

Chevron's Death by a Thousand Cuts

Investigating the Rumors of Deference's
Demise

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Abstract

Does *Chevron* deference face a “death by a thousand cuts?” Many believe so, but few assess that claim with quantitative data. This thesis does. It extends a database of all Supreme Court cases in which an agency interprets a law, spanning 1600 cases from 1984 to the present. Then it investigates how *Chevron* fares at the Supreme Court over time. Wielding whole population statistics, it finds an unprecedented and recent decline in the rate at which the Supreme Court defers under *Chevron*. Because the decline develops in the last decade, it seems hasty to conclude *Chevron* approaches its doom. Any of the following still seem plausible: the government soon wins a spree of *Chevron* cases, the Court cabins *Chevron* once and for all, or the doctrine settles into a new normal. Those outcomes depend on why *Chevron* faces decline. While eliminating other explanations, the data suggests justices could oppose *Chevron*, agencies could struggle more with their paperwork, or the Court could disagree more with the government in general. Each has its own implications for the administrative state.

1 Introduction

When Americans picture the government at work, they might remember *I'm Just a Bill* from *Schoolhouse Rock!* In this animated short, Bill journeys through Capitol Hill—a journey that takes him through the House, the Senate, and then to the President's desk, where he must evade a veto. After he does, a Congressman comments, “He signed you, Bill, and now you're a law!” The charming song ends there, and many believe Bill's journey does too.

That journey is “no more, if it ever was” (Gluck 2014, 611). Congress writes vaguely. His key terms are ambiguous. After signing Bill, the President might not know his unequivocal meaning, but suggests ways to implement him nonetheless. Even if Congress does not write clear laws, the President must execute them.

Imagine two reasonable people disagree on how to interpret Bill. Their disagreement arrives in court. Now judges must parse Bill's meaning. To do so, they could use *Chevron* deference.

In 1984, just eight years after *I'm Just A Bill* first airs, the Supreme Court decides *Chevron*. In that unanimous decision, the Court outlines a method for choosing one of a bill's many permissible interpretations. It requires judges to defer to reasonable agency interpretations of ambiguous statutes. Put simply, if Congress writes Bill ambiguously, and an agency interprets him, then courts must agree with that agency.

Though *Chevron* might not appear earth-shattering, Justice Breyer and leading academics call it “the undisputed admin law champion” (Breyer et al. 2017, 256). With *Chevron*, agencies can interpret statutes across all kinds of subjects. From transportation directives to health protections, back to environmental regulations, and even to immigration law, agencies employ *Chevron* to align ambiguous statutes with their regulatory ambitions. This makes *Chevron* controversial at all levels of government.

Due to its controversy, many describe it as “in rough shape,” “under siege,” and perhaps facing its “imminent demise” (Matz 2018). Maybe, today, they are right. But similar descriptions surface in the 1990s, circulating

ever since. In law reviews, predicting *Chevron*'s death is a perennial favorite.

According to recent and comprehensive quantitative analysis, *Chevron* is alive and well at the circuit courts. When the circuits use *Chevron*, agencies prevail almost 80% of the time (Barnett and Walker 2017, 30). No one recently, however, investigates *Chevron* at the Supreme Court in a similar manner. Most of the literature is qualitative, not quantitative. The little existing and recent quantitative literature follows *Chevron* at the Court for ten years or less (Berman 2014; Richardson 2021).

An older database offers a solution. Even today, people regard Eskridge and Baer's *Continuum of Deference* as "the most comprehensive study of deference in the Supreme Court" (Barnett and Walker 2017, 18). From 1984 to 2006, it analyzes all Supreme Court cases in which agencies interpret a law.

This thesis extends that database through the 2019-2020 term. The extension hand-codes all statutory and regulatory interpretation cases from the last decade and a half. Along the way, it picks up the *Chevron* cases over that time. For each of those, the extension has two relevant measures: first, whether the Court defers under *Chevron*; and second, whether the government prevails.

These measures reveal two trends over time. First, the Court defers under *Chevron* less often. And second, agencies lose more often in *Chevron* cases. In the last five years, both trends accelerate. With a closer look, the Court defers only once under *Chevron* since 2015. This does not prove *Chevron* will soon die. But it does align with such predictions.

The predictions of *Chevron*'s demise often refer to a "death by a thousand cuts." According to this view, the Court excepts more cases at *Chevron*'s steps. The exceptions eventually make *Chevron* so unwieldy that the worlds with and without it look identical.

Some might ask, then, why the Court would carve up *Chevron*. From some scattered dissents and concurrences over the last decade, it seems likely that *Chevron* has enemies on the Court. Every year or two, Justices Thomas and Gorsuch write that *Chevron* is unconstitutional. They always refuse to defer. For the rest of the Court, invoking *Chevron* might feel like stepping

on eggshells.

Instead of tearing up the doctrine, justices might not invoke *Chevron* at all. People call this “*Chevron* avoidance.” To compromise with Justices Thomas and Gorsuch, other members of the Court might rationalize their opinions without *Chevron*. In that case, *Chevron* would not face a “death by a thousand cuts.” *Chevron* would decline because of no cuts at all.

It is possible, though, that bad luck may explain *Chevron*’s poor health. Throughout Trump’s tenure, the government does not fulfill regulatory law’s requirements. People document that the Trump administration fares worse in administrative law cases than his predecessors, and that lines up with most of *Chevron*’s decline. *Chevron* might rebound during the Biden administration.

Or maybe it fits into a broader trend. At the Court, the government loses more statutory and regulatory interpretation cases than ever before. Lately, the government’s chances are not better than a coin flip. If the losses continue in the Biden administration, then expect the Court to obstruct the administrative state in general. That implicates policy outcomes far more than *Chevron* ever could.

Speaking of which, people might overstate how much *Chevron* influences the Court. With and without *Chevron*, the government wins at about the same rate. This comparison suggests that if *Chevron* slowly passes on, it might not matter at the Court. Still, most believe *Chevron* matters at the circuit courts. So *Chevron*’s decline might influence regulatory law nationwide, even if away from the country’s highest court.

2 Literature Review

Summarizing *Chevron*

The original *Chevron* decision explains that courts should defer to an agency’s reasonable interpretation of an ambiguous statute. Today, people understand this explanation as a two-step test. It goes as follows:

- Before the test begins, judges must except some statutes and agency decisions. For some examples, judges may not use this test on criminal statutes,¹ and they should exclude agency interpretations that do not carry the force of law. Expect more on these “step zero” exceptions later.
- At step one, judges must find the statute “silent or ambiguous.” If the statute speaks to “the specific issue at hand,” judges must scrutinize its meaning with “traditional tools of statutory construction.” If it does not, then judges must check if an agency interprets the statute. If one does, then judges proceed to step two.
- At step two, judges must decide whether the agency’s interpretation is “reasonable.” If they decide it is, then they cannot “substitute” their “own construction” of the statute. Instead, they must interpret the statute as the agency does.²

To the average American, *Chevron* might seem like mundane and boring procedure. At the time, “no one” arguing the case would expect it to become a “landmark” decision (Merrill 2014, 257). A few years and more than a thousand citations later, people describe it as “one of the few defining” modern Supreme Court decisions (Sunstein 1990, 2075).

1. See *Crandon v. United States* 494 US 152 (1990) (explaining that the Court “never thought” the Department of Justice has the power to interpret criminal statutes).

2. Some dissent that *Chevron* should have only one step. According to them, the two steps ask only a “single question”—whether the agency permissibly and authoritatively interprets a statute (Stephenson and Vermeule 2009, 599). This is a normative question, not a descriptive one. Most judges act as if *Chevron* has two steps, even if it should not. And many treat the idea of “collapsing” *Chevron*’s two steps into one as “provocative” (Bamberger and Strauss 2009, 612).

Today, writing about *Chevron* deference “takeschutzpah” (Herz 2015, 1887). *Chevron* is among the most debated controversies in law. From a count in 2017, federal courts and academia cite *Chevron* 14,000 times (Breyer et al. 2017, 256). For scale, that outnumbers many landmark decisions by a wide margin: Sum the citations of *Brown v. Board*, *Roe v. Wade*, and *Marbury v. Madison*. Double it. *Chevron* is still cited more.

The literature is so deep that it is doubtful any person could read every academic work about *Chevron*. To unpack *Chevron*’s history and debate its desirability, some casebooks dedicate hundreds of pages. This literature review cannot do justice to *Chevron* in the same way. For the sake of brevity, it will summarize the debate.

Most of *Chevron*’s controversy hinges on whether it is constitutional. On one side, people charge *Chevron* with conflicting with two articles in the Constitution. In conflict with Article III, they describe *Chevron* as a “counter-*Marbury*” decision (Sunstein 2006, 2589). According to them, *Marbury v. Madison* dictates that only courts may interpret the law, yet *Chevron* requires judges “abandon” this duty (Hamburger 2014, 316). In conflict with Article II, *Chevron* takes away the power to write laws from Congress and gives it to agencies. Congress abdicates its policy-making responsibility and writes vague truisms into a statute, which then agencies rewrite into policy decisions. In the 2010s, high-ranking government officials echo this argument. Justices Thomas and Gorsuch ask the Court to cabin *Chevron* repeatedly. Others make pleas to retain it (Scalia 1989, 516). And Congress considers the Separations of Powers Restoration Act annually, written to restrict *Chevron*.

Others defend *Chevron*’s constitutionality. They respond that the Constitution itself is just like an “ambiguous” statute (Siegel 2018, 972), and the Court interpreted it in a way that permits agencies to interpret and write rules. They return to colonial America to justify this constitutional interpretation (Green 2020; Wurman 2020), which critics debate (Hamburger 2014). Or they respond, even assuming critics interpret the Constitution correctly, that the Court applies *Chevron* unconstitutionally in very few cases and that overruling *Chevron* would “substantially undermine” constitutional directives (Barnett 2020, 41). Of course, *Chevron* is not the only deference doctrine, so these points predate *Chevron* by decades (Woodward and Levin 1979). Back-and-forth commentary continues today (Vermeule 2015; Ham-

burger 2016).

A secondary controversy concerns *Chevron*'s policy implications. Above all, people object that *Chevron* induces Congress to write “flabby, unclear laws” (Cass 2016, 69). Others point out that *Chevron* may exacerbate policy flip-flops between administrations (Pierce 2020). More contend that it should be overruled because the Court applies it inconsistently, dissolving it “into the mist” (Beerman 2014, 822). In response, people point out that overruling *Chevron* would “upset hundreds of judicial decisions, thousands of statutory provisions, and literally countless agency decisions” (Green 2019, 101). And interviews suggests that legislative drafters do not consider *Chevron* a blank check to write ambiguous laws (Gluck and Bressman 2013). At most, people argue, the Court should “narrow” rather than end the doctrine (Hickman and Nielson 2021, 931).

At the same time, some argue that if *Chevron* disappeared, the difference would be “marginal” (Pojanowski 2016, 1091). When considering the Supreme Court, there is empirical consensus. Scholars observe that how the Court applies *Chevron* depends on “an uncomfortable political component” (Miles and Sunstein 2006, 870). Justices on the Supreme Court apply *Chevron* “ideologically” (Eskridge and Raso 2020, 1793), deferring more often when they agree with the agency’s policy positions.

The consensus flips when considering the lower courts. As early as the 1990s, scholars argue that the circuit courts apply *Chevron* as “a mechanical rule” (Kerr 1998, 59). In articles from both the past and present, they find that the circuits usually do not wield *Chevron* “opportunistically” (Schuck and Elliott 1990, 1035). These findings make for “compelling evidence” that *Chevron* constrains judges from going rogue and substituting their political beliefs in statutory interpretation (Barnett, Boyd, and Walker 2018, 1524). These judges may feel more held back by *Chevron* than justices on the Supreme Court.

So *Chevron* matters, at least in the circuits. This study will not weigh in on the normative debate about *Chevron*. Instead, it will catalog *Chevron*'s history and mention its possible futures. But before that, it must discuss *Chevron*'s cousins.

Deference on a Continuum

Deference includes more than *Chevron*. When judges listen to an agency's advice and change their minds, that is deference. This thesis focuses on canons outlining the conditions when judges should defer to an agency, which are called deference regimes. The Court employs other deference regimes before and during *Chevron*'s life. Eskridge and Baer organize all of them into a "continuum" (Eskridge and Baer 2008, 1098). The continuum goes in order of most to least deferential:

- *Curtiss-Wright* deference requires that judges defer to the executive's foreign policy decisions.
- *Auer* deference requires that judges defer to an agency's reasonable interpretation of its own ambiguous regulations.
- *Chevron* deference requires that judges interpret ambiguous statutes as an agency reasonably does.
- *Beth-Israel* deference recommends that judges interpret ambiguous statutes and treaties as an agency reasonably does.
- *Skidmore* deference recommends judges interpret the law as an agency does in proportion to its "power to persuade."
- Anti-deference suggests that judges should construe an ambiguous law against the government, most often but not exclusively in criminal law.

Curtiss-Wright is "super-strong" deference (1011). According to 1936's *United States v. Curtiss-Wright Export Corp.*, the executive is "the sole organ of the federal government in the field of international relations." This reasoning does not come up in every national security case. But when it does, the government always wins. That leads to "vigorous dispute" (Ramsey 2000, 380), which continues today. The Court most recently mentions *Curtiss-Wright* in 2015's *Zivotofsky v. Kerry*.

Since *Beth-Israel* deference addresses treaties, it too relates to international relations. Last year in *GE v. Outokumpu*, the Court mentions an old deference regime that asks the Court to give "great weight" to executive interpretations of treaties. This evokes its own controversies. Many argue over

whether to “justify, enhance, or undermine” deference over treaties (Chesney 2007, 1728). But *Beth-Israel* deference encompasses more than treaties. Properly understood, *Beth-Israel* deference is not one deference regime at all. Eskridge and Baer clump most pre-*Chevron* regimes into this category. The regimes apply only in specific fields like labor, immigration, and tax law.³ Despite applying to different fields, most follow a similar test. They recommend judges defer to an agency if the agency’s interpretation does not contravene the ambiguous law’s meaning. Today, most of *Beth-Israel* deference is “petering out” as *Chevron* displaces the specific regimes (Eskridge and Baer 2008, 1108).

Like *Beth-Israel* deference, anti-deference is not one regime. Instead, it refers to canons of statutory interpretation when they require judges to interpret an ambiguous law against the government. For some examples, the government may interpret a statute to apply internationally while the presumption against extraterritoriality suggests the opposite. Or the government may interpret a statute such that it disturbs the constitution, which the canon of constitutional avoidance suggests judges should avoid.⁴ Most commonly, the rule of lenity requires that judges interpret ambiguous criminal statutes in favor of defendants.

It is unclear how the rule of lenity interacts with *Chevron*. *Chevron*’s step zero usually excludes criminal statutes, but not always. When a statute is ambiguous and includes both civil and criminal penalties—making it “dual-use”—some courts defer to agency interpretations of the law (Glen and Stillman 2016, 131), even in criminal cases. Since the rule of lenity “conflicts” with *Chevron* when interpreting such statutes (Greenberg 1996, 13), people disagree over which trumps the other. In the future, the Court may resolve the disagreement.⁵

3. This suggests one should treat results about *Beth-Israel* deference with a degree of skepticism. The literature does not agree about clumping these deference regimes under the category. In fact, no other scholarly work explains the category.

4. Examples are plentiful. The category also includes the presumption of scienter, a canon against rendering sections of a statute “superfluous,” the rule of the last antecedent, the canon that ambiguous rules governing benefits for veterans and soldiers should favor them, *noscitur a sociis*, etc. as long as they require courts disagree with an agency’s interpretation.

5. They recently duck the disagreement. See *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* 589 US ___ (2020) (Gorsuch, J., statement on the denial of

Unlike the rule of lenity, the remaining two doctrines connect clearly to *Chevron*.

Chevron concerns statutes. *Auer* concerns regulations. An agency may write vague regulations, just as Congress writes vague statutes. *Auer* dictates that judges should interpret ambiguous regulations as an agency reasonably does. The practice is longstanding, hailing from 1945’s *Bowles v. Seminole Rock*. All the same, people debate it today, and the Court’s practice is changing. 2019’s *Kisor v. Wilkie* revises *Auer* into a three-step test, which is “parallel” to *Chevron*’s test (Larkin 2020, 108). Some ask the Court to overrule it (Meisel 2019). Others hope to retain it (Sunstein and Vermeule 2017). It attracts its own empirical research. This study only pays lip service to *Auer*, however, when it implicates *Chevron*. On occasion, it does. Take *Long Island Care v. Coke*. When the Court defers to a regulation interpreting the Fair Labor Standards Act under *Chevron*, it does so by deferring to the Department of Labor’s interpretation of its own conflicting regulations under *Auer*.

Sometimes agencies interpret the law without writing regulations. In court, they may defend their interpretation by citing informal documents lacking “the force of law.” These documents no longer merit *Chevron* deference. Instead, they may receive *Skidmore* deference. This standard demands more from an agency than *Chevron* does. An agency cannot just reasonably interpret the law. It must do so persuasively.

Notice “no longer.” During the 1980s, most would describe *Skidmore* deference as defunct. For fifty years after *Chevron*’s birth, the Court defers to agencies under *Chevron* even when their interpretations lack “the force of law.”⁶ Since *Chevron* demands less and comes at no cost, agencies choose it over *Skidmore*.

That all changes in the build up to *United States v. Mead Corporation*.

certiorari, arguing only Congress can “make an act a crime.”)

6. See, e.g., *Nationsbank v. Variable Annuity* 513 US 251 (1995) (deferring to an interpretation found in the “Comptroller’s Letter” and “Interpretive Letter No. 494”) and *Young v. Community Nutrition Institute* 476 US 974 (1986) (deferring to the FDA’s “notice” published in the Federal Register).

Because of *Mead*, *Skidmore* fits into the oldest rumors of *Chevron*'s demise.

***Chevron*'s Long-Rumored Demise: *Mead* and More**

Historically, the rumors of *Chevron*'s demise are greatly exaggerated.

They begin three years after *Chevron*'s birth. In *INS v. Cardoza-Fonseca*, the Court denies the government *Chevron* deference. A single justice thinks the majority will doom *Chevron*. He calls the analysis "unnecessary" and "erroneous." According to him, the majority "badly misinterprets *Chevron*" by limiting it to only when the Court cannot otherwise interpret a statute. In his words, such a limitation turns *Chevron* into a "doctrine of desperation," which is "not an interpretation, but an evisceration, of *Chevron*."

Because *Chevron* favors the government, some might expect these words to come from a liberal. Not so. Those words come from Antonin Scalia. Over his tenure, he defends *Chevron* from a Court he believes will kill it. Since people study *Chevron* today, it should shock few that Scalia's predictions do not come to pass.

Then comes the 1990s and early 2000s, in which the Court chips away at *Chevron*'s domain. On one front, Scalia defends *Chevron* from the Court. On the other, he leads the charge.

Scalia defends *Chevron* from every step of "the *Mead* revolution" (Knudsen and Wildermuth 2015, 95). It begins with *Skidmore*'s incremental and protracted revival:

- In *EEOC v. Arabian Oil*, the Court mentions that the government's interpretation does not qualify for *Chevron* and especially "does not fare well" under *Skidmore* deference. In response, Scalia calls *Skidmore* "an anachronism" from a time before *Chevron*.
- In *Bragdon v. Abbott*, the Court remarks that its members "need not pause" when deciding whether to defer an agency under *Chevron*. Ignoring *Chevron*, it relies on *Skidmore* after the agencies demonstrate "their body of experience and informed judgment." Scalia is in dissent.

- In *Christensen v. Harris County*, the Court adds that interpretations lacking “the force of law” do not merit *Chevron* deference. *Chevron*’s new step zero excludes “policy statements, agency manuals, and enforcement guidelines,” which can still merit *Skidmore* deference. Scalia protests. According to him, any “authoritative view” from an agency should qualify for *Chevron*. He again calls *Skidmore* “an anachronism,” which *Chevron*’s “watershed decision” replaces. Whenever he makes these points, he writes alone. Meanwhile, commentators call this a “seismic shift” against the administrative state (DeLong 2000, 5).
- Finally comes *United States v. Mead Corporation*. There the Court refuses to defer to the Treasury Department’s ruling letter under *Chevron* but not *Skidmore*. Scalia calls the majority “an avulsive change” to administrative law. He fears that when the Court “resurrects” *Skidmore*, “uncertainty, unpredictability, and endless litigation” will follow. In short, *Mead*’s new continuum of deference will “collapse” *Chevron*, “neither sound in principle nor sustainable in practice.”

Years pass. *Chevron* lives on. People still debate about the *Mead* revolution. Some argue that it makes *Chevron* “confusing” and leads to poor policy outcomes (Bressman 2005, 1447). They compare *Mead* to *Chevron*’s “prolonged, difficult, and confused adolescence” (Weaver 2002, 173). Others cheer, arguing *Mead* makes deference more coherent. *Skidmore* and *Chevron*’s overlap introduces uncertainty for agencies, but that is “a feature, not a bug” (Matthews 2013, 1354). It reins in agencies’ worst excesses while preserving regulatory flexibility. This study does not take a stance on *Mead*’s desirability. It does note, however, that *Mead* limits *Chevron*’s domain, maybe dramatically so.

So does *Whitman v. American Trucking*. Around the same time as *Mead*, *Whitman* shows Scalia narrowing *Chevron*. Before 2001, academics and judges make it clear that *Chevron* has a step two (Merrill 1994, 352). But until *Whitman*, the Court never rejects an agency interpretation of a statute at step two. Perhaps agencies write reasonable statutes until then. Or maybe the Court shies away from calling a regulation “unreasonable,” opting instead to call the statute unambiguous. Regardless, the Court behaves as if all regulations interpreting an ambiguous statute are reasonable

from 1984 to 2001.

That changes in *Whitman*. Justice Scalia, *Chevron*'s defender, writes for an unanimous Court. Even if the Clean Air Act is ambiguous, the Court reasons, EPA's regulation defies the statute's text in an "astonishing," "unlawful," and most importantly, "unreasonable" way. So begins step two at the Supreme Court.

As discussed later, these new limits to *Chevron* coincide with a decline in the government's win rate. It is a far cry, however, from the "collapse" of *Chevron*. In fact, two following cases expand *Chevron*'s domain.

Brand X* and *Arlington

Over the decade following *Mead* and *Whitman*, two cases apply *Chevron* to peculiar situations.

The first situation occurs when a judge defers under *Chevron*, but then the agency forwards a new interpretation. Before *National Cable and Telecommunications Association v. Brand X Internet Services*, circuits split on whether to retain the older agency interpretation for the sake of *stare decisis* or allow agencies to "fill statutory gaps" anew. The majority holds that the new agency interpretation trumps the old one, as Congressional delegation "does not depend" on court behavior. The dissent, written again by Justice Scalia, calls this decision not only "bizarre," but "probably unconstitutional." According to him, it creates Article III concerns and continues *Mead*'s confusing approach to the law.

After *Brand X*, the debate continues. During his tenure on the Court, Justice Scalia takes every opportunity to complain about the ills of *Brand X*. In *United States v. Home Concrete and Supply*, for example, he complains that the Court need only mention "the magic words" involved in *Chevron* to "(poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court." Despite his protest, *Brand X* lives on,⁷ though subject to academic debate (Masur 2007).

7. For the most recent *Brand X* case, see *Encino Motorcars v. Navarro* 579 US ___ (2016) (noting agencies should feel "free to change their existing policies," but only when

Putting aside *Brand X*'s normative debate, its implication seems clear. It expands *Chevron*. If an agency wishes to “flip-flop” its interpretation under *Chevron* (Breyer et al. 2017, 336), *Brand X* enables doing so.

The second situation might be more bizarre. Before *Arlington v. FCC*, it was unclear whether judges must defer to an agency's interpretation of statutes that govern its own jurisdiction. Academia debates this situation for years before the Court resolves it (Sales and Adler 2009). Intuitively, applying *Chevron* in this way makes some feel that “there is something amiss” (Breyer et al. 2017, 280). Ignoring that intuition, *Arlington* holds that agencies can interpret their own jurisdiction. Unlike in *Brand X*, Scalia writes for the majority, arguing that no clear line exists between jurisdictional and non-jurisdictional rules. The dissent responds with a “fundamental” disagreement: the Constitution prohibits applying *Chevron* as a “weapon” to expand an agency's power.

These sections do not focus on Scalia's opinions to praise his hot takes. Instead, it does so to expose how one person can desire limiting and expanding *Chevron*'s domain, all while fearing its death. This desire, joined by the Court's countervailing opinions over the years, shows how people can exaggerate marginal disagreements about *Chevron*. Consequently, this study begins expecting to find that the modern rumors of *Chevron*'s demise are exaggerated, too. It finds the opposite. Those rumors are discussed next.

Today's Rumors

The rumors of *Chevron*'s demise come back with a vengeance.

They begin in academia. Linda Jellum (2007, 730) predicts *Chevron*'s “demise,” insisting that the Court cites *Chevron* less often over time. For evidence, she cites a paper by Thomas Merrill (1992, 772) finding the Court decides between “ten and twenty” deference cases per year. Then she compares that to the 2003, 2004, and 2005 terms, where she finds three to five *Chevron* cases a year. People still cite this comparison today (Richardson 2021, 37).

the regulation is not “arbitrary and capricious”).

The comparison is skewed. Merrill’s measure includes other deference regimes, including *Skidmore* and *Beth-Israel*.⁸ According to Eskridge and Baer’s database, her count of *Chevron* cases fits the historical average. If they did not, she admits that the Court’s shrinking docket could explain the drop (Jellum 2007, 773). And even supposing the Court does cite *Chevron* less often, so what? Fewer citations could suggest the Court treats *Chevron* as a closed issue, rather than a dead letter. In conclusion, her argument does not survive empirical scrutiny, and that explains why her predictions did not come to pass.

Meanwhile, Jellum and others make qualitative arguments that *Chevron* stands on its last leg. Few cite quantitative evidence, and again *Chevron* survives for another decade. *Chevron*’s prognoses miss the mark.

Flash forward to today. Many believe *Chevron* is “under fire” (McGinnis 2020). They cite conservative opposition to the administrative state, expecting the Court to curtail the doctrine. They give the Roberts Court the nickname “Team Death to *Chevron* by a Thousand Cuts” (Steinberg 2017a). In this “death by a thousand cuts” (Sharkey 2018, 2412), as the Court accepts more cases at *Chevron*’s step zero, the doctrine applies less often. Together, the exceptions construct a “*Chevron*-ousting package” (Heinzerling 2017, 1962), which can turn the doctrine into a “zombie” (Steinberg 2017b). Some muse that it “may already be dead” (Johnson 2017, 1287).

Meanwhile, Trump appoints three new justices. With each appointment, pundits wonder whether this one will finally kill *Chevron*. They describe Justice Gorsuch as “one step closer” to overruling it (Bazelon and Posner 2017). They mention Justice Kavanaugh’s potential to “weaken or abandon *Chevron*” (Levy 2018). And they accuse Justice Barrett of an “aggressive pro-business agenda” to “overturn the doctrine in its entirety” (Goodwin 2020).

8. In the 1990-1991 term alone, there are 5 examples. For a *Skidmore* case, see *EEOC v. Arabian Oil*, 499 US 244 (1991). For what Eskridge and Baer call *Beth-Israel* cases, see *Litton v. NLRB* 501 U.S. 190 (1991), *Cottage v. Commission* 499 U.S. 554 (1991), and *Demarest v. Manspeaker* 498 U.S. 184 (1991). For a case that uses the word “deferred” without referencing deference, see *United v. Johnson* 499 U.S. 187 (1991).

Some rebut these predictions. While acknowledging the doctrine may face “decline,” they argue “reports of the doctrine’s pending demise” are “overblown” (Hickman and Bednar 2018, 1397). According to them, *Chevron* will survive as long as Congressional delegation continues. This follows from Congress’ political incentives. Instead of compromising on the minutia of policies, they delegate those decisions to agencies. And since courts do not make policy, or at least claim not to, they will permit those delegations. Altogether, the thousand cuts amount to no more than “weak” limits on *Chevron* (Vermeule 2016, 13).

With qualitative evidence alone, this debate is impossible to resolve. Scholars from both sides editorialize the Court’s latest *Chevron* cases. From the same cases, they come to opposing conclusions, talking past each other. Where some see a cut against *Chevron*’s domain, others see business as usual. Checking up on *Chevron*’s health would demand quantitative evidence.

Some quantitative evidence emerges during this thesis’ writing stage. Nathan Richardson catalogs the last four years of *Chevron* cases, finding that the Court rarely defers. He concludes that “deference is dead at the Supreme Court” (Richardson 2021, 4). Such a conclusion, however, jumps the gun.

Confirming such a conclusion requires a reference point. As authors on both sides conclude, *Chevron* is less “revolutionary” than people assume (Herz 2015, 1871), and it “generally” does “not determine case outcomes” at the Supreme Court (Hickman and Bednar 2018, 1444). Perhaps the last four years are business as usual. Perhaps they are not. Determining that requires comparing *Chevron*’s past to its present. To do so, a study needs to fill the historical gap between 1984 and 2016. The method for filling that gap is detailed below.

3 Methodology

The Cases

This study focuses on a subset of Supreme Court cases. To define the subset, this study employs a test. Call it the “population” test. Think of it like *Chevron*’s two-step test. At step zero, the cases must correspond with a Supreme Court opinion. At step one, they must feature the Supreme Court interpreting a law, be it a statute, treaty, or regulation.⁹ And at step two, the government must defend its interpretation of the law, usually in a brief.

Many cases do not meet the population test. At step zero, a few cases are dismissed every year. At step one, many cases do not discuss a statute, treaty, or regulation. Instead, they feature state and local law, common law doctrines, or court-established rules. At step two, the government can fail to defend its interpretation of the law.¹⁰ Failing a step means excluding a case from the population. Just like a regulation may fail under any step of *Chevron*, a case may be thrown out at any step of the population test.

The population test aims to include, not exclude. It captures all *Chevron* cases, but not all *Chevron*-adjacent cases. The phrase “*Chevron*-adjacent” refers to a simple and rare situation, wherein a case’s history might relate to *Chevron*, but its current controversies do not. For an example, consider *Encino MotorCars, LLC. v. Navarro II*. The Court mentions a lower court deferred under *Chevron*. It ignores *Chevron* from then on. In the case’s first iteration, the Court did not defer to the Department of Labor’s interpretation of the Fair Labor Standards Act because it stemmed from a “procedurally

9. This equates statutes with statute-equivalent laws. Such an equivalence includes interstate compacts codified by Congress, see, e.g. *Tarrant Regional Water District v. Herrmann* 569 US 614 (2013) (“Congress approved the Compact in 1980, transforming it into federal law”), and non-self-executing treaties with implementing legislation, see *Medellin v. Texas* 552 US 491 (2008) (explaining that treaties “are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing”) (internal quotation marks omitted).

10. “Don’t forget the *Chevron* waiver!” some might exclaim (Rozansky 2018). This refers to a truly bizarre situation in which an agency axes or even argues against its interpretation while briefing. The Court has not spoken about this issue. But regardless, if the government submits a brief that contradicts its earlier interpretation, the database catches it. Step two only excludes the cases where the agency does not take a position at all.

defective” regulation. In the second iteration, Labor declines to submit a brief or even interpret the law. So the case strikes out at step two of the population test. Some might fret about this exclusion. But these cases in no way implicate how the Court defers under *Chevron*.

In fact, some might instead object that the study includes too many cases. For example, they may argue that constitutional law cases should not make it into the database. That argument is misguided for two reasons. First, the later-discussed *Chevron* variables subset out these cases. Second, a law does not exist in a vacuum. For the Court to question a law’s constitutionality, it must interpret it first. Countless cases suffice as examples, so pick *FCC v. Fox II*. There the Court first determines the scope of the FCC’s policy. Then it decides whether it was unconstitutionally vague. Notice: the regulatory interpretation precedes applying constitutional rules. If this study excluded such constitutional law cases—and, indeed, cases with counterintuitive subject matters generally—it would miss the government’s attempts to defend its interpretation of the law.

In the end, the test includes around half of the Supreme Court’s cases in any given term. From the fall of 1983 to the summer of 2005, Eskridge and Baer code 1014 cases for 156 variables, excluding the original *Chevron* case. From the fall of 2005 to the summer of 2020, this study codes 586 cases for 38 variables. Combined, the databases should “consist of *all* Supreme Court cases. . . in which a federal agency interpretation of a statute was at issue” since *Chevron* was released (Eskridge and Baer 2008, 1094), 1600 in all.¹¹

This study’s breadth erases the “need to conduct significance tests” (Eskridge and Baer 2008, 1095). Significance tests evaluate the extent to which a sample is inconsistent with a particular null hypothesis about a population. Here, the “sample” is the population. Consequently, such tests would be pointless. When the Court changes how often it defers under *Chevron*, this study presents such a change through descriptive statistics.

11. The data is hosted at <https://doi.org/10.7910/DVN/ZNCKL5>.

The Coding

Not even an eighth of the 1600 cases discuss *Chevron*. And while Eskridge and Baer analyze canons other than *Chevron*, this study does not. It is therefore necessary to separate *Chevron* cases from the rest. Fortunately, Eskridge and Baer’s variable typology has this covered. Each time the Court so much as mentions *Chevron*’s name, Eskridge and Baer write it down.

This study mimics their typology. It codes a case for whether its majority opinion cites *Chevron*, and then if applicable, it follows the Court’s analysis at step zero, step one, and step two. Table 1 summarizes these variables, and an appendix explains them further. Notice that of the 1600 cases passing the population test, only 180 involve *Chevron*, including the original case. That is fewer than one-eighth of statutory and regulatory interpretation cases in which the government forwards an interpretation of the law. From now on, this study refers to that near one-eighth as “*Chevron* cases.”

Variable	Eligible Cases	Yes
Does the Court cite <i>Chevron</i> ? (Citation Check)	1600	180 (11.25%)
Does the Court apply <i>Chevron</i> ? (Step Zero)	180	126 (70.00%)
Is the statute ambiguous? (Step One)	126	80 (63.49%)
Is the regulation reasonable? (Step Two)	126	78 (61.90%)
Does the Court defer in <i>Chevron</i> cases? (<i>Chevron</i> Deference)	180	78 (43.33%)

Table 1: *Chevron* Variables

Reacting to Table 1, some readers wonder whether this study wastes resources. If this study only cares about *Chevron*, why not code just *Chevron* cases? Three responses come to mind. First, such a procedure would not inspire confidence. *Chevron* comes up when one may not expect it. Without reading all statutory interpretation cases, some *Chevron* cases could go unnoticed. Second, this study originally aims to analyze *Auer* and *Skidmore*

deference. That hope is not fulfilled, but it did provide reason to code them all.¹² Third, it enables comparing *Chevron* cases to statutory and regulatory interpretation broadly.

Others spot a numerical discrepancy from where step one ends and step two begins. When an interpretation fails at step one, that should end the matter. The Court at least insists so. The Court repeats that when Congress makes its intent known, “that is the end of the matter.” Despite that catchphrase, the matter does not always end. Occasionally, the Court issues dicta.

For an example, consider *Ledbetter v. Goodyear Tire and Rubber Co.* In *Ledbetter*’s eleventh footnote, the Court dunks on the EEOC, and the interpretation fails every step of *Chevron*. At step zero, the Court does not consider the EEOC’s Compliance Manual, except for its power to persuade under *Skidmore*. At step one, it finds the statute unambiguous. And at step two, it argues the EEOC’s interpretation would be unreasonable anyway, as it relies on “misreading” law.

Ledbetter is not one-off. The Court hands down dicta more often than one might expect. For another example, look at *County of Maui v. Hawaii Wildlife Fund*. The Court again refuses to defer at every step. At step zero, it points out that no party asks for *Chevron*. At step one, it argues that the EPA’s arguments conflict with the Clean Air Act’s “structure,” “purposes,” and “text,” which together make the statute unambiguous. And at step two, it calls the EPA’s hypothetical interpretation “neither persuasive nor reasonable.”

One more case deserves a mention. *Judulang v. Holder*’s seventh footnote addresses *Chevron*. There the Court begins with step two. It clarifies that an arbitrary and capricious regulation is unreasonable. Then it adds step zero analysis. Because the BIA’s regulation does not interpret a statute, *Chevron* does not apply. At this point, most can distinguish the dicta with ease. The Court should not have bothered with step two analysis. Without a statute to interpret, *Chevron* is irrelevant.

The three cases show that the Court independently analyzes *Chevron*’s

12. Not a huge loss. After reading them, it did not take much time to code them.

steps. For that reason, this study cannot ignore the remaining steps when a regulation fails only one. It codes them independently of each other.

Remember that this study measures how often the Court defers under *Chevron*. Formally, the Court defers when and only when it applies *Chevron* and the interpretation passes both steps. When *Chevron* changes over time, this research design can detect it.

Regardless of whether the Court defers, an agency can still win or lose a case. So this study has one more important measure: the decision with respect to the agency. This study refers to this variable as “the decision” from now on. The decision has three outcomes. The agency wins, loses, or it receives a “mixed” decision. The appendix again details that further.

Finally, the explanatory variables deserve a paragraph: For decades, the same men hold the title of Chief Justice. For four- and eight-year periods, the same President occupies the White House. A quick Google search reveals the political party in control of the Presidency, the House, and the Senate in any given year. During each Supreme Court term, one calendar year passes. Supreme Court opinions mention which agency argued in front of them. When they do not, the agencies take credit for their own briefs. Subject matter categorizations originate in the Solicitor General’s Supreme Court brief database.

The Coding Checks

To maintain cross-database consistency, this study mirrors Eskridge and Baer’s method in *the Continuum of Deference*. Their study employs an individual to code every case. This prevents “coding inconsistencies” that result from differing opinions (Eskridge and Baer 2008, 1094). This study entrusts the coding burden to one person as well.

As a coding check, Eskridge and Baer have the non-coding author search for errors. This study could not afford such a luxury. Instead, this study employs three alternative coding checks.

The first check employs the same coder at a different time. Months after the code’s completion, some randomly-selected cases are coded again blind.

In no case does the coder come to new results. Of course, that coding does not literally occur blind. Some memory remains. Nonetheless, the second round of coding should reveal that the first round avoids careless mistakes.

The second coding check employs a different database altogether. Professor Nina Mendelson’s *Change, Creation, and Unpredictability in Statutory Interpretation* follows the first ten years of the Roberts Court. While it does not hone in on deference, it “systematically” codes for all canons between the fall of 2005 and the summer of 2014 (Mendelson 2018, 90).¹³ The time period overlaps with two-thirds of this study’s extension. Such overlap verified that no *Chevron* cases went unnoticed or miscoded from 2005 through 2014.

The final check fills in for the remaining terms. Professor Nathan Richardson’s new article, *Deference is Dead (Long Live Chevron)* has a table of *Chevron* cases from the winter of 2016 to the spring of 2020. Independent from his influence,¹⁴ this study comes to two identical conclusions about *Chevron* over the last four years. Conclusion one: fifteen majority opinions cite *Chevron*. Conclusion two: the Court defers in only one of those cases, *Cuozzo v. Lee*. With those conclusions aligned, this study feels secure about its coding for the past half-decade.

With these coding checks, one should feel confident while reviewing the results about *Chevron*. Not so for the other deference regimes.

Forget About the Other Regimes

The thesis began with grand plans to examine every deference regime from 1983 to the present. These plans did not pan out for two reasons.

The most important is the “the multi-regime problem.” Eskridge and Baer do not create intermediary variables for deference regimes other than *Chevron*. They create one all-encompassing variable, the deference regime invoked. To their credit, the regime variable is elegant. It categorizes a case based upon which regime the majority invokes. It has occasional problems,

13. Mendelson groups *Skidmore*, *Chevron*, and *Auer*. But the data includes relevant quotes from majorities, concurrences, and dissents. The quotes made differentiating the deference regimes simple.

14. Coding for this study ends in July 2020. His article is public in October.

though, when a case involves more than one regime.

To grasp these occasions, follow *Federal Express Corp. v. Holowecki*'s majority. There the Court invokes *Chevron*, *Auer*, and *Skidmore* deference, in that order. It agrees the EEOC can interpret the Age Discrimination in Employment Act's ambiguous provisions under *Chevron*. But the EEOC does not do so clearly. The EEOC regulations are as ambiguous as the statute. And so the Court looks to defer to the agency's interpretation of its own regulations under *Auer*. It cannot. The EEOC's regulations parrot the statute, disqualifying them from *Auer*.¹⁵ In a Hail Mary, the Court turns to *Skidmore*. The EEOC's informal documents persuasively interpret its own regulations and the corresponding statute. Finally, the Court agrees with the EEOC's interpretation.

Invoking so many regimes, *Federal v. Holowecki* makes for great case-book material. Indeed, multi-regime cases are a special occasion. But they confound the regime variable. For *Federal v. Holowecki*, three possible entries exist: *Auer*, *Chevron*, and *Skidmore*. Picking one would be arbitrary. And Eskridge and Baer require just that. Their method codes *Federal v. Holowecki* as an *Auer* case.

This approach sacrifices too much for the sake of elegance. Coding for only one regime neglects any and all nuance while crediting regimes with false wins and losses. In *Federal v. Holowecki*, Eskridge and Baer's method credits *Auer* for the government's victory. In reality, the Court favors the government's interpretation because of *Skidmore*, not *Auer*.

Based on the regime variable, Eskridge and Baer (2008, 1142) present "the precise win rates" of each regime. That presentation is deceptive. At best, the variable captures incomplete information. With a relatively small population of deference cases, crediting wins and losses with the wrong regime creates a case selection problem. Exacerbating this problem, multi-regime

15. Parroting is a longstanding exception to *Auer* deference, see *Gonzales v. Oregon* 546 US 243 (2006) ("An agency does not acquire special authority to interpret its own words when . . . it has elected merely to paraphrase the statutory language"). Under *Auer*'s new framework, the agency loses at step three for parroting, see *Kisor v. Wilkie*, 588 U.S. (2019) ("a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight").

cases can strike at the heart of administrative law, creating precedent for multiple doctrines at once. For a famous example, recall *Mead* from the literature review. While people still disagree about the semantics of whether it constitutes a “revolution,” few dispute that *Mead* has an outsized impact on administrative law.

The multi-regime problem does not apply to *Chevron* cases, which have their own variables. So why not create intervening variables for other regimes, just like for *Chevron*? Why refrain from going in depth, making multiple variables for each regime, breaking it down, step by step? Two answers.

First, for some regimes, this would make little sense. Consider *Auer*. During the 2018-2019 term, the Court reinvents the regime. In *Kisor v. Wilkie*, *Auer* adopts a new three-step framework. Before this, judges did not know this framework existed, so their opinions did not follow *Kisor*’s framework. The same goes for the other regimes. While *Chevron* has fit neatly into its framework, the other regimes have developed messily.

Second, that would require retroactive coding, tripling this study’s research burden. It would require adding new variables for all 586 cases in this database and redoing Eskridge and Baer’s original 1014 cases.

Ignoring the multi-regime problem, however, presenting findings about other regimes would still require redoing those original cases. When Eskridge and Baer code *Chevron* cases, they do not misstep. But in cases with other regimes, coding accuracy suffers.

To illustrate some missteps, one need only look at glance at the *Skidmore* case population. Take the first six cases Eskridge and Baer coded as invoking *Skidmore*:

1. *Regan v. Wald* does not invoke *Skidmore* deference. It instead invokes *Curtiss-Wright*.¹⁶

16. This should cast doubt on results about *Curtiss-Wright* deference, too. Eskridge and Baer claim to track every invocation since 1983, 9 in total, yet miss an obvious one in 1984, meaning their count should instead total 10. The coding error comes across as strange when they also code it as a national security case. Still, even counting *Regan v. Wald*, it remains true that the government never loses when the majority cites *Curtiss-Wright*.

2. *Regan v. Time Inc.* does not mention, cite, or invoke *Skidmore*. The majority does not get closer to *Skidmore* than merely mentioning a “compelling Government interest.”¹⁷
3. Neither does *Cornelius v. NAACP* invoke *Skidmore*. While the government defends its interest in restricting speech, it does so against a First Amendment challenge.
4. *Bennett v. Kentucky Department of Education* is also wrong. Again, Eskridge and Baer code it as a *Skidmore* case while the Court never mentions or cites *Skidmore*. It does, however, cite *Chevron* deference.
5. *Tony and Susan Alamo Foundation v. Secretary of Labor* yet again does not cite or mention *Skidmore* despite coding to the contrary. It is another First Amendment case.
6. Finally, Eskridge and Baer code one correctly. In *Mountain States Telephone v. Santa Ana*, the Court cites, invokes, and relies upon *Skidmore* deference.

The illustration does not intend to point fingers at Eskridge and Baer. Accurately coding over a thousand Supreme Court cases is a monumental task.¹⁸ Still, coding inconsistency should caution one against reading into the results for regimes other than *Chevron*.

Finally, some regimes do not have enough cases to analyze. The regime variable is sobering. Since 1983, the Court invokes *Auer* a mere 25 times and *Curtiss-Wright* a mere 12 times.¹⁹ With such small populations, concluding much from the data seems suspect at best.

Together, these methodological problems caution against extrapolating the non-*Chevron* data. Better data could make for fascinating material. But this study uses what it has: data on *Chevron*.

17. A keyword in *Skidmore* cases does arise when the majority clarifies arguments are not “persuasive.” This, however, refers to Justice Brennan’s arguments in his dissent, not reasons the government gives defending its interpretation.

18. A monumental task indeed, one that came with frequent errors. See, e.g., *Immigration and Naturalization Service v. Cardoza-Fonseca* 480 US 421 (1987) (citing only *Chevron* deference). Eskridge and Baer code this as a *Skidmore* case, but yet again correctly identify it in the *Chevron* variables.

19. If one corrects *Regan v. Wald*, the number of *Curtiss-Wright* cases climbs to 13.

4 Results

Chevron: Not an Automatic Win

Some ask the Court to overrule *Chevron*. Others hope to see it live another forty years. At the heart of this dispute, both groups believe that whether the government wins at the Supreme Court depends on *Chevron* deference.

Glancing at statistics, that belief seems imprecise. The government fares worse—not better—in *Chevron* cases. Table 2 shows that empirical reality.

Subset	Cases	Wins	(%)
<i>Chevron</i>	180	113	(62.77%)
Population	1600	1044	(65.25%)

Table 2: The Decision in *Chevron* Cases and the Broader Population

Do not take Table 2 to mean that *Chevron* depresses the government’s win rate. It does, however, display at a glance that *Chevron* is far from an automatic win.

This section does not end with such a glance. Instead, it concentrates on two situations that arise in *Chevron* cases. In both, *Chevron* does not determine the case’s outcome. Instead, statutory interpretation does.

The first situation is common. In this situation, the Court refuses to defer, and still the government wins. Since 1984, this happens 39 times. Even after the Court jettisons *Chevron*, the government fares well. It still wins 38.23% of the cases wherein the Court refuses to defer. The statute can unambiguously support the government’s position. Or the Court can exhaust other tools of statutory interpretation before turning to *Chevron*. Either way, the takeaway remains the same: *Chevron* is often unimportant in *Chevron* cases.

The second situation is rare. In this situation, the Court defers under *Chevron*, and yet the government does not win. Either the government re-

ceives a mixed or disappointing decision. The situation arises three times.²⁰ After the Court defers under *Chevron*, the government does not lock in its victory. It can still lose on other matters of statutory interpretation.

Finally come simpler statistics. They are referenced in the variables section. Contrary to what some might believe, the Court rarely defers. Across all cases in which the government interprets the law, the Court mentions *Chevron* 11.25% of the time. And after it mentions *Chevron*, it defers 43.33% of the time. Put together, the Court defers in only 4.87% of the population.

This all points to a simple conclusion: many expect too much of *Chevron*. Its critics and defenders alike pretend *Chevron* has more power than it does. That can make the literature “overheated,” veering it “close to nonsense” (Eskridge and Raso 2010, 1797). Others put it best. At the Supreme Court, *Chevron* seems more like a “standard of review” than a mandate (Hickman and Hahn 2020, 655).

***Chevron*’s Death?**

From the 1980s to the early 2010s, plenty of people predict *Chevron*’s death. Quantitatively, their predictions do not come true. From 1985 to 2015, the Court defers under *Chevron* steadily, with some highs and lows. During those thirty years, the doctrine does not change. They fuss over nothing.

When these people refer to *Chevron*, they probably mean the “revolutionary” doctrine in the 1983-1984 and 1984-1985 terms (Starr 1986, 283). Over these two years, *Chevron* seems unstoppable. In *Chevron* cases, the Court defers over and over. In only one does the Court not defer, *Bennett v. Kentucky Education*. There the Court mentions it would defer, as long as the government “later” interprets a statute. During these years, *Chevron* appears more powerful because the Court has to demonstrate how it works. This iteration of *Chevron* is long dead. Shortly after, the doctrine mellows. The Court defers between 45 and 50% of the time.

20. Two cases deliver mixed decisions, see *K Mart Corporation v. Cartier, Inc.* 486 US 281 (1988) and *Utility Air v. EPA* 573 US 302 (2014). One delivers an outright loss, see *Christopher v. SmithKline* 567 US (2012).

People today, however, have something to fuss about. Table 3 compares ten-term periods since *Chevron*'s original decision. It leads to only one conclusion: this time seems different.

Time	Cases	Defers?		Yes (%)
		Yes	No	
1984-1990	40	19	21	47.50%
1991-2000	53	26	27	49.91%
2001-2010	47	21	26	44.68%
2011-2020	40	12	28	30.00%
1984-2020	180	78	102	43.33%

Table 3: *Chevron* Deference Over Time

The Court defers less often in the 2010s. With a closer look, the trend becomes sharper. Since the 2014-2015 term begins, the Court hears twenty *Chevron* cases and defers only once. Table 4 demonstrates this bad streak.²¹

In this streak, the government's win rate plummets. Recall from Table 3 that the government wins 62.22% of *Chevron* cases in general. Since 2015, Table 4 shows the government winning only 30.00% of these cases since 2015.

21. While viewing Table 4, some might object that step zero rejects too many cases. In this batch, they will name two cases, see *FERC v. EPSA* 577 US (2016) (stating the Court "need not address" *Chevron* after finding FERC's delegated authority) and *Kisor v. Wilkie* 588 US (2019) (using *Chevron* as a model for *Auer*'s new test). A footnote in the appendix addresses this objection. Eskridge and Baer pick an over-inclusive definition of step zero, but this study sticks with it. If it calms an objector's mind, treat the streak as one for eighteen. The point remains, even if it sounds less punchy.

Case	Year	Rejects <i>Chevron</i> at			Defers?	Decision
		Step 0	Step 1	Step 2		
<i>Oneok v. Learjet</i>	2015	No	Yes		No	Loss
<i>Michigan v. EPA</i>	2015	No	No	Yes	No	Loss
<i>Mellouli v. Lynch</i>	2015	No	No	Yes	No	Loss
<i>King v. Burwell</i>	2015	Yes			No	Win
<i>Kingdomware v. US</i>	2016	No	Yes		No	Loss
<i>FERC v. EPSA</i>	2016	Yes			No	Win
<i>Encino v. Navarro</i>	2016	No	No	Yes	No	Loss
<i>Cuozzo v Lee</i>	2016	No	No	No	Yes	Win
<i>Esquivel v. Sessions</i>	2017	No	Yes		No	Loss
<i>Coventry v. Nevils</i>	2017	No	Yes		No	Win
<i>WI Central v. US</i>	2018	No	Yes		No	Loss
<i>SAS v. Iancu</i>	2018	No	Yes		No	Loss
<i>Pereira v. Sessions</i>	2018	No	Yes		No	Loss
<i>Epic v. Lewis</i>	2018	Yes			No	Mixed
<i>Digital v. Somers</i>	2018	No	Yes		No	Loss
<i>Sturgeon v. Frost II</i>	2019	No	Yes		No	Win
<i>Smith v. Berryhill</i>	2019	Yes			No	Win
<i>Kisor v. Wilkie</i>	2019	Yes			No	Win
<i>Maui v. Hawaii</i>	2020	Yes	Yes	Yes	No	Loss

Table 4: *Chevron* Cases Since the 2014-2015 Term Begins

This study resists the urge to editorialize the trend. Some may interpret this as *Chevron*'s death. Others might interpret it as a coincidence. No one, however, can dispute that the trend is unprecedented. Quantitatively, *Chevron* fares worse today than any other time in history.

Of course, the past need not determine the future. *Chevron*'s fortunes could reverse. For now, this study considers *Chevron*'s current decline.

A Step-by-Step Breakdown

Many predict *Chevron*'s death, but they disagree about which step brings it on. Some blame a ballooning number of step zero exceptions (Eggert 2017, 704; Sharkey 2018, 2412). Others explain it by the intertwined steps one

and two, arguing textualist judges see less ambiguity in statutes (Herz 2015, 1887; Jellum 2007, 761). If this study presents *Chevron* on its death bed, they will continue to bicker over its diagnosis. To resolve such bickering, this study devises its own autopsy. Again, the *Chevron* variables describe the Court’s behavior at each step. With these variables, this study can evaluate the competing explanations for *Chevron*’s decline.

Such an evaluation begins with step zero. Table 5 displays the Court’s step zero analysis in ten-year periods. This measure defines step zero liberally: either *Chevron* applies, or it does not. That definition captures all of the so-called “step zero exceptions” (Levin 2016, 6).

Term	Cases	Passes	(%)
1984-1990	40	33	82.50%
1991-2000	53	37	72.55%
2001-2010	47	30	63.83%
2011-2020	40	26	65.00%

Table 5: *Chevron* Step Zero Over Time

Looking at Table 5, those decrying the *Mead* revolution should feel vindicated. They should, however, treat it as a process and not an event. For the three decades following the original *Chevron* decision, the proportion of interpretations passing step zero declines steadily. *Mead* seems more like a consequence of this decline, rather than the cause of it.

Those blaming *Chevron*’s recent decline on step zero, though, find no vindication here. Frankly, their claims clash with empirical reality.

According to them, step zero “totally undermines” *Chevron* (Sharkey 2018, 2413). They decry step zero for writing a “delegation fiction” into *Chevron* that makes it a “mess” (Eggert 2017, 785). They warn that *Chevron* is amid a “radical retreat,” and step zero hosts the “battleground” (Sharkey 2018, 2412).

This is hyperbole. After *Mead*, step zero barely changes. The Court rejects almost an identical number of interpretations at step zero each decade.

If step zero hosts a battleground, then it does not see battle very often.

Term	Cases	Passes	(%)
1984-1990	33	19	57.58%
1991-2000	37	26	70.27%
2001-2010	33	24	72.72%
2011-2020	29	16	55.17%

Table 6: *Chevron* Step One Over Time

Step one becomes stricter in the 2010s. Either the Court reviews less open-ended statutes, or it resolves more legislative ambiguity itself. Either way, the government does not fare well in making the case that statutes are ambiguous.

By the numbers alone, the step one in the 2010s resembles the step one from the 1980s. That is a false resemblance. Keep in mind that the Court would almost always reject an interpretation at step one during the 1980s. That contrasts the 2010s, where the Court more frequently rejects interpretations at step zero and step two.

Term	Cases	Passes	(%)
1984-1990	19	19	100.00%
1991-2000	26	26	100.00%
2001-2010	26	21	80.77%
2011-2020	17	12	70.59%

Table 7: *Chevron* Step Two Over Time

Step two takes a different path from the others. As discussed in the literature review, the Court does not find a regulation unreasonable in a *Chevron* case until *Whitman v. American Trucking*.

After step two's debut, it does not change much. Numerically, the Court rejects exactly 5 interpretations per decade under step two since *Whitman*.

That means it is no longer true that the Court “almost never” rejects an interpretation at step two (Breyer et al. 2017, 256), but *Whitman*’s impact is limited. Only the Court’s words change since step two’s introduction. On occasion, it uses creative language, such as in *Mellouli v. Lynch*. There it rejects the BIA’s interpretation for making “scant sense.”

While step two explains some of *Chevron*’s decline, it does not seem like a death knell. In fact, no step alone seems like a death knell. *Chevron*’s decline over the past few decades seems to come as a consequence of changes in *Chevron* at every step, rather than one in particular.

Explaining *Chevron*’s Decline

This study cannot explain why *Chevron* faces decline. It can, however, suggest why the data contravenes some explanations and fits with others. To do so, it presents some descriptive statistics.

Most explain *Chevron*’s decline as a consequence of the Court’s changing sentiment. This explanation lines up with some justices’ recent opinions. In a turn of events, Justice Thomas, *Brand X*’s author, betrays *Chevron* entirely. In *Michigan v. EPA*, he requests that the Court cabin *Chevron*. According to him, *Chevron* enables “unconstitutional delegations.” His request comes up again last year when he dissents from the Court’s denial of certiorari of *Baldwin v. US*. He believes there is “no...justification” for *Chevron*. He argues it violates Article III and defies the Administrative Procedures Act. In those cases, he writes alone, but that is not always so.

Opposing *Chevron*, Justice Thomas and Justice Gorsuch team up for first time in *PDR Network, LLC v. Carlton Harris Chiropractic*. They argue that *Chevron* usurps “the legislative power” to write laws and “the judicial power” to interpret them. They urge the Court to “reconsider” it. A year later, they make the same case. In a short remark, Thomas’ dissent, joined by Gorsuch, adds that *Chevron* “likely violates” the constitution.

Of course, few know exactly what the justices think. Still, if justices want to defer under *Chevron* today, their opinion starts two votes down. This could lead to *Chevron avoidance*, where the opinion can take “an easier way out” than *Chevron* (Bressman 2005, 1464). The way out could mean

deferring under *Skidmore* or interpreting the statute by its text alone. Perhaps justices prefer delivering an outcome over the method to get there. Or they may want to silence backlash from their colleagues. Either way, recent years do see fewer *Chevron* cases than the historical average.

And while only two justices want to overrule *Chevron*, others may desire to limit it. While it spotlights *Auer*, rather than *Chevron*, *Kisor v. Wilkie* reveals how the Court wants to handle *Chevron*. The majority—joined by Justices Kagan, Breyer, Sotomayor, Roberts, and then-Justice Ginsburg—models *Auer* deference after *Chevron*'s two-step framework. The remaining justices protest, calling for the Court to put *Auer* out of its misery. After all, they note, the new framework limits *Auer* so much that Justice Roberts sees “little practical difference” between a “zombified” *Auer* and one “on life support.”

In their final lines, opinions by Justices Kavanaugh, Alito, and Roberts do not equate overruling *Auer* with overruling *Chevron*. They defend *Chevron*'s life while advocating for *Auer*'s demise.

It is hard to know, however, what Justice Kavanaugh feels. In his time at the Court, he never defers to an agency under *Chevron*. Still, he makes it clear that he does not desire *Chevron*'s death. In *PDR v. Carlton*, for example, he derides the FCC for arguing in favor of “not mere *Skidmore* deference or *Chevron* deference, but absolute deference.” That implies that, at least on occasion, he would defer under *Chevron*.

Few know, too, how Justice Barrett feels about *Chevron*. Some believe she will lead a “conservative crusade” against it (Overley 2020; Goodwin 2020). Others expect her to accept *Chevron* (May 2020), just like Justice Scalia did. Maybe she will end up somewhere in the middle.

To contribute to this conversation, Table 8 details how each Justice votes in *Chevron* cases. Its findings do not project the future. Justices can change their minds. It is implausible but technically possible that Justice Breyer could vote to overrule the doctrine. And do not treat Table 8 as the be-all and end-all. All justices sit on a finite number of cases. And the table only measures whether they do or do not defer. It does not catch their sentiment about *Chevron*.

Table 8 suggests that in the modern era, conservative and liberal justices alike do not defer often. Most would not expect, for example, that Justice Sotomayor defers less often than Justice Alito. Perhaps this decade’s new justices have little opportunity to defer under *Chevron*. Or maybe they secretly root for *Chevron*’s demise along with Justice Gorsuch and Justice Thomas. Regardless, the point remains: when listing justices in order of least to most deferential, political ideology alone does determine the order. To the contrary, Table 8 makes it clear that newer justices, liberal and conservative, defer less often.

Justice	Cases	Defers	(%)	Justice	Cases	Defers	(%)
Burger	16	12	75.00%	Marshall	44	19	43.18%
Powell	18	13	73.22%	Kennedy	147	63	42.18%
White	55	35	63.63%	Alito	54	22	40.74%
Stevens	136	78	57.35%	Scalia	143	56	39.16%
Souter	95	53	55.79%	Roberts	58	22	37.93%
Ginsburg	118	60	50.85%	Kagan	36	14	38.89%
Breyer	107	54	50.47%	Sotomayor	36	13	36.11%
Brennan	39	19	48.72%	Thomas	128	41	32.03%
Blackmun	60	29	48.33%	Gorsuch	10	0	00.00%
O’Connor	114	53	47.37%	Kavanaugh	5	0	00.00%
Rehnquist	117	55	47.01%				

Table 8: *Chevron* by Justice

If *Chevron*’s decline results from justices disliking the doctrine, then expect the Court to limit *Chevron* in the years to come. If it does, do not doubt that people will gossip about *Chevron*’s demise. In that case, though, they might have a point. When the Court limits *Chevron*, circuits will follow. In turn, agencies have fewer opportunities to deploy *Chevron* in court. Those defending *Chevron* will boo, and their opponents will cheer.

The trend might go beyond *Chevron*. Some argue that, lately, the Court disfavors the government more often in general. According to this view, most “take [it] for granted” that *Chevron* matters when the Court disagrees with the government (Epstein and Posner 2018, 833). This has empirical support. According to Epstein and Posner’s study of all Court cases from 1932

to 2016, the Court hands down more unfavorable opinions to the President today than ever.

This study finds the same for statutory and regulatory interpretation. Across all Court cases in which the government forwards an interpretation of the law, it finds that the government loses more often today. Table 9 summarizes that data.

Term	Cases	Wins	(%)
1984-1990	349	239	68.48%
1991-2000	434	303	69.81%
2001-2010	409	268	65.53%
2011-2020	409	235	57.34%

Table 9: Court Agreement with Agencies in Statutory and Regulatory Interpretation Cases

Even if the government’s win rate in statutory and regulatory interpretation cases decreases over time, that decrease might not match *Chevron*’s decline. To determine if it does, Table 10 shows a similar metric: how often the government wins in *Chevron* cases. It reveals that as the government wins fewer statutory and regulatory interpretation cases, it loses fewer *Chevron* cases.

Term	Cases	Wins	(%)
1984-1990	40	27	67.50%
1991-1990	53	38	71.70%
2001-2010	47	28	59.57%
2011-2020	40	20	52.00%

Table 10: Court Agreement with Agencies in *Chevron* Cases

Since the Court takes so few *Chevron* cases per decade, the win rates might not decrease at the same rate. Still, it remains plausible that *Chevron*’s

decline emanates not from a hostility to the doctrine, but from judges disagreeing with the government more often in general. The tables neither rule out that possibility nor prove it so. These tables reveal correlation, not causation.

Even so, the government’s depressed win rate in statutory and regulatory interpretation cases is interesting on its own. It might stumble across a trend implicating all of administrative law—and more. As the Court delivers more losses to the government, that can change policy outcomes across the country. Ignoring the normative implications, though, Table 9 at least corroborates Epstein and Posner’s findings.

Back to *Chevron*. Recall that a consensus argues justices treat *Chevron* opportunistically. They favor or disfavor government interpretations of the law not because of *Chevron*, but because of political ideology. The data offers a proxy for the interpretation’s political ideology: the political party controlling the White House.²² With one exception, however, *Chevron*’s decline depends little on who occupies the White House. Back-to-back administrations with opposing political allegiances differ little in how often they win *Chevron* cases. In Table 11, it is hard to distinguish Bush I’s win rate from Clinton’s or Bush II’s win rate from Obama’s.

In the Trump years, the government’s win rate in *Chevron* cases hits rock bottom. This outcome might not be political. The Trump administration frequently ignores administrative law’s “procedural requirements” (Noll 2021, 1). On average, other president’s regulations survive legal challenges around 70% of the time. But the Trump administration’s regulations survive less than 20% of the time. The same goes in *Chevron* cases. While most presidents win over half of *Chevron* cases, Trump wins only a quarter.

22. The data includes other proxies, such as which party controls the House and the Senate. This seems like an unreliable estimate, though, because Congress might write an ambiguous statute in 2003, and then an agency might not interpret it until 2010. For what it is worth, the data does not suggest that political control of Congress implicates whether the government wins in *Chevron* cases. Eskridge and Baer include another variable—the political ideology of the interpretation—but it seems too fickle for another person to replicate. This thesis opts against doing so.

President	Cases	Wins	(%)
Reagan	29	21	77.78%
Bush I	24	16	66.67%
Clinton	42	29	69.05%
Bush II	37	22	59.46%
Obama	36	21	58.33%
Trump	12	3	25.00%

Table 11: Presidential Win Rates in *Chevron* Cases

Admittedly, Trump’s tenure features fewer *Chevron* cases in general. Some of the featured few, though, exemplify the Trump administration’s failings in administrative law. Take *Epic Systems Corp. v. Lewis*. The government submits two briefs, one by the Solicitor General and another by the National Labor Relations Board. Their briefs oppose each other. Ignoring the briefs, the Court interprets what it sees as an unambiguous statute. Even if the statute was ambiguous, the Court adds, it would not defer under *Chevron*. When the government thinks with “two minds,” the Court will not defer to “garble.”²³

Perhaps *Chevron*’s bad streak will end as the Biden administration begins filing its paperwork. While *Chevron* in the Obama years does not look like the same doctrine from the 1980s and 1990s, it could win more in the coming years. Historically, the past half-decade may end up as an aberration. Time will tell.

23. Oddly enough, this decision has precedent supporting it, even if the majority fails to cite it, see *Bowen v. American Hosp. Association* 476 US 610 (1986) (mentioning that “twenty-seven agencies” write regulations about the case’s subject matter, depriving the Department of Health and Human Services the requisite expertise to interpret the law).

5 Conclusion

Employing a database of 1600 cases from 1984 to the present, this thesis corroborates that *Chevron*'s influence at the Supreme Court is waning. Lately, the Court defers less often under *Chevron*, and the government wins fewer *Chevron* cases.

This thesis does more than falsify the rumors of *Chevron*'s demise. It situates *Chevron*'s modern iteration in a continuum of deference. By comparing the government's win rate in statutory and regulatory interpretation cases with and without *Chevron*, it finds that *Chevron* does not tip the balance. When the Court mentions *Chevron* in its opinion, that does not make the government more likely to win.

Comparing *Chevron* to no deference at all leaves the rest of the continuum unexplored. While this study captures snippets about *Skidmore*, *Auer*, and other regimes, it does not collect credible data about them. With better research design, another study could explore how other deference regimes influence the Court. That seems worthwhile, especially for *Auer*, which *Kisor v. Wilkie* overhauls. Over the next decade, researchers could discover whether *Kisor* curtails *Auer* deference. To do so, they might follow *Auer* from 1945's *Bowles v. Seminole Rock* to the present.

Even without exploring other deference regimes, this thesis helps explain *Chevron*'s decline. The Trump administration or the Court could take the blame. If the Trump administration's difficulties with administrative law strike in *Chevron* cases, then *Chevron* might rescue itself from its decline during Biden's tenure. But if the Court feels hostile toward the government or *Chevron* in particular, then *Chevron* will have some rough years ahead.

Though it might matter little whether *Chevron* triumphs or withers at the Supreme Court, *Chevron* does make a difference at the circuit courts. If the Court restricts *Chevron*, circuits might follow the Court's lead. A *Chevron* riddled with holes would not deliver many wins to the government. Nationwide policy would change, for better or worse.

For a closing remark, return to *I'm Just a Bill*. After Bill first details his "long, long wait" in committee, the boy compliments him. "Gee, Bill, you

certainly have a lot of patience.” Before concluding that *Chevron* will die and that statutory interpretation will revert to *Schoolhouse Rock!* basics, people should emulate Bill’s patience. Maybe *Chevron* lays on its death bed now. Or perhaps *Chevron* will soon escape a historical anomaly. Statistics do not suggest one over the other. Over the next few years, people should—and likely will—keep a watchful eye on *Chevron* at the Supreme Court.

Appendix

Chevron Variables

***Chevron* Cited: Does the Court mention *Chevron*?**

0 = No

1 = Yes

The Court usually cites *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* But it can pick other cases, such as *Mead* or *Brand X*.

Step Zero: Does the Court think *Chevron*'s framework applies?

0 = No

1 = Yes

Chevron does not apply in two situations: first, where the Court cites *Chevron* and then ignores it; and second, where the Court cites *Chevron* but excepts the case at step zero. Eskridge and Baer conglomerate both situations in this variable, calling it “step zero.” The variable employs a liberal definition of *Chevron*'s step zero. In their eyes, the Court either thinks “the *Chevron* framework applies,” or it does not (Eskridge and Baer 2008, 1214). This study does not necessarily endorse that definition. It does, however, replicate what they provide.

Step One: Does the Court find the statute unambiguous?

0 = No

1 = Yes

999 = N/A

Step Two: Does the Court find the regulation reasonable?

0 = No

1 = Yes

999 = N/A

An interpretation does not fail at step 2 until the 2000-2001 term. So until then, the coding presumes that an interpretation meeting step one should also meet step two. Some might disagree with this characterization of step two. Fair enough. But Eskridge and Baer code it this way, and this study

agrees.

Votes: Do justices defer under *Chevron*?

0 = No

1 = Yes

999 = N/A

Regime Invoked

0 = No Regime

1 = Anti-Deference

2 = Consultative Deference

3 = *Skidmore* Deference

4 = *Beth-Israel* Deference

5 = *Chevron* Deference

6 = *Auer* deference

7 = *Curtiss-Wright* deference

In the regime variable, Eskridge and Baer (2008, 1217) code for only “the most deferential category,” which is the regime with “the highest number” in their typology. So in the presence of *Auer*, *Chevron* and *Skidmore* go unnoticed by the regime variable. Or so they claim.

In practice, they do not. Take *Gonzalez v. Oregon*. There the Court cites the three regimes again. This time it discharges the agency’s interpretation under all of them. It does not defer under *Auer* because the regulations parrot the statute. It does not defer under *Chevron* because Congress explicitly limits the Attorney General’s rulemaking authority. And it does not defer under *Skidmore* because it finds the executive’s rationale unpersuasive. Most would assume Eskridge and Baer code this as an *Auer* case. Not so. They code it as a *Skidmore* case. The same discrepancies come up in other multi-regime cases. Maybe they leave out an important caveat to their procedure. Or perhaps they make a few mistakes. Without much to go on, this study codes these situations for the most decisive regime, rather than the strongest one with a mention. This study emulates what they did, rather than what they claim they did.

It does not matter. As mentioned, analyzing the regime variable is unworkable. These notes merely give diligence where it is due.

The Decision

The Decision

0 = Favorable Decision

1 = Unfavorable Decision

2 = Mixed Decision

Usually, the Court delivers a simple decision. In those, the majority agrees or disagrees with the agency's wishes. Not always. Sometimes the Court rules "for the agency with regard to some issues and against the agency with regard to others" (Eskridge and Baer 2008, 1213). Those opinions count as a mixed decision.

Keep in mind that the government can win a case even when the Court does not adopt the government's reasoning exactly. The Court may choose a "narrower rationale" to grant the government's wish (1213). That still counts as a win.

Mixed decisions can come up only when cases ask more than one interpretative question. Even in the cases that do, the government usually wins or loses all of the questions at once.

Though mixed decisions act as a residual category between wins and losses, this thesis treats mixed and losing decisions the same way. Unless the government unambiguously wins a case, it counts as a loss for the purposes of calculating the win rates. For that reason, do not spend too much time differentiating losing and mixed decisions.

Still, the appendix exists to explain the variable typology, so it presents two examples.

Recall *Epic Systems v. Lewis* from the results section. Ignore how *Chevron* plays a role in the case. The government could never win. Even if left to a coin flip, only one agency wins, either the Solicitor General or the National Labor Relations Board. The other always loses. No matter the outcome, the decision is mixed.

Very few cases, however, feature the government dueling itself. For a more usual example, take *Utility Air Regulatory Group v. EPA*. In that case, the EPA defends two of its interpretations of the Clean Air Act. The Court accepts only one as reasonable. Without perfect evidence about what the EPA values more, this case goes into the mixed decision category.²⁴

Identifier Variables

Name

Each case has a shortened name. During and after the 2006 term, the name mentions both parties of the case. Before the 2006 term, the name consists of one to three words that Eskridge and Baer chose.

Case Code

Each case has a code. During and after the 2006 term, the code consists of the case's term and a number, counting up from the term's case docket in reverse-alphabetical order. Before the 2006 term, the code consists of the case's term and a number, counting up chronologically.

Control Variables

Term

This refers to the year in which a term begins. In the 2019-2020 term, for example, that is 2019.

24. Some might argue that the government only cared about the winning interpretation, so it should not count as a mixed decision. Justice Scalia does proclaim that the Solicitor General regarded the winning issue as “more important” during oral argument. The transcript does not support that. The Solicitor General clarifies the first interpretative question is “not just about the 3 percent,” see Transcript of Oral Argument at 53, *Utility Air Regulatory Group v. EPA* 573 US 302 (2014) (No. 121146). And when the Court asks him about whether the case's eventual outcome would satisfy the EPA, he repeats “I'm not endorsing this” multiple times, see Transcript of Oral Argument at 78. Regardless of how one interprets that oral argument, divining the EPA's intent from the Solicitor General's off-handed remark does not seem fair. So it remains a mixed decision.

Chief Justice

0 = Burger

1 = Rehnquist

2 = Roberts

President

0 = Reagan

1 = Bush I

2 = Clinton

3 = Bush II

4 = Obama

5 = Trump

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