Charles J. Cooper
"Examining Agency Use of Deference, Part II"
Written Responses to Senator James Lankford's Questions for the Record
May 9, 2016

1. **QUESTION:** *Chevron* deference attempts to balance competing tensions between the executive and judiciary. On the one hand, proponents of *Chevron* deference argue that it appropriately cabins judicial activism; on the other, critics of *Chevron* worry that agencies are free to wield administrative powers that Congress did not delegate to them, without fear of scrutiny from the courts. What, in your opinion, is the proper balance between these two tensions?

   ANSWER: In my view, the proper balance between these tensions is the one set by the Constitution itself, which vests the judicial power in the federal courts and all legislative powers enumerated in Article I in the Congress. As I explained in my written testimony, the vesting of these powers is exclusive, *see also Department of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment), and because *Chevron* is premised on a delegation of either judicial or legislative power to agencies, *Chevron* is contrary to either Article III or Article I. Therefore, regardless of whether one believes that courts *should* act as a greater check on agency power than they currently do, the relevant point is that the Constitution *requires* that courts do so.

   It is true that Justice Scalia, who during most of his life was *Chevron*'s greatest defender on the Court, believed that *Chevron* played a critical role in cabining judicial activism. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) ("We have cautioned that judges ought to refrain from substituting their own interstitial lawmaking for that of an agency. That is precisely what *Chevron* prevents." (quotation marks and citation omitted)). But as the Chief Justice stated in his *City of Arlington* dissent, "*Chevron* is a powerful weapon in an agency's regulatory arsenal" because "Congress often fails to speak to the precise question before an agency," *id.* at 1879 (quotation marks omitted), and with the Administrative State's breathtaking expansion of power since the Progressive Era, *Chevron* effectively gives agencies unchecked authority over large swaths of American life. As between judicial activism and agency autarchy, it is unclear which is the greater threat to American liberty.

   But it *is* clear, in my opinion, that *Chevron* cannot be squared with the Constitution, and that is a conclusive reason for rejecting *Chevron* and restoring the original design of the Constitution.

2. **QUESTION:** The Judicial Review Restoration Act amends the APA to clarify that the reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." This would eliminate both *Chevron* and *Auer* deference. How would agency rulemaking change if judicial deference to statutory provisions and rules were eliminated?

ANSWER: There can be little doubt that *Chevron* and *Auer* have a dramatic effect on agency rulemaking. As Professor Herz testified, there is empirical evidence that *Chevron* encourages agencies to adopt more aggressive interpretations of statutes than they would otherwise. This empirical evidence confirms what is obvious as a matter of common sense: if there is a non-frivolous argument in favor of an agency-empowering interpretation, the agency has every reason under *Chevron* and *Auer* to adopt that interpretation and take its chances in court.

Few cases so vividly illustrate this problem as *Utility Air Regulatory Group v. EPA*. In that case, the EPA interpreted the Clean Air Act (CAA) to impose permitting requirements on all stationary sources emitting 100 or 250 tons of greenhouse gases per year, depending on the permitting requirement in question. 134 S. Ct. 2427, 2436 (2014). The 100- and 250-ton figures were in the statute itself; EPA was simply applying them to greenhouse gases. However, EPA recognized that its decision to interpret the CAA in this fashion would have "calamitous consequences," such as increasing permit applications from 800 per year to nearly 82,000 and "causing construction projects to grind to a halt nationwide." *Id.* at 2442–43. To remedy this problematic consequence—one that resulted from the EPA's own agency-empowering interpretation of the statute—the EPA announced that it would "tailor" the statute by replacing the 100- and 250-ton statutory thresholds with a 100,000-ton threshold of its own invention. *Id.* at 2444–45. The EPA literally rewrote numerical requirements specified in the statute to suit its own policy purposes.

Fortunately, a majority of the Supreme Court held that even *Chevron* deference cannot authorize such an effort. It affirmed that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at 2445. "It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires . . . permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the bounds of its statutory authority." *Id.* (quotation marks omitted). The Court noted that, instead of changing the statute's requirements—requirements to which Congress and the President had agreed—the agency should have realized that its need to do so signaled "that it had taken a wrong interpretive turn." *Id.* at 2446.

Yet, had just one Justice switched his vote, the EPA would have succeeded in its brazen attempt to rewrite an Act of Congress. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, would have permitted the EPA to read an "implicit exception" into the "less important language" of the statute—that is, "the particular number used by the statute." *Id.* at 2454. In doing so, Justice Breyer noted that the EPA was merely "exercising the legal authority to which it is entitled under *Chevron*." *Id.* at 2453.

The EPA rewrote the indisputable, numerical requirements of a statute, and, because of *Chevron*, its gamble almost paid off. When an agency regulation directly contradicts its authorizing statute, and yet the Court still comes within one vote of sustaining the agency's action, the lesson to the administrative agencies is to seize as much power as possible, confident that they will have a fighting chance in court.

In light of the incentives created by *Chevron* and *Auer*, I believe that, if these doctrines were eliminated, and agency rules were consequently subject to *de novo* judicial review, agencies would be much more cautious about adopting aggressive, agency-empowering interpretations. It is hard to imagine, for instance, that the EPA would have attempted its gambit in *Utility Air Regulatory Group* had it known that the Court would review its interpretation of the Clean Air Act without deference. Therefore, although agencies will almost always try to increase their power when interpreting statutes, they would be more constrained in doing so in the absence of *Chevron* and *Auer*.

3. **QUESTION:** An alternative method would be for Congress to institute a *Skidmore*-type standard, where courts are to accept the statutory interpretation that is most persuasive. If, for example, Congress passed such legislation what would be the effect on both the courts and the agencies?

   ANSWER: The *Skidmore* doctrine states that the weight given to an agency interpretation of its own authority should "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). I agree with Justice Scalia's view that "*Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

   As I stated in my oral testimony, under *Skidmore*, courts would regard agency interpretations in the same way they view amicus briefs from private parties: as potentially useful resources insofar as they are well-reasoned and persuasive. But just as courts do not defer to amicus briefs from private parties, they would not defer to agencies under *Skidmore*. Therefore, I believe that the effect of imposing the *Skidmore* doctrine in judicial review of agency interpretations should be materially indistinguishable from requiring *de novo* review, and I have explained in my prior answer what I believe the effect of *de novo* review would be on agency behavior.

   However, I am concerned that courts might purport to apply *Skidmore* while effectively smuggling *Chevron* or *Auer* into their analysis. After all, the Court in *Mead* seemed to believe that *Skidmore* requires some form of deference to agency interpretations. *See id.* at 234 ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." (quotation marks and citation omitted)). Insofar as courts would continue to accord deference to agency interpretations under *Skidmore*, the same constitutional concerns present with *Chevron* and *Auer*—though perhaps ameliorated

somewhat—would continue to exist, and agencies would continue to have the same incentives to push the boundaries of their power with aggressive interpretations.

For those reasons, I believe that imposing the *Skidmore* doctrine *should* lead to *de novo* review, with the agency's interpretations prevailing only insofar as they are persuasive, but I am concerned that this might not obtain in reality. *Skidmore* would be better than *Chevron* and *Auer*, but the most secure way to resolve the constitutional problems with deference and to reign in out-of-control agency interpretations is to impose a clear *de novo* standard of review, as the Administrative Procedure Act (APA) was originally designed to do.

4. **QUESTION:** Critics argue that *Chevron* deference rests on an "implicit delegation of judicial power to administrative agencies and is also an impermissible abdication of judicial duty." In his concurring opinion in *Perez v. Mortgage Bankers Association*, Justice Clarence Thomas stated that "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." If the courts will not defend their constitutionally granted powers, what, if any, steps should Congress take to prevent an improper transfer of judicial authority to the executive branch?

   ANSWER: As I made clear in my prepared testimony, I completely agree with Justice Thomas that, insofar as *Chevron* is justified as a delegation of judicial power to agencies, it is at war with Article III, which vests the judicial power exclusively in the federal courts. I also strongly agree with the implied premise of the question: just because the Court has not recognized the constitutional problems with *Chevron* does not mean that Congress has no role to play. Congress, as a coequal branch with an obligation to uphold the Constitution, has a *duty*—within the limits of its own authority—to maintain the separation of powers. *Salazar v. Buono*, 559 U.S. 700, 717 (2010) ("Congress, the Executive, and the Judiciary *all* have a duty to support and defend the Constitution." (emphasis added)); *see also* U.S. CONST., art. VI, cl. 3. For reasons described in my written testimony, it is clear that Congress has the power to abrogate *Chevron* and *Auer* legislatively and require *de novo* review of agency interpretations, and I believe that it should do so.

   Outside of the *Chevron* and *Auer* contexts, there are other significant ways in which judicial power is unconstitutionally transferred to agencies. For example, my written testimony described the effect of the Court's decision in *Crowell v. Benson*, 285 U.S. 22, 46 (1932), which permitted agencies to exercise judicial power subject to review by the courts. Congress could take action against this type of delegation by restricting the domain of agency adjudications, but that is a topic that is beyond the scope of my testimony and is better left for another day.

5. **QUESTION:** Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

ANSWER: Although it is true that Justice Scalia was perhaps the foremost defender of *Chevron* on the Court throughout his career, it is important to note that, in his last full term on the Court, even Justice Scalia expressed significant skepticism about *Chevron*'s validity. In *Perez v. Mortgage Bankers Association*, Justice Scalia explained that Section 706 of the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations," but the Court, "[h]eedless of the original design of the APA," has "held that *agencies* may authoritatively resolve ambiguities in statutes [and regulations]." 135 S. Ct. at 1199, 1211 (Scalia, J., concurring in the judgment) (emphasis in original). Indeed, Justice Scalia even went so far as to suggest that the conflict between the APA and *Chevron* is "perhaps insoluble if *Chevron* is not to be uprooted." *Id.* at 1212. Unfortunately, we will never know whether Justice Scalia would have eventually come around to the view that *Chevron* should be overruled, but his separate opinion in *Perez* clearly stated his increasing discomfort with the legitimacy of *Chevron*. Tellingly, Justice Scalia had become the Court's leading advocate against *Auer* and *Seminole Rock*—which suffer from the same constitutional infirmities as *Chevron*—notwithstanding that he authored the opinion in *Auer*. *See, e.g.*, *id.* at 1212–13; *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring in part and dissenting in part).

The impact of Justice Scalia's untimely death on the current Court's application of *Chevron* is complex. It is true, as your question states, that Justice Scalia rigorously enforced Step 1 and moved on to Step 2 infrequently, thus mitigating the impact of *Chevron* within his own approach to reviewing agency action. Losing the foremost textualist and enforcer of Step 1 on the Court could lead the Court to defer more to agencies under Step 2.

On the other hand, Justice Scalia was the staunchest defender of *Chevron*'s applicability, forcefully criticizing the Court in cases restricting *Chevron*'s scope, *see, e.g.*, *Mead*, 533 U.S. at 239 (Scalia, J., dissenting); *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment), and authoring *City of Arlington v. FCC*, 133 S. Ct. at 1863, one of the most sweeping and troubling expansions of *Chevron*'s domain. The other justices on the current Court have, at times, shown greater willingness to place limits on when *Chevron* applies, *see, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply Chevron to "a question of deep 'economic and political significance' that is central to [a] statutory scheme" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 2000)); *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting); *Mead*, 533 U.S. at 218. Without Justice Scalia advocating to the contrary, it is possible that the Court will apply *Chevron* less often.

In sum, while Justice Scalia had an expansive view of *Chevron*'s applicability, he did not often defer under *Chevron*'s Step 2, making it difficult to predict how his absence will affect future *Chevron* cases. Of course, given that there appear to be at least three votes to overrule *Auer*, *see Perez*, 135 S. Ct. 1211 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *Decker*, 133 S. Ct. at

1338–39 (Roberts, C.J., concurring), and given that four justices have expressed serious reservations about agency power under *Chevron*, *see Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting), the future of these deference doctrines will very likely hinge on who replaces Justice Scalia on the Court.

6. **QUESTION:** Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act in *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

   ANSWER: Yes, it does mark a significant shift in the Court's *Chevron* jurisprudence. The "major questions" doctrine originated with the Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, which refused to defer to the FDA's view that it had statutory authority to regulate tobacco products. The Court rejected the agency's statutory interpretation at Step 1, concluding that the statute and related congressional actions unambiguously precluded the FDA's regulation of tobacco products. It then found its interpretation fortified by the fact that it was unlikely that Congress intended to delegate to the agency "major questions" of "such economic and political significance." 529 U.S. 120, 159, 160 (2000).

   The major questions doctrine had been cited in other cases before *King*, but, as in *Brown & Williamson*, the Court had done so after completing its analysis under Step 1, in order to bolster its view that the statute at issue was unambiguous. *See Utility Air Regulatory Grp.*, 134 S. Ct. at 2444; *cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not, one might say, hide elephants in mouseholes").

   What makes *King* so striking and different from prior invocations of the major questions doctrine is that the Court determined (erroneously) that the statute *was ambiguous* but still declined to apply *Chevron* and, as Professor Gillian Metzger has pointed out, "went out of its way to independently interpret the statute to reach the same result as the agency." Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1778 (2015).

   There are, of course, numerous "major cases"—cases that have a profound impact on our economic and political life—where agencies rely on *Chevron* to support expansive regulatory actions. For example, the EPA's clean power plan regulations—which the Supreme Court has stayed for the time being, *see West Virginia v. EPA*, 136 S. Ct. 1000 (2016)—surely addresses a question of "deep economic and political significance," and the agency's statutory interpretation should not be accorded *Chevron* deference if the courts are faithful to *King*. That the Chief Justice and Justice Kennedy were willing to use the major questions doctrine in *King*, combined with the significant skepticism of agency power voiced by Justices Thomas and Alito, suggests that Justice Scalia's replacement

will likely be decisive in determining whether *King* is regarded as an aberration or as the herald of a new dispensation in *Chevron* cases.

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May 4, 2016

Hon. James Lankford
United States Senate
316 Hart Senate Office Building
Washington, D.C. 20510

Re: Post-Hearing Questions for the Record, "Examining Agency Use of Deference, Part II," March 17, 2016

Dear Senator Lankford,

I am pleased to answer the following post-hearing questions for the record.

Question: Empirical studies have shown that, for most justices, whether they defer to an agency or not hinges largely on political affiliations. Conservative justices defer more frequently when there is a Republican in the White House and liberal justices defer more when there is a Democrat in the White House. What steps should Congress take to ensure that courts review agency action in a neutral manner regardless of who is President?

Answer: At bottom, I think there is very little Congress can do to ensure judicial neutrality. Ideology inescapably affects judicial decisionmaking; there is no direct steps Congress, or others, can take to reduce that effect. It is already the case that the "official version" of the judicial task is one of neutral law-application; that is what *every* judicial nominee promises to do and what most judges think they are doing. So any sort of direct command or exhortation to "be neutral" will be ineffective.

That said, what Congress *can* do is to lessen the effects of or opportunity for ideologically driven judicial decisionmaking. This too is not easy or straightforward. But ideology is most prominent in the face of legal uncertainty. The clearer the legal principles, the less relevant the judge's ideology. (One of the reasons that ideology looks so important is that litigated cases by definition involve settings where there is at least some, and often a great deal of, uncertainty.) In statutory cases, that means drafting with clarity and precision. Of course, that is much easier said than done.

Finally, it is important to understand that the link between judicial decisions and political affiliations is not in any way limited to review of agency decisions. In fact, a doctrine of deference in the face of ambiguity should and probably does *reduce* the overall role of ideology

in review of agency decisions. As you point out, and studies have shown, ideology matters here too; ideology colors all judicial decisionmaking, including on "meta" questions like decisions about how to make decisions. But the question is not whether deference can be applied "neutrally." The question is whether judicial decisionmaking in cases involving unclear statutes would be more, less, or equally "political" absent a deference principle. It is pretty clear that giving judges free reign would not *reduce* the ideological nature of their decisions. It is possible that it would have no effect; my prediction would be that ideology would become more important.

Question: Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less often than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

Answer: For the reasons you give, it is hard to predict the impact of the loss of Justice Scalia on the *Chevron* doctrine. On the one hand, his actual *votes* were not deferential; he was relatively quick to disagree with agencies. The median justice is more deferential, and therefore one would predict an increase in deference. On the other hand, because he was such a strident defender of *Chevron*, and because the basic message of *Chevron* is one of deference, an important and influential voice stressing the need to defer is now gone. These effects may balance each other out. In addition, Justice Scalia was in a minority on some central *Chevron* issues, most notably the continued viability of *Skidmore* and the "step zero" doctrine of *Mead*. On these issues, his departure will likely lead to cementing the majority view rather than shifting it. In short, overall, I would not expect the impact the loss of Justice Scalia to have a significant impact on the current Court's application of *Chevron* deference.

Question: Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

Answer: In one form or another, the idea that courts should not defer to agencies on "major questions" is an old one, long predating *Chevron*. It is a standard basis on which to distinguish two granddaddy administrative law decisions: *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (deferring to the NLRB on the question whether newspaper sellers were "employees") and *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (refusing to defer on the question whether foremen were "employees"). See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("[In deciding whether to defer to the agency, a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."). On the other hand, though the idea is an old one, it is rarely invoked. One reason *King v. Burwell* has received so much

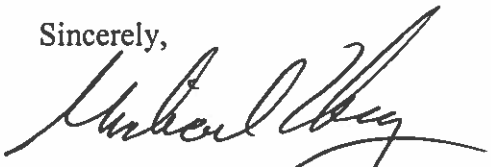
attention is precisely the rarity with which the Court relies on this principle. This one decision alone does not seem to me enough to indicate a trend.

That said, there are two doctrinally striking features of *King v. Burwell* that I think do herald some new disinclination to defer. First, prior major question cases under *Chevron* have invoked the principle as a reason to stay in step one; they acknowledged *Chevron* applied, but did not defer because they were particularly determined to stay in step one for major questions. Examples of this approach include *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In contrast, *King v. Burwell* found that *Chevron* simply did not not apply. In *Chevron*-speak, it was decided at step zero rather than step one. The actual impact of this difference is negligible; either way, the Court determines statutory meaning for itself. But it is new and notable that the Court simply tossed *Chevron* aside altogether rather than operating within its framework, and that implies some hostility to the decision.

Secondly, it is black-letter law that when an agency has interpreted a statute and *Chevron* does not apply then *Skidmore* does. Thus, the agency's views have some weight, they count for something (but maybe not much) even if they do not receive full-fledged *Chevron* deference. Yet the Chief Justice does not even mention *Skidmore* in *King*. It is as if it never occurred to him that another deference regime might be applicable. And this even though *Skidmore* is not especially constraining and it would have *supported* the conclusion he reached. So that too I think reveals some hostility to deference.

I hope these additional comments are helpful, and thank you again for the opportunity to testify.

Sincerely,



Michael Herz
Arthur Kaplan Professor of Law

cc: Hon. Heidi Heitkamp

Post-Hearing Questions for the Record
Submitted to Neomi Rao
Associate Professor of Law
George Mason University School of Law
From Senator James Lankford

"Examining Agency Use of Deference, Part II"
March 17, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

On The Original Purpose of Chevron

Question: *Chevron* deference attempts to balance competing tensions between the executive and judiciary. On the one hand, proponents of *Chevron* deference argue that it appropriately cabins judicial activism; on the other, critics of *Chevron* worry that agencies are free to wield administrative powers that Congress did not delegate to them, without fear of scrutiny from the courts. What, in your opinion, is the proper balance between these two tensions?

> **Response**: This tension arises largely when open-ended delegations of authority to the executive provide little "law" for courts to interpret. In these circumstances, courts have sometimes deferred to an agency's policy preference, rather than supplying a judicial policy. One possibility for diminishing this tension would be for Congress to legislate with greater specificity, which would provide statutory standards that courts could use when deciding challenges to agency action. Another possibility would be for courts to interpret delegations narrowly or to decline to assume delegation when a statute is silent on a particular question.

On Legislative Action

Question: The Judicial Review Restoration Act amends the APA to clarify that the reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." This would eliminate both *Chevron* and *Auer* deference. How would agency rulemaking change if judicial deference to statutory provisions and rules were eliminated?

> **Response**: Given the complexity and scope of administration, it is difficult to predict how rulemaking would change if the Judicial Review Restoration Act was enacted. Under current doctrine and judicial practice, courts do not consistently defer to agencies. Eliminating deference altogether, however, could change the legal landscape. Agencies

may respond by ensuring that rulemaking more closely tracks statutory requirements. Faced with greater scrutiny by the courts, however, agencies may also take actions to avoid judicial review by shifting away from formal rulemaking and adjudication. For instance, agencies may increase the use of informal guidance, litigation threats, and other actions that can effectively secure regulatory compliance, but not be easily challenged in court.

Question: An alternative method would be for Congress to institute a *Skidmore*-type standard, where courts are to accept the statutory interpretation that is most persuasive. If, for example, Congress passed such legislation what would be the effect on both the courts and the agencies?

Response: Because the *Skidmore* standard for review of agency action includes many different factors and operates as a standard, not a rule, it is difficult to anticipate how such a standard would be legislated and then to predict how such a statutory standard would affect courts and agencies.

Question: Critics argue that *Chevron* deference rests on an implicit delegation of judicial power to administrative agencies and is also an impermissible abdication of judicial duty." In his concurring opinion in *Perez v. Mortgage Bankers Association*, Justice Clarence Thomas stated that "[b]ecause the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." If the courts will not defend their constitutionally granted powers, what, if any, steps should Congress take to prevent an improper transfer of judicial authority to the executive branch?

Response: One way that Congress might prevent a so-called transfer of judicial authority to the executive branch is first to prevent the transfer of legislative authority to the executive branch. The Executive has no inherent lawmaking power and can exercise only those powers conferred by statute or, in some limited cases, by the Constitution directly. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The Executive Power in Article II, however, necessarily includes the power to interpret the laws in the course of implementing and executing them. Such exercises of executive power may be subject to judicial review, in which case the courts have an obligation to "say what the law is." The judiciary exercises the power to interpret laws in the course of deciding "Cases" and "Controversies." The executive and the courts both exercise interpretive power, but in their own spheres. Judicial deference thus may not be a transfer of judicial power, as the executive possesses interpretive power, but deference could in some instances be an abdication of the judicial responsibility to interpret the law.

On the Supreme Court Vacancy

Question: Justice Scalia was a strong proponent of *Chevron*; however, he focused on determining congressional intent under step-one and deferred to agency interpretations less than other justices. What impact does the loss of Justice Scalia have on the current Court's application of *Chevron* deference?

> **Response**: The Supreme Court's recent decisions indicate that at least some justices are rethinking the scope and application of *Chevron* deference, particularly Justices Thomas and Alito. For many years, Justice Scalia was one of the most consistent defenders of *Chevron*; however, some of Justice Scalia's opinions before he passed away suggest he was reconsidering *Auer* and perhaps *Chevron* deference. It is fair to say that the doctrines are currently in flux and will turn on the developing and evolving views of several justices, and, of course, Justice Scalia's replacement.

On King v. Burwell

Question: Chief Justice Roberts declined to apply *Chevron* deference in the challenge to the Affordable Care Act *King v. Burwell*. Writing for the Court, Roberts argued that it was unlikely that Congress would delegate a decision of such "deep economic and political significance" to the IRS. The full impact of this case is yet to be seen, but this "major question" doctrine may prove to be a preliminary step to the *Chevron* doctrine, does this mark a shift in the type of cases where the Court will apply *Chevron*?

> **Response**: *King v. Burwell* builds on and reaffirms earlier decisions suggesting that there is a major question exception to *Chevron*. *King* potentially places more questions outside of *Chevron*'s domain, and leaves those questions for the courts when reviewing agency action. One difficulty here, however, is ascertaining what questions are significant enough to avoid *Chevron*. This inquiry will depend on a case-by-case determination in particular challenges. Another important issue is whether *King v. Burwell* indicates a broader retreat from *Chevron*, or just a further cabining of the doctrine.

On Chevron'*s Impact on the Separation of Powers*

Question: *Chevron* deference rests on an implicit delegation of legislative authority to executive branch agencies, how has the acceptance of increased delegation influenced Congress's role as the legislative branch?

> **Response:** The judicial and political acceptance of open-ended delegations has diminished Congress' legislative power in a number of ways. Most obviously, delegation has shifted even important policymaking decisions to agencies and the President. This

diminishes both the incentives and the ability for Congress to legislate. In light of the growth of the administrative state, Members of Congress might find it easier as individuals to influence administration, rather than undertake the arduous collective task of enacting legislation.

This dynamic has undermined Congress as an institution in relation to the Executive. Congress' power comes from collective lawmaking. Individual members have their particular interests, but they can pursue legislation only through majorities in both the Senate and House of Representatives. If individual lawmakers can pursue their interests outside the lawmaking power, for instance through administrative agencies, this fundamentally erodes the collective Congress. Delegation thus unravels the competition between the political branches and diminishes Congress. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).