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### **Judge Brett Kavanaugh's Views on *Chevron* Deference at the FCC and Beyond**

by

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#### **I. Introduction and Summary**

President Trump has nominated D.C. Circuit Judge Brett Kavanaugh to fill the Supreme Court vacancy left by Justice Kennedy's retirement. Judge Kavanaugh has served on the D.C. Circuit for a dozen years, having authored more than 300 opinions, including more than 120 opinions that deal with administrative law.<sup>1</sup> As I have noted elsewhere, Judge Kavanaugh "is one of the most sophisticated, provocative, and creative voices in the federal judiciary when it comes to administrative law."<sup>2</sup>

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<sup>1</sup> See BRETT MICHAEL KAVANAUGH, SENATE JUDICIARY COMMITTEE QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 63 (July 2018) (reporting authorship of 307 opinions); Adam Feldman, *The Next Nominee to the Supreme Court*, EMPIRICAL SCOTUS (Dec. 7, 2017) (reporting that Judge Kavanaugh had authored 122 opinions dealing with administrative law).

<sup>2</sup> Christopher Walker, *Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018), <http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/>. This *Perspectives* draws substantially from and builds on this SCOTUSblog post.

Just as it was at Neil Gorsuch’s Supreme Court confirmation hearing before the Senate Judiciary Committee last year,<sup>3</sup> I expect *Chevron* deference (and perhaps *Auer* deference) to be discussed at Judge Kavanaugh’s confirmation hearing. A recent *Mother Jones* headline aptly summarizes one potential line of attack: “How Brett Kavanaugh Could Cripple the Next Democratic President. Two words: *Chevron* deference.”<sup>4</sup>

Over three decades ago in *Chevron v. Natural Resources Defense Council*, the Supreme Court announced a two-step approach to judicial review of federal agency interpretations of statutes the agency administers. The reviewing court must first determine whether the statute is ambiguous. If the statute is ambiguous, the court must uphold the agency’s interpretation at step two so long as it is reasonable.<sup>5</sup>

In recent years, however, there has been a growing call (mainly from those right-of-center) to eliminate – or at least narrow – administrative law’s judicial-deference doctrines regarding federal agency interpretations of law.<sup>6</sup> These reform efforts have been front and center at the Supreme Court. For example, in 2015, in *Perez v. Mortgage Bankers Ass’n*, Justices Scalia, Thomas, and Alito all questioned the wisdom and constitutionality of judicial deference to agency interpretations of their own regulations (*Auer* deference).<sup>7</sup> And this Term in *Pereira v. Sessions*, Justice Kennedy joined the prior calls by Justice Thomas and then-Judge Gorsuch to reconsider “reflexive deference” to agency statutory interpretations (*Chevron* deference).<sup>8</sup>

So how would a Justice Kavanaugh affect *Chevron* deference’s future at the Supreme Court? The potential impact is threefold. First, as those who follow the FCC know, Judge Kavanaugh has embraced a strong version of the major questions exception to *Chevron* deference, which would strip any deference for agency interpretations of a major economic or political question unless Congress has provided a clear statement to the contrary. Second, as a textualist in the

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<sup>3</sup> See Chris Walker, *Gorsuch on Chevron Deference, Round II*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 23, 2017), <http://yalejreg.com/nc/gorsuch-on-chevron-deference-round-ii/>.

<sup>4</sup> Pema Levy, *How Brett Kavanaugh Could Cripple the Next Democratic President*, MOTHER JONES (July 24, 2018), <https://www.motherjones.com/politics/2018/07/brett-kavanaugh-supreme-court-chevron-deference/>.

<sup>5</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>6</sup> See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (chronicling attacks).

<sup>7</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in judgment); *id.* at 1225 (Thomas, J., concurring in judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in judgment). See also *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (instructing courts to defer to an agency’s interpretation of its own regulation unless plainly erroneous or inconsistent with the regulation” (internal quotation marks omitted)); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same).

<sup>8</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (citing, *inter alia*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712–2714 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–1158 (10th Cir. 2016) (Gorsuch, J., concurring)). See generally Chris Walker, *Gorsuch’s “Clear Enough” & Kennedy’s Anti-“Reflexive Deference”: Two Potential Limits on Chevron Deference*, YALE J. ON REG.: NOTICE & COMMENT (June 22, 2018), <http://yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/>.

Scalia mold, Judge Kavanaugh is more likely to find a statute unambiguous at *Chevron* step one and thus less likely to defer to an agency's statutory interpretation. Third, in his academic writings, Judge Kavanaugh has advanced a narrowing of *Chevron* deference that would preserve agency deference for open-ended congressional delegations but eliminate it for routine statutory ambiguities.

## II. Judge Kavanaugh's Major Rules Exception to *Chevron* Deference

As articulated in his dissent from denial of rehearing in the FCC net neutrality regulation challenge, Judge Kavanaugh has embraced a strong version of one significant narrowing of *Chevron* deference: the major questions doctrine.<sup>9</sup>

*King v. Burwell*, the statutory challenge to the Affordable Care Act, is a recent and prominent example of the major questions doctrine.<sup>10</sup> In a 6-3 decision written by Chief Justice John Roberts, the Court found the statutory language ambiguous. But the Court refused to apply any deference to the agency's interpretation of the statutory ambiguity. Instead, the Chief Justice invoked the major questions exception to *Chevron* deference because the statutory provision implicated "a question of deep economic and political significance that is central to this statutory scheme" and for which the agency (the IRS) had no expertise.<sup>11</sup>

Judge Kavanaugh looked to *King v. Burwell* when the FCC's net neutrality regulation reached the D.C. Circuit in *United States Telecom Ass'n v. FCC*. In his dissent from the denial of rehearing en banc, he argued that "[i]f the Supreme Court's major rules doctrine means what it says, then the net neutrality rule is unlawful because Congress has not clearly authorized the FCC to issue this major rule."<sup>12</sup>

As Jeff Pojanowski has observed, Judge Kavanaugh's version of the major questions doctrine, which Judge Kavanaugh relabeled the major rules doctrine, "came with a twist":

After canvassing the Supreme Court's jurisprudence and scholarly commentary, [Judge Kavanaugh] identified what he dubbed the "major rule" exception to *Chevron* deference. He saw this *Chevron* carve-out as holding that if "an agency wants to exercise expansive regulatory authority over some major social or regulatory activity . . . an *ambiguous* grant of statutory authority is not enough." . . . Rather than hiding regulatory elephants in mouse holes, Congress can extend the reach of the administrative state only through clear statements.<sup>13</sup>

Dan Deacon has argued that Judge Kavanaugh's approach is a "weaponized" version of the doctrine that, absent a clear congressional statement to the contrary, strips away not only

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<sup>9</sup> See *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

<sup>10</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

<sup>11</sup> *Id.* at 2489 (internal quotation marks omitted).

<sup>12</sup> *United States Telecom Ass'n*, 855 F.3d at 426 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

<sup>13</sup> Jeffrey Pojanowski, *Cabining the Chevron Doctrine the Kavanaugh Way*, LAW & LIBERTY (June 12, 2017), <http://www.libertylawsite.org/2017/06/12/cabining-the-chevron-doctrine-the-kavanaugh-way/>.

*Chevron* deference for major questions but also any agency authority to regulate concerning those major questions. “[T]he ‘major rules’ doctrine might extend to actions that ‘de-regulate’ as well as regulate,” Deacon observes, “[b]ut the overall logic and tenor of [Judge Kavanaugh’s] argument is largely anti-regulatory.”<sup>14</sup>

In that sense, Judge Kavanaugh’s major rules doctrine is a second-order means of addressing nondelegation doctrine concerns. Judge Kavanaugh’s view of separation of powers – and, in particular here, Article I’s nondelegation command that Congress cannot delegate legislative powers to federal agencies (or anyone else)<sup>15</sup> – motivates his administrative law jurisprudence. Cass Sunstein, among others, has noted that the Supreme Court has seldom used the nondelegation doctrine to strike down a statute, largely because of line-drawing problems.<sup>16</sup> Judge Kavanaugh’s major rules doctrine attempts to address nondelegation concerns through a substantive canon of statutory interpretation instead of a constitutional doctrine, by establishing an interpretive presumption that, absent a clear congressional statement, Congress does not intend to delegate rulemaking authority over questions of major economic or political significance.

Because Judge Kavanaugh expounded this major rules doctrine in a dissent, its precise contours are understandably not fully developed. But I concur in Jeff Pojanowski’s assessment that “Judge Kavanaugh’s careful explication and reformulation of the ‘major questions’ exception is an important development in its own right, and a rich source for further reflection on the role of the courts in the administrative state.”<sup>17</sup> It is an even richer source for reflection when Judge Kavanaugh’s major rules doctrine is considered in conjunction with his proposal, discussed in Part IV below, to limit *Chevron* deference to open-ended congressional delegations.

### III. Judge Kavanaugh’s Textualist Approach to *Chevron* Step One

As a textualist of Justice Scalia’s vintage, a Justice Kavanaugh would likely find statutes unambiguous more often than some of his more-purposivist peers who tend to interpret statutes in accordance with what they perceive as the statute’s purpose (and more often than his predecessor, Justice Kennedy). As such, he would be less likely to defer to agency statutory interpretations. The role of ambiguity is critical to *Chevron* deference. After all, *Chevron* commands that a reviewing judge defer to an agency’s interpretation of a statute the

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<sup>14</sup> Dan Deacon, *Judge Kavanaugh and “Weaponized Administrative Law”*, YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), <http://yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/>; accord Eric Citron, *Kavanaugh on Net Neutrality: U.S. Telecom Association v. Federal Communications Commission*, SCOTUSBLOG (July 24, 2018), <http://www.scotusblog.com/2018/07/kavanaugh-on-net-neutrality-u-s-telecom-association-v-federal-communications-commission/>.

<sup>15</sup> See U.S. CONST. ART I. § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States . . .”).

<sup>16</sup> See, e.g., Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

<sup>17</sup> Pojanowski, *supra* note 13.

agency administers if (1) the statutory provision at issue is ambiguous and (2) the agency’s interpretation is reasonable.<sup>18</sup>

As Kent Barnett and I have empirically explored in the circuit courts, the ambiguity inquiry at *Chevron*’s first step is far more exacting than the reasonableness inquiry at the second step.<sup>19</sup> In our eleven-year dataset of every published circuit-court decision that cites *Chevron* deference, we found that agencies prevailed under the *Chevron* doctrine 93.8% of the time when the court found the statute ambiguous and reached step two, but only 39.0% when the court found the statute unambiguous and thus stopped at step one.<sup>20</sup>

Judge Kavanaugh has written extensively about the role of ambiguity in statutory interpretation. Most famously, he set forth his concerns in a *Harvard Law Review* essay reviewing Judge Robert Katzmann’s book on statutory interpretation.<sup>21</sup> There, he argued that “judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.”<sup>22</sup>

Judge Kavanaugh himself has recognized that his textualist orientation will likely result in his finding fewer statutes ambiguous under *Chevron* step one than some of his judicial peers. As he observed in his Story Lecture last year, whereas some judges might require 90 percent certainty to declare a statute unambiguous, “I probably apply something approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it is not ambiguous, and I do not resort to [*Chevron* deference].”<sup>23</sup>

Accordingly, one should expect a Justice Kavanaugh to approach *Chevron*’s first step in a textualist fashion similar to Scalia’s, in which he exhausts all of the tools of statutory interpretation at *Chevron* step one to resolve the ambiguity. Or as Justice Gorsuch framed it this Term in *Wisconsin Central Ltd. v. United States*, a “clear enough” – as opposed to, perhaps, a crystal clear – *Chevron* step one inquiry.<sup>24</sup> Judge Kavanaugh’s opinion in *Loving v. IRS* is a good example of this approach.<sup>25</sup> There, he relied on “the text, history, structure, and context of the statute” to reject the IRS’ interpretation of the statutory text “regulate practice of representatives of persons before the Department of Treasury” to include the authority to regulate tax preparers.<sup>26</sup>

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<sup>18</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>19</sup> Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

<sup>20</sup> *Id.* at 35 fig.3.

<sup>21</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

<sup>22</sup> *Id.* at 2118.

<sup>23</sup> Brett Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. LECTURE 5 (Feb. 1, 2018) (reprinting Judge Kavanaugh’s Joseph Story Distinguished Lecture delivered on October 25, 2017), <https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf>.

<sup>24</sup> *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). *See generally* Walker, *supra* note 8 (discussing Justice Gorsuch’s “clear enough” approach).

<sup>25</sup> *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

<sup>26</sup> *Id.* at 1016.

#### IV. Judge Kavanaugh’s Narrowing of *Chevron* Deference for Statutory Ambiguities

In addition to his major rules doctrine to limit *Chevron* “step zero” and his more-textualist approach to *Chevron* “step zero,” Judge Kavanaugh has advanced in his academic writings a more-systemic narrowing of *Chevron* deference based on concerns about uniformity of federal law and partisanship in judicial decisionmaking.

As he explained in his Story Lecture, Judge Kavanaugh finds the threshold ambiguity inquiry under *Chevron* problematic because his “goal is to help make statutory interpretation . . . a more neutral, impartial process where like cases are treated alike by judges of all ideological stripes, regardless of the issue and regardless of the identity of the parties in the case.”<sup>27</sup> Judge Kavanaugh’s articulation of how this goal affects *Chevron* deference is worth quoting in full:

But that objective is hard to achieve, at least in many cases, if the threshold trigger for *Chevron* deference is ambiguity.

What is the solution to this one? To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms—at least, they should under current law—when statutes use terms like “reasonable,” “appropriate,” “feasible,” or “practicable.” In those cases, courts can say that the agency may choose among reasonable options allowed by the text of the statute. But that is really the *State Farm* doctrine. You legal nerds here tonight know what I mean by the *State Farm* doctrine; I think there are a lot of us. But that is not really the *Chevron* doctrine.

In cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency’s interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial way in most cases. Of course, there will be disagreements about what the meaning is, but it will not be sidetracked by that threshold ambiguity-versus-clarity determination.

Put simply, the problem with certain applications of *Chevron*, as I see it, is that the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of that initial clarity-versus-ambiguity decision. Here, too, as with constitutional avoidance, as with the legislative history canon, we need to consider eliminating that inquiry as part of the threshold trigger.<sup>28</sup>

It is difficult to assess Judge Kavanaugh’s proposal in the abstract. Perhaps he is suggesting a total elimination of *Chevron* deference when dealing with specific statutory ambiguities as opposed to open-ended delegations (that, as discussed in Part I, do not implicate major economic or political questions) – though that line is often difficult to discern, much less draw. Or maybe this is just another way to articulate Judge Kavanaugh’s textualist, Scalia-esque approach to *Chevron* step one, as outlined in Part II. Or perhaps he is echoing Justice Kennedy’s concerns from his *Pereira* concurrence about how *Chevron* deference “has come

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<sup>27</sup> Kavanaugh, *supra* note 23, at 9 (footnote omitted).

<sup>28</sup> *Id.*

to be understood and applied,” with “[t]he type of reflexive deference exhibited in some of these cases.”<sup>29</sup>

One final note: If Judge Kavanaugh is concerned about administrative law’s political dynamics, the right prescription may be the opposite: Preserve a bright-line *Chevron* doctrine. In the latest article forthcoming from our *Chevron* dataset, Kent Barnett, Christina Boyd, and I find that, at least in the circuit courts, *Chevron* deference has a powerful effect on constraining partisanship in judicial decisionmaking and encouraging uniformity in federal law – the values that seem to motivate Judge Kavanaugh in his academic writing.<sup>30</sup> In our dataset (2003-2013), Judge Kavanaugh largely applied the same approach to *Chevron* deference regardless of whether the agency interpretation under review was classified as “conservative” or “liberal.” But that was not true for all conservative and liberal judges in our dataset.<sup>31</sup> And perhaps this partisanship he sees in other judges’ application of *Chevron* deference is what is driving Judge Kavanaugh’s concerns here.

## V. Conclusion

In sum, Judge Kavanaugh’s approach to *Chevron* deference in practice would likely be quite similar to Justice Scalia’s textualist approach at step one. He has also expressed concerns similar to his potential predecessor (Justice Kennedy) about how the doctrine has become “reflexive deference” in practice, perhaps signaling a desire to cabin *Chevron*’s domain. In light of how he has embraced the major questions doctrine dissent from the D.C. Circuit’s affirmance of the FCC’s net neutrality regulations, it would be unsurprising to see a Justice Kavanaugh join Chief Justice Roberts’s calls for a narrower, more context-specific *Chevron* deference.<sup>32</sup>

Although Judge Kavanaugh’s opinions have not addressed the propriety of *Auer* deference to an agency’s interpretation of its own regulations, his concerns about interpretive doctrines that turn on ambiguity, coupled with his views on separation of powers, seem to suggest he would be receptive to calls to eliminate – or at least further limit – *Auer* deference. Indeed, Judge Kavanaugh has listed Justice Scalia’s dissent calling for the overruling of *Auer* as one of three Scalia dissents that Judge Kavanaugh expects to become the law.<sup>33</sup> We may find out the answer as soon as this coming Term, as a pending cert petition asks the Court to overrule *Auer v. Robbins*.<sup>34</sup>

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<sup>29</sup> *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

<sup>30</sup> Kent H. Barnett, Christina L. Boyd, Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3132045>.

<sup>31</sup> *See id.* figs.9–10.

<sup>32</sup> *See* Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095 (2016) (detailing Chief Justice Roberts’s context-specific approach to *Chevron* deference).

<sup>33</sup> Patrick Gregory, *Kavanaugh: 3 Scalia Dissents Will Become Law of Land*, BLOOMBERG LAW (June 6, 2016), <https://www.bna.com/kavanaugh-scalia-dissents-n57982073854/>.

<sup>34</sup> *See* Chris Walker, *New Supreme Court Cert Petition to Overrule Auer Deference: Kisor v. O’Rourke*, YALE J. ON REG.: NOTICE & COMMENT (July 9, 2018), <http://yalejreg.com/nc/new-supreme-court-cert-petition-to-overrule-auer-deference-kisor-v-orourke/>.

Judge Kavanaugh's dissent in the FCC net neutrality regulation case, moreover, provides some fascinating clues for how a Justice Kavanaugh might address nondelegation and separation of powers concerns more generally. Again, we may learn more about his views on nondelegation doctrine as early as this Term, when the Supreme Court decides *Gundy v. United States*, which raises a nondelegation challenge.<sup>35</sup>

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<sup>35</sup> See, e.g., Jennifer Mascott, *Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine*, GEO. MASON L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3225085>.