasoning"); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2460 (2018) (overcoming stare decisis, in part, because the precedent at issue had "been undermined by more recent decisions").

321. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 982–83 (2005); HICKMAN & PIERCE, *supra* note 35, § 3.6.4 (explaining doctrine).

on a previous statement of law from a court.[322] It is one thing to let an agency change the law going forward; it is something else to let an agency change the law that applies to what has already happened, especially when private parties have relied on judicial decisions.[323] It is doubtful that the *Mead* Court had this in mind when it advocated the eligibility of formal adjudications for *Chevron* review. Nor was it contemplated in *Chevron*, which, again, concerned prospective rulemaking and not retroactive adjudication. So long as *Brand X* is law and *Chevron* applies in the adjudication context, cases like *Gutierrez-Brizuela v. Lynch*[324] will arise, where private parties will not be able to plan their lives around judicial holdings.[325] The Tenth Circuit, with then-Judge Gorsuch writing, attempted to get around this problem by finding a limit on the scope of *Brand X*. A better solution would be to avoid the problem altogether by narrowing *Chevron*'s domain.

The second development is the continued trend among the circuit courts of treating the choice-of-adjudication procedures as a matter of agency discretion that itself is eligible for *Chevron* deference. As noted above, since the Court decided *Mead*, the First Circuit explicitly adopted this approach as well—and cited *Brand X* as the impetus for replacing its previous presumption with *Chevron* deference to the agency's procedural choices.[326] This jurisprudential shift—and the bootstrapping it enables—should matter in how one thinks about *Mead* and *Chevron* deference for agency adjudications. Congress rarely expressly requires APA formal adjudication procedures. As a growing number of circuits give agencies more control over the procedures they use, those courts simultaneously allow agencies to choose whether they will receive *Chevron* deference for the interpretations advanced through those adjudications.[327]

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322. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150–52 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Garfias-Rodriguez v. Holder, 702 F.3d 504, 512–14, 530–33, 545–46 (9th Cir. 2012) (en banc) (featuring several opinions struggling with the issue).

323. *See Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) ("Quite literally then, after this court declared the statutes' meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals.").

324. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

325. *See supra* text accompanying notes 215–21920 (describing the circumstances of *Gutierrez-Brizuela* and *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015)).

326. *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16–18 (1st Cir. 2006).

327. The Supreme Court, of course, could also hold that these circuit court cases are mistaken. But to the extent that the Court accepts this growing line of precedent, it undermines the case for *Chevron* in the adjudication context.

The third jurisprudential development after *Mead* is the Supreme Court's decisions strengthening the fair notice doctrine. As noted above, in recent years, the Court has breathed life into this doctrine, which limits an agency's ability to retroactively make policy through adjudication.[328] Whereas circuit court cases in the pre-*Mead* era had recognized the "due process" implications of retroactively making policy,[329] the Court itself had addressed the topic on only a few occasions, with its main case on the subject probably being *Chenery II*. That presumably is why the Court in *Christopher* cited D.C. Circuit precedent, rather than its own cases, for "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[330] As explained above, this development cuts against *Chevron* deference in the adjudication context.

These post-*Mead* developments, combined with administrative law's traditional preference for rulemaking as the better vehicle for agency policy choice,[331] suggest that the Court could limit *Chevron*'s applicability to the rulemaking context without seriously offending stare decisis. The fact that the Court has occasionally deferred to interpretations announced in adjudication is important. But that fact also must be understood in context; in reality, the overwhelming majority of the Court's applications of *Chevron* are rulemaking cases, not adjudication cases. And the Court has not yet considered how the intervening developments in the broader law discussed here may affect the proper scope of *Chevron*'s domain.

B. Narrowing, Not Overruling

The foregoing analysis, moreover, is reinforced by the Supreme Court's prior narrowing of its deference standards irrespective of stare decisis. As already documented, the Court has already narrowed *Chevron*'s scope, in *Mead* and *King*, without raising stare decisis concerns. More recently, in *Kisor*, the Supreme Court narrowed *Auer* deference without suggesting that doing so violated stare decisis. Here, we do not argue that the Supreme Court should throw out *Chevron*

328. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–59 (2012).

329. *See, e.g.*, Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986) (opinion of Scalia, J.).

330. *Christopher*, 567 U.S. at 156 (alteration in original) (quoting *Gates & Fox Co.*, 790 F.2d at 156).

331. *See* SEC v. Chenery Corp. *(Chenery II)*, 332 U.S. 194, 202 (1947) (explaining that although an agency can choose its policymaking tool, rulemaking is generally more appropriate).

altogether. We just urge that *Chevron*'s domain be narrowed. *Kisor* provides the roadmap for what we have in mind.

In *Kisor*, the lone question before the Court was whether to overrule *Auer*. Invoking stare decisis, Justice Kagan, joined by a plurality of the Court and Chief Justice Roberts in part and for the judgment, explained why *Auer* should be retained. Yet the Court did not simply reaffirm *Auer*; the Justices narrowed it. Kagan emphasized that "even as we uphold [*Auer*], we reinforce its limits" and "further develop [them] today."[332] The Court then took "the opportunity to restate, *and somewhat expand on*" what the Court had said before, in an effort to "clear up some mixed messages."[333] That "expan[sion]" was really a narrowing of *Auer*'s scope. The Court stressed, for instance, that real ambiguity must be present and courts have the threshold ability to resolve "hard interpretive conundrums, even relating to complex rules."[334] The Court also expressly repudiated language suggesting that *Auer* was more deferential than *Chevron*.[335] Likewise, the Court held that interpretation must be "the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views," and "must in some way implicate its substantive expertise."[336] "When the agency has no comparative expertise in resolving a regulatory ambiguity," deference is inappropriate.[337] Importantly, although not per se forbidding the practice, the Court also strongly hinted that courts should not defer to agency interpretations advanced in briefs, at least not ordinarily.[338]

Auer deference is no longer the same creature that it was. Previously, most courts did not understand *Auer* to be as narrow as *Kisor* now holds, and Justice Kagan's majority opinion in *Kisor* pointedly casts doubt on older cases from the Supreme Court itself that did not apply *Kisor*'s newly announced limitations.[339] What we propose

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332. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (upholding, but modifying, *Auer v. Robbins*, 519 U.S. 452 (1997)).

333. *See Kisor*, 139 S. Ct. at 2414 (emphasis added).

334. *See id.* at 2414–15 (citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

335. *See id.* at 2416.

336. *Id*. at 2416–17.

337. *Id.* at 2417.

338. *See id.* at 2417 n.6.

339. *See id.* at 2414–15 (criticizing—with an "e.g."—*United States v. Larionoff*, 431 U.S. 864 (1977), for applying "deference without significant analysis of the underlying regulation" and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), for applying "deference without

here is similar. Just as the *Kisor* Court narrowed *Auer* without offending stare decisis—in fact, the Court's judgment depends on stare decisis[340]—the Court could also narrow *Chevron*'s domain without doing serious damage to precedent.

Mead itself fit this pattern. Prior to *Mead*, the Court's language did not limit *Chevron* according to the legal force of agency action or the procedures used by the agency. *Mead* changed how *Chevron* was understood to work for entire categories of cases. That change is one reason why Justice Scalia's dissent in *Mead* was so bellicose; he viewed the Court's decision as a departure from *Chevron*.[341] Yet the Court's majority disagreed and concluded that it was free to narrow *Chevron*'s domain. The Court could and should do so again.

C. Consider the Alternative

Our final argument is directed to pragmatists. It is almost a foregone conclusion that the Supreme Court will do *something* with *Chevron*; the Justices are too invested in the issue to stand down entirely. The Supreme Court has already begun nibbling around the edges.[342] And the Chief Justice—who, in *Kisor*, cast the deciding vote to save *Auer*—has gone out of his way to invite further litigation about *Chevron*.[343] The Court is looking for a path. Unless it has a plan in mind, the Court, acting on its dissatisfaction with *Chevron*, may make a hash of judicial deference doctrine and create unintended consequences through ad hoc revisions based on the facts of individual cases. Indeed, if there are not five votes to scrap the entire *Chevron*

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careful attention to the nature and context of the interpretation"). Notably, Justice Gorsuch observed that "[t]he majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*." *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring in the judgment).

340. *See Kisor*, 139 S. Ct at 2422–23.

341. *See* United States v. Mead Corp., 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting) ("To decide the present case, I would adhere to the original formulation of *Chevron* . . . . *Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates . . . .").

342. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (rejecting *Chevron* deference where the government's position is inconsistent between agencies).

343. *See, e.g.*, Debra Cassens Weiss, *Roberts Mostly Joins Liberal Justices as SCOTUS Refuses To Overturn* Auer *Decision on Agency Power*, AM. BAR ASS'N J. (June 26, 2019, 9:50 AM), http://www.abajournal.com/news/article/supreme-court-rules-on-federal-regulator-power-in-case-on-auer-deference [https://perma.cc/A3QJ-G3LK] ("Roberts and four other conservative justices, in separate opinions, made clear that they did not think the majority ruling upholding *Auer* foreclosed a review of Chevron deference.").

framework, a series of ad hoc, case-driven limits seems likely unless the Court can land on a unified theory. Regardless of one's views of *Chevron* generally, the prospect of ad hoc limits rather than principled narrowing should not be attractive.

At bottom, there is no bright-line rule governing when the Court should overrule a case.[344] And there is reason to think that the Court has its eyes on *Chevron*. In light of that reality, the question for those who think stare decisis should apply here is what restrictions on *Chevron* make the most sense. Curtailing it for adjudications fits that description.

CONCLUSION

Chevron is under attack—and sometimes it deserves it. Why, for instance, does Justice Gorsuch dislike *Chevron* so much? It is because of cases like *Gutierrez-Brizuela*, where an agency not only told a court to read a statute in a liberty-depriving way but also instructed that same court to apply the agency's "new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control."[345] Retroactivity is disfavored for a reason. Cases likes *Gutierrez-Brizuela* give *Chevron*'s critics ammunition.

If *Kisor* is a guide, the Supreme Court is looking for a path to curtail *Chevron* that is grounded in doctrine, administrable in practice, potent enough to prevent abuse, and limited enough to preserve the doctrine's core. This Article offers that path. *Mead*'s insight that not all types of agency action merit deference is valid, but that insight should be taken further. Dropping deference for agency adjudications is a workable middle ground, preserving *Chevron* for notice-and-comment regulations where it is most defensible while eliminating it in those contexts for which *Chevron* is less defensible in theory and more dangerous in practice. Whatever one's views of *Chevron* generally, the reality is that deferring in the adjudication context is in tension with *Chevron*'s theoretical justifications, can produce real unfairness, and has created a mess in the lower courts to boot. All of this can be addressed by narrowing *Chevron*'s domain. So, really, why not do it?

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344. *See, e.g.*, Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1853 (2013) (noting that Justices characterize stare decisis "as a matter of discretion rather than compulsion").

345. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016).