
Social Security Act — Administrative Law —
Chevron Deference — American Hospital Ass’n v. Becerra

Scholars have described the Supreme Court’s 1984 decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ as an “accidental landmark,”² “the most important administrative law decision in the [nation’s] history,”³ and a “phoenix.”⁴ Others have described it as a “complete and total failure,”⁵ a “dead” doctrine,⁶ and “the Frankenstein’s monster of administrative law: a hideous ‘behemoth’ that has escaped its restraints and is wreaking havoc on its creator, the courts, the Constitution, and the American public.”⁷ The famous decision instructs courts, when reviewing an agency’s interpretation of an allegedly ambiguous statute, to defer to that interpretation if (1) the statute is ambiguous and (2) the agency has reasonably interpreted the statute.⁸

Recently, in *American Hospital Ass’n v. Becerra*⁹ (*AHA*), the Supreme Court faced its latest opportunity to reconsider the thirty-eight-year-old doctrine. The Court granted certiorari on a *Chevron* question;¹⁰ the parties briefed *AHA* as a *Chevron* case;¹¹ and *Chevron* occupied much of oral argument.¹² Yet the Court’s unanimous opinion, authored by Justice Kavanaugh, did not once mention *Chevron*. It eschewed a host of *Chevronian* buzzwords, treating the decision not like Frankenstein’s monster or a phoenix, but instead like a different literary figure: *Harry Potter*’s Lord Voldemort — the case-that-must-not-be-named.¹³ Though *AHA* did not upset existing precedent, it portends a shift in doctrine that could redefine the contours of administrative law.

On November 13, 2017, the Department of Health and Human Services (HHS) promulgated a regulation concerning, in relevant part, HHS’s 2018 reimbursement rates to hospitals for Medicare-beneficiary

¹ 467 U.S. 837 (1984).

² Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 253 (2014).

³ Lawrence B. Solum, Essay, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 251 (2021).

⁴ Lisa Schultz Bressman & Kevin M. Stack, Essay, *Chevron Is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021).

⁵ Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010).

⁶ Michael Herz, Essay, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1879 (2015).

⁷ Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 614 (2020).

⁸ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁹ 142 S. Ct. 1896 (2022).

¹⁰ Question Presented, *AHA* (No. 20-1114), <https://www.supremecourt.gov/qp/20-01114qp.pdf> [<https://perma.cc/V65V-7RQY>].

¹¹ Brief for the Petitioners at i, *AHA* (No. 20-1114), 2021 WL 4081077, at *i; Brief for the Respondents at 19, *AHA* (No. 20-1114), 2021 WL 4937288, at *19.

¹² See Transcript of Oral Argument, *AHA* (No. 20-1114), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1114_h31j.pdf [<https://perma.cc/ZU52-QMAC>].

¹³ See J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE* 11, 85 (1998).

outpatient services.¹⁴ The Medicare Act¹⁵ affords HHS two options when setting these rates: Under option one, if HHS surveys drug-acquisition costs, it may use that data to “vary [reimbursement rates] by hospital group.”¹⁶ Alternatively, under option two, “if hospital acquisition cost data are not available,” HHS must reimburse “the average price for the drug . . . as calculated and adjusted by the [agency].”¹⁷

Prior to 2020, HHS had never conducted an option-one survey; it had therefore long relied upon option two.¹⁸ Nonetheless, invoking the word “adjusted” in option two, HHS — without conducting a survey — varied its 2018 rates for a specific group of hospitals: “Section 340B hospitals, which generally serve low-income or rural communities.”¹⁹ Federal law sets a ceiling on the drug prices that manufacturers can charge 340B hospitals.²⁰ Consequently, 340B hospitals often pay below-market prices for drugs but can secure Medicare reimbursements at average market rates under option two. Seeking to eliminate this perceived windfall, HHS reduced 340B hospitals’ reimbursement rates.²¹

The American Hospital Association (AHA) and similarly situated parties challenged the 340B reimbursement reduction in the U.S. District Court for the District of Columbia.²² They accused HHS of violating the Medicare Act by varying rates by hospital group without surveying costs, and they moved to enjoin the reduction.²³ Siding with AHA, the court permanently enjoined the rule in relevant part²⁴ and later held that the rule violated the Act, remanding it to HHS for reconsideration.²⁵ The court rejected HHS’s threshold arguments that the plaintiffs needed to exhaust their administrative remedies before suing and that 42 U.S.C. § 1395l(t)(12) — another Medicare provision — barred judicial review of their claims.²⁶ On the merits, the court reasoned that HHS’s option-two power to “adjust[.]” rates does not include

¹⁴ Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs, 82 Fed. Reg. 52,356 (Nov. 13, 2017) [hereinafter Medicare Program] (to be codified at 42 C.F.R. pts. 414, 416, 419).

¹⁵ Social Security Act tit. XVIII, 42 U.S.C. §§ 1395–1395lll.

¹⁶ *Id.* § 1395l(t)(14)(A)(iii)(I).

¹⁷ *Id.* § 1395l(t)(14)(A)(iii)(II).

¹⁸ *AHA*, 142 S. Ct. at 1900.

¹⁹ *Id.* at 1899; *see id.* at 1901 (quoting Medicare Program, *supra* note 14, at 52,499); *see also* Public Health Service Act § 340B, 42 U.S.C. § 256b.

²⁰ 42 U.S.C. § 256b(a)(1).

²¹ *AHA*, 142 S. Ct. at 1901.

²² *Am. Hosp. Ass’n v. Azar*, 348 F. Supp. 3d 62, 71 (D.D.C. 2018). The AHA and similarly situated parties had previously filed a preenforcement suit to enjoin the reduction, but the court concluded that it lacked jurisdiction over the suit. *Am. Hosp. Ass’n v. Hargan*, 289 F. Supp. 3d 45, 47 (D.D.C. 2017), *aff’d sub nom.* *Am. Hosp. Ass’n v. Azar*, 895 F.3d 822 (D.C. Cir. 2018).

²³ *See Am. Hosp. Ass’n*, 348 F. Supp. 3d at 71.

²⁴ *Id.* at 86.

²⁵ *Am. Hosp. Ass’n v. Azar*, 385 F. Supp. 3d 1, 15 (D.D.C. 2019).

²⁶ *Am. Hosp. Ass’n*, 348 F. Supp. 3d at 73–79. Section 1395l(t)(12) precludes judicial review of HHS’s “development of the classification system under paragraph (2)” and “periodic adjustments made under paragraph (6).” 42 U.S.C. § 1395l(t)(12)(A), (C).

an option-one-like power to vary rates by group.²⁷ HHS therefore exceeded its authority by reducing rates for 340B hospitals without cost survey data.²⁸ The court refused HHS's request to proceed under *Chevron*, concluding that, because the "rate reduction is unsupported by the statute's unambiguous text, the Court need not address whether [HHS] is entitled to deference under *Chevron*."²⁹

The Trump Administration appealed to the U.S. Court of Appeals for the D.C. Circuit, which reversed the district court's decision. Writing for a divided panel, Chief Judge Srinivasan³⁰ agreed with the district court that the plaintiffs' claims were reviewable³¹ but disagreed with the lower court on the merits. Applying *Chevron* step one, he asked whether "Congress has directly spoken to the precise question at issue."³² Answering in the negative, he labeled the relevant provision ambiguous before proceeding to *Chevron* step two and concluding that HHS reasonably interpreted the provision.³³ Judge Pillard dissented.³⁴ Like the majority, Judge Pillard applied *Chevron*, but she concluded at *Chevron* step one that the provision lacked ambiguity and that HHS's regulation conflicted with the provision's unambiguous meaning.³⁵

AHA filed a petition for a writ of certiorari to the U.S. Supreme Court,³⁶ which granted review of the question "whether *Chevron* deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data."³⁷ The Court also instructed the parties to brief whether § 1395l(t)(12) precluded judicial review.³⁸

On June 15, 2022, the Supreme Court unanimously reversed the D.C. Circuit's judgment.³⁹ Writing for the Court, Justice Kavanaugh first agreed with the lower courts that § 1395l(t)(12) did not preclude judicial review of the suit, concluding that the provision governs rate setting "for *other* Medicare outpatient services," but not for the drug reimbursement rates at issue.⁴⁰ Second, Justice Kavanaugh, echoing Judge Pillard, held

²⁷ *Am. Hosp. Ass'n*, 348 F. Supp. 3d at 81 (alteration in original) (quoting 42 U.S.C. § 1395l(t)(14)(A)(iii)(II)); see *id.* at 79–83.

²⁸ *Am. Hosp. Ass'n*, 385 F. Supp. 3d at 9–10.

²⁹ *Am. Hosp. Ass'n*, 348 F. Supp. 3d at 82 n.17.

³⁰ Chief Judge Srinivasan was joined by Judge Millett.

³¹ *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020). The sole dissenting judge, Judge Pillard, agreed on this point. *Id.* at 834 (Pillard, J., dissenting).

³² *Id.* at 828 (majority opinion) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

³³ *Id.* at 828–34.

³⁴ *Id.* at 834 (Pillard, J., dissenting).

³⁵ *Id.* at 835.

³⁶ Petition for a Writ of Certiorari, *AHA*, 142 S. Ct. 1896 (No. 20-1114), 2021 WL 601674.

³⁷ Question Presented, *supra* note 10.

³⁸ *Am. Hosp. Ass'n v. Becerra*, 141 S. Ct. 2883, 2883 (2021) (mem.).

³⁹ *AHA*, 142 S. Ct. at 1898–99.

⁴⁰ *Id.* at 1903.

that “the text and structure of the statute” foreclosed HHS’s interpretation.⁴¹ Justice Kavanaugh emphasized that option one allows HHS to vary rates by hospital group *only if* HHS first conducts a drug-cost survey.⁴² Per the Court, HHS cannot sidestep this requirement by invoking option two’s “adjust” language — to do so “would render irrelevant [option one’s] survey prerequisite.”⁴³ “In short,” the Court concluded, option two “allows HHS to set reimbursement rates based on average price and affords the agency discretion to ‘adjust’ the price up or down,” but not to “vary the reimbursement rates by hospital group.”⁴⁴

Though the Court’s reasoning mirrored that of Judge Pillard’s dissent, the two opinions diverged in one key way: Judge Pillard framed her opinion within the *Chevron* framework, labeling the statute unambiguous at step one.⁴⁵ Justice Kavanaugh, by contrast, eschewed *Chevron* altogether, instead describing the case as a “straightforward” matter of statutory interpretation.⁴⁶ In so doing, the Court did not formally upset existing doctrine. But its conscientious avoidance of the *Chevron* framework forebodes a doctrinal shift that could see *Chevron* formally overruled, relegated to the lower courts, or perhaps, one day, resurrected.

Justice Kavanaugh’s opinion began by disinfecting the question presented of any direct reference to *Chevron*.⁴⁷ This sterilization continued throughout his Taboo game of a decision, which refused to defer under *Chevron* to HHS’s interpretation of an allegedly ambiguous statute — without once using the words “defer,” “deference,” “ambiguous,” “ambiguity,” “unambiguous,” or “*Chevron*.” The case-that-must-not-be-named lurked behind every word of Justice Kavanaugh’s opinion, forcing readers into a sort of doublethink: *Chevron* is so irrelevant that the Court need not invoke it, yet it looms so large that the Court must contort its lexicon lest readers interpret this as a *Chevron* case.

Ahead of the Court’s decision, some scholars prophesized that *AHA* might mark the end of *Chevron*,⁴⁸ but the Court instead issued a decision

⁴¹ *Id.* at 1904.

⁴² *Id.* at 1905.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Am. Hosp. Ass’n v. Azar*, 967 F.3d 818, 835 (D.C. Cir. 2020) (Pillard, J., dissenting).

⁴⁶ *AHA*, 142 S. Ct. at 1904.

⁴⁷ The Court granted certiorari on “whether *Chevron* deference permits” HHS’s conduct, Question Presented, *supra* note 10, but Justice Kavanaugh reformulated the question to inquire “whether the statute affords HHS discretion” to act as it did, *AHA*, 142 S. Ct. at 1899.

⁴⁸ See, e.g., Anya Bernstein & Glen Staszewski, Opinion, *Populism Has Found a Home at the Supreme Court, Too*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/opinion/supreme-court-populism.html> [<https://perma.cc/BBF4-3XCJ>] (considering the implications should the Court use *AHA* to overrule *Chevron*); Cary Coglianese, Opinion, *Did Step Zero Help Doom Chevron?*, REGUL. REV. (June 13, 2022), <https://www.theregreview.org/2022/06/13/coglianese-did-step-zero-help-doom-chevron> [<https://perma.cc/4E55-NM3B>] (arguing that *AHA* could help seal

leaving its long-standing precedent formally untouched. Consequently, some scholars have attempted to minimize the opinion's significance. For example, responding to the question, "What should we make of [the Court's decision to eschew *Chevron*]?" Professor Christopher Walker answers, "Probably not much."⁴⁹ Walker positions *AHA* within a long line of cases in which *Chevron* deference did "not have much of an effect on agency outcomes at the Court," citing a study by Professor William Eskridge and Lauren Baer purporting to show "that the Court only applie[s] the *Chevron* deference framework in about one in four cases in which it should."⁵⁰ In a similar vein, some in the media labeled *AHA* a "bust" for those who wanted to see *Chevron* overturned.⁵¹

But these commentators downplay *AHA*'s strangeness. Between 2005 and 2020, the Roberts Court granted certiorari on seven questions specifically referencing *Chevron*.⁵² The Court explicitly applied *Chevron*'s framework to resolve five of those questions.⁵³ It resolved the other two questions on non-*Chevron* grounds, but both majority opinions referenced *Chevron*, as did concurring or dissenting opinions in both cases.⁵⁴ Of course, issues of judicial deference to agencies often

"*Chevron*'s fate"); Richard A. Epstein & Mario Loyola, Opinion, *The Supreme Court's Chance to Rein in the Regulatory State*, WALL ST. J. (Dec. 7, 2021, 3:11 PM), <https://www.wsj.com/articles/the-supreme-court-chance-to-rein-in-federal-agency-power-chevron-deference-gorsuch-barrett-11638888240> [<https://perma.cc/85XU-WWA4>] (positioning *AHA* as a chance to walk back *Chevron*'s "disastrous[]" reasoning).

⁴⁹ Christopher J. Walker, *What American Hospital Association v. Becerra Means for the Future of Chevron Deference: Probably Not Much*, YALE J. ON REGUL.: NOTICE & COMMENT (June 15, 2022), <https://www.yalejreg.com/nc/what-american-hospital-association-v-becerra-means-for-the-future-of-chevron-deference-probably-not-much> [<https://perma.cc/4TUP-MFZZ>].

⁵⁰ *Id.* (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008)).

⁵¹ Matt Ford, *The Supreme Court Decided to Leave the Administrative State Alone — For Now*, NEW REPUBLIC: THE SOAPBOX (June 20, 2022), <https://newrepublic.com/article/166847/supreme-court-decided-leave-administrative-state-alone-for-now> [<https://perma.cc/DXU2-K7QC>].

⁵² On four other occasions in which the Roberts Court entertained certiorari requests on questions directly referencing *Chevron*, the Court instead granted certiorari on modified questions that did not explicitly reference *Chevron*. See *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 313 (2014); *Energy-Intensive Mfrs. Working Grp. on Greenhouse Gas Regul. v. EPA*, 571 U.S. 951, 951 (2013) (mem.) (consolidated with *Util. Air*, 573 U.S. 302); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217 (2009). For a list of questions presented to the Court, see *Granted/Noted Cases List*, SUP. CT. OF THE U.S. [hereinafter *Cases List*], <https://www.supremecourt.gov/orders/grantednotedlists.aspx> [<https://perma.cc/T7EV-F38R>].

⁵³ See *City of Arlington v. FCC*, 569 U.S. 290, 295, 307 (2013); *Cable, Telecomms. & Tech. Comm. of New Orleans City Council v. FCC*, 568 U.S. 936, 936 (2012) (mem.) (consolidated with *City of Arlington*, 569 U.S. 290); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009); *USEC, Inc. v. Eurodif S.A.*, 553 U.S. 1003, 1003 (2009) (mem.) (consolidated with *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009)); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007); see also *Cases List*, *supra* note 52.

⁵⁴ See *Barber v. Thomas*, 560 U.S. 474, 487–89 (2010); *id.* at 502 (Kennedy, J., dissenting); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10, 20–21 (2007); *id.* at 41 (Stevens, J., dissenting); see also *Cases List*, *supra* note 52.

arise in response to questions that do not directly reference *Chevron*.⁵⁵ Scholars have worn through many quills trying to sort cases that call for the *Chevron* framework from those that do not.⁵⁶ And the Supreme Court has not shown an agency *Chevron* deference since 2016.⁵⁷ But *AHA* stands alone in the Roberts Court's seventeen-year history: when explicitly presented with a *Chevron* question, the Court had never before failed to produce an opinion referencing that landmark decision.

A review of *AHA*'s oral argument further highlights the oddness of the Court's *Chevron*-less opinion. The Justices and oral advocates referenced *Chevron* by name a total of forty-nine times.⁵⁸ Justices Thomas, Breyer, Alito, Gorsuch, Kavanaugh, and Barrett all referenced *Chevron* by name, and both advocates discussed the case.⁵⁹

Further, the Court's *Chevron* avoidance last Term extended beyond just *AHA*. A case decided a week after *AHA*, *Becerra v. Empire Health Foundation*,⁶⁰ asked the Court to resolve a different interpretive question concerning Medicare reimbursements.⁶¹ Though *Empire Health*'s question presented did not reference *Chevron*, the case nevertheless fell comfortably within *Chevron*'s traditional purview.⁶² Yet neither Justice Kagan's majority opinion nor Justice Kavanaugh's dissent referenced the seminal case.⁶³ Even last Term's marquee administrative law dispute, *West Virginia v. EPA*,⁶⁴ largely shunned *Chevron* — it appeared only in Justice Kagan's dissent, which referenced *Chevron* three times while explaining the holding of an earlier case.⁶⁵ Not every creeping shadow connotes intrigue, but the consistency with which the Court dodged *Chevron* last Term suggests that something mysterious is afoot.

Some have posited that *AHA*'s *Chevron*-shaped hole speaks to a Supreme Court ready to abandon the doctrine, albeit gradually. Professor Jonathan Adler, for example, describes the case as “further

⁵⁵ See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2136, 2142 (2016); *Michigan v. EPA*, 135 S. Ct. 2699, 2704, 2706–07 (2015).

⁵⁶ Compare Eskridge & Baer, *supra* note 50, at 1090 (arguing that the Court rarely applies *Chevron* in cases that seem to call for it), with Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron when It Should?*, 57 INT'L REV. L. & ECON. 81, 81–82 (2018) (rejecting Eskridge and Baer's argument and findings). Of note, Eskridge and Baer include in their dataset a “large minority of cases” in which the government did not request deference, while Salmanowitz and Spamann see the absence of a deference request “as an indication that the case was not eligible for deference after all.” *Id.* at 84 & n.36 (quoting Eskridge & Baer, *supra* note 50, at 1119).

⁵⁷ See *Cuozzo Speed Techs.*, 136 S. Ct. at 2144, 2146.

⁵⁸ See Transcript of Oral Argument, *supra* note 12, *passim*. By contrast, characters speak the name “Voldemort” only twenty-eight times in the first installment of *Harry Potter*. See ROWLING, *supra* note 13, *passim*.

⁵⁹ See Transcript of Oral Argument, *supra* note 12, *passim*.

⁶⁰ 142 S. Ct. 2354 (2022).

⁶¹ *Id.* at 2358.

⁶² See Question Presented, *Empire Health* (No. 20-1312), <https://www.supremecourt.gov/qp/20-01312qp.pdf> [<https://perma.cc/7BGV-JJWJ>].

⁶³ See *Empire Health*, 142 S. Ct. at 2358–68; *id.* at 2368–70 (Kavanaugh, J., dissenting).

⁶⁴ 142 S. Ct. 2587 (2022).

⁶⁵ *Id.* at 2635 (Kagan, J., dissenting).

evidence the Court is more likely to let *Chevron* fade away than it is to directly overrule it.”⁶⁶ *SCOTUSblog* editor James Romoser, meanwhile, theorizes that *AHA* may “portend[] the future of *Chevron* Rather than a single, decisive blow or a continued death by a thousand cuts, the [C]ourt might simply snuff out *Chevron* with the silent treatment.”⁶⁷

These arguments are compelling, but they leave unanswered a key question: What should onlookers make of the fact that no one on the Court — in the majority or in concurrence — said *anything* about *Chevron*? The Justices do not typically shy away from opining on the famous case. As recently as 2019, Justice Thomas cited *Chevron* while “emphasiz[ing] the need to reconsider” the “assumption underl[y]ing . . . precedents requiring judicial deference to certain agency interpretations.”⁶⁸ And in 2018, Justice Breyer endorsed *Chevron* “as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.”⁶⁹ These Justices’ silence in *AHA* illuminates a Court not yet ready to rock the doctrinal ship. Cases like *AHA* and *Empire Health* contain a Schrödinger’s *Chevron* — they leave the doctrine technically untouched while simultaneously treating it as dead and forgotten. So what does this mean for administrative law doctrine going forward? Several possibilities present themselves.

First, as Adler and Romoser argue, *AHA* may portend *Chevron*’s gradual eradication. The Supreme Court in 1984 made *Chevron* the doctrinal rule. It spent the next few decades minting exceptions to the rule. Professor Cass Sunstein groups these exceptions into two threshold “*Chevron* Step Zero” inquiries: First, under *United States v. Mead Corp.*⁷⁰ and related cases, “when agencies have not exercised delegated power to act with the force of law, a case-by-case analysis of several factors . . . determine[s] whether *Chevron* provides the governing framework.”⁷¹ Second, under the major questions doctrine, *Chevron* may not apply when “a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue.”⁷² These two versions of *Chevron* step zero can remove an inquiry from the *Chevron* framework entirely.⁷³ In

⁶⁶ Jonathan H. Adler (@jadler1969), TWITTER (June 15, 2022, 10:15 AM), <https://twitter.com/jadler1969/status/1537076302561148928> [<https://perma.cc/4L59-9UXH>].

⁶⁷ James Romoser, *In an Opinion that Shuns Chevron, The Court Rejects a Medicare Cut for Hospital Drugs*, SCOTUSBLOG (June 15, 2022, 8:50 PM), <https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevrons-the-court-rejects-a-medicare-cut-for-hospital-drugs> [<https://perma.cc/4RMY-SV4U>].

⁶⁸ *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring in the judgment).

⁶⁹ *Moody v. Stewart*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting). Justice Breyer’s dissent responded to Justice Gorsuch’s *Chevron*-skeptical majority opinion, which cast doubt on the doctrine’s future: “[W]hether *Chevron* should remain is a question we may leave for another day.” *Id.* at 1358 (majority opinion).

⁷⁰ 533 U.S. 218 (2001).

⁷¹ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006).

⁷² *Id.*

⁷³ *See id.*

recent years, the Supreme Court has only expanded step zero, most notably in last Term's "major questions quartet" of cases.⁷⁴ *AHA* may foreshadow another expansion, albeit one unprecedented in scope: By performing an analysis using the traditional tools of statutory interpretation without reference to *Chevron* step one, the Court may have presaged a doctrinal shift that will relocate the traditional-tools analysis outside the *Chevron* framework.⁷⁵ Such a shift, by swallowing *Chevron* step one, may prevent courts from even citing the landmark decision, thus easing the path to its eventual overruling.

Another case decided last Term, *Kennedy v. Bremerton School District*,⁷⁶ blueprints how the Court may later invoke *AHA* and its brethren to enshrine *Chevron*'s demise in doctrine. In *Kennedy*, the Court reviewed a holding grounded in the Court's 1971 decision in *Lemon v. Kurtzman*,⁷⁷ which instructed courts to consider "a law's purposes, effects, and potential for entanglement with religion" in Establishment Clause cases.⁷⁸ In the decades following *Lemon*, the Court rarely applied its eponymous test, and scholars debated whether it remained good law.⁷⁹ *Kennedy* laid those debates to rest. Writing for a six-Justice majority, Justice Gorsuch asserted that the "Court long ago abandoned *Lemon*," favorably citing lower court cases that "recognized *Lemon*'s demise."⁸⁰ Invoking this alleged abandonment to "overrule[]" *Lemon*,⁸¹ the majority hid behind its reading of case law and, in doing so, shirked responsibility for the doctrinal shift.⁸²

This retrospective rationale — formally overruling a decision by reference to its desuetude — could find a new victim in *Chevron*. Like *Lemon*, *Chevron* has fallen into disfavor with the Court. Like the *Lemon*

⁷⁴ See generally Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

⁷⁵ In *Chevron*'s early days, the Court similarly considered whether to conduct the traditional-tools analysis without expressly entering the *Chevron* framework. See, e.g., *Dole v. United Steelworkers*, 494 U.S. 26, 35, 42–43 (1990). But later cases made clear that the analysis falls within *Chevron*'s first step. See, e.g., *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 52–53 (2011).

⁷⁶ 142 S. Ct. 2407 (2022). For a more in-depth discussion of *Kennedy*, see generally Justin Driver, *The Supreme Court, 2021 Term — Comment: Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208 (2022).

⁷⁷ 403 U.S. 602 (1971).

⁷⁸ *Kennedy*, 142 S. Ct. at 2427 (citing *Lemon*, 403 U.S. at 612–13).

⁷⁹ Compare, e.g., Julie K. Underwood & Julie F. Mead, *Establishment of Religion Analysis: The Lemon Test or Just Lemonade?*, 25 J.L. & EDUC. 55, 56 (1996) (arguing that *Lemon* remains the safest framework for "making decisions that may implicate religion in schools"), with, e.g., Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499 (2002) (asserting that "[t]he Court has implicitly abandoned the *Lemon* test").

⁸⁰ *Kennedy*, 142 S. Ct. at 2427, 2428 n.4 (quoting *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 947 n.3 (9th Cir. 2021) (R. Nelson, J., dissenting from the denial of rehearing en banc)).

⁸¹ *Id.* at 2434 (Sotomayor, J., dissenting).

⁸² But see Richard M. Re, *Reason and Rhetoric in Edwards v. Vannoy*, 17 DUKE J. CONST. L. & PUB. POL'Y 63, 85 (2022) (arguing that "overruling by *fait accompli*" may not contravene the principles of *stare decisis*).

test, *Chevron* deference has seen itself doctrinally overshadowed — by the major questions doctrine, the *Mead* version of step zero, and now a traditional-tools analysis wholly removed from *Chevron* step one. And like *Lemon*, *Chevron* has repeatedly attracted censorious opinions from Justices writing in concurrence or dissent.⁸³ The two cases retain differences — most importantly, “unlike *Chevron*, the *Lemon* test . . . never really bec[a]me a fixture of the relevant Supreme Court jurisprudence.”⁸⁴ But with each subsequent *AHA*-like decision, *Chevron*’s detractors gain ever more ammunition to make a *Lemon* out of *Chevron*.

Alternatively, *AHA* may herald the development of a two-track *Chevron* system, one for the Supreme Court and one for lower federal courts. To some extent, such a system exists already: Walker and Professor Kent Barnett observe that *Chevron* affects decisions at the circuit level far more often than at the Supreme Court, coining the terms “*Chevron* Regular” and “*Chevron* Supreme” to express this trend.⁸⁵ If the Supreme Court keeps avoiding *Chevron*, while leaving untouched its *Chevron*-friendly precedent,⁸⁶ perhaps *Chevron* Regular will survive while *Chevron* Supreme quietly fades.

And a two-track system may make sense — after all, *Chevron* can help reduce inconsistency among courts by limiting judges’ ability to impose their own interpretations on ambiguous statutes.⁸⁷ Professors Michael Coenen and Seth Davis advance a similar point regarding the major questions doctrine, contending that it “should exist as a tool for the Supreme Court and only the Supreme Court to use.”⁸⁸ They reason that lower courts, without adequate guidance, may struggle to “define what makes a question ‘major’” and may thus incur “unnecessary costs” by incorrectly applying the doctrine.⁸⁹ Professor Aaron-Andrew Bruhl notes a related argument in the *Chevron* context: the Justices’ “relatively

⁸³ Compare, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring in the judgment) (labeling *Lemon* a “misadventure”), with, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (labeling *Chevron*’s holding a “fiction”).

⁸⁴ Jonathan H. Adler, *Will Chevron Get the Lemon Treatment?*, VOLOKH CONSPIRACY (July 10, 2022, 1:34 PM), <https://reason.com/volokh/2022/07/10/will-chevron-get-the-lemon-treatment> [<https://perma.cc/JZ5A-MJEQ>].

⁸⁵ Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017); see also Aaron-Andrew P. Bruhl, *Hierarchically Variable Deference to Agency Interpretations*, 89 NOTRE DAME L. REV. 727, 760 (2013) (noting “circumstantial and structural reasons to suspect that the Supreme Court is less deferential than lower courts”).

⁸⁶ For an example of the Court’s *Chevron*-friendly precedent, see *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014).

⁸⁷ But see Amy Semet, *Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621, 630 (2022) (noting the frequency with which courts of appeals split in their interpretations of the National Labor Relations Act, despite *Chevron*).

⁸⁸ Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779 (2017).

⁸⁹ *Id.* at 780.

favorable decision-making environment — their advantages in resources, time, perceived expertise, and so forth” — may “make[] deference less necessary for them than for their . . . colleagues in the lower courts.”⁹⁰ Of course, a two-track system may lose its efficacy if — as seems likely — many lower court judges emulate the Supreme Court and stop citing *Chevron*. But if others — like Chief Judge Srinivasan and Judge Pillard in *AHA* — continue invoking *Chevron* unless and until the Court overrules it, then *Chevron* Regular may still help reduce intra- and inter-circuit splits.

Finally, *AHA* leaves room for a future Supreme Court to revive *Chevron*. In the short term, the Court may continue applying what substantively amounts to a robust form of *Chevron* step one — the traditional-tools analysis — without citing the landmark case. Though decisions like *AHA* and *Empire Health* do not doctrinally conform to *Chevron*’s framework, they resemble decisions in which the Court rejected or accepted an agency’s reading of a statute after rigorously applying *Chevron*, as in *Michigan v. EPA*⁹¹ and *Cuozzo Speed Technologies, LLC v. Lee*.⁹² In the longer term, a future Supreme Court may rely upon the current Court’s doctrinal ambiguity to resurrect *Chevron* — after all, *Chevron* technically remains good law, and future Justices could read the Court’s silence as constituting a holding pattern rather than a termination.⁹³

Amid a Term overflowing with doctrinal tsunamis — on abortion, gun control, the environment, religion — *AHA* stands out for what it does not do. A *Chevron* case through and through — except not a *Chevron* case at all. As the Supreme Court continues to grapple with the case-that-must-not-be-named in the years ahead, it will almost certainly delve into the doctrine at some point. And when that day arrives — when the Supreme Court finally decides to label *Chevron* a Frankenstein’s monster, a phoenix, or some other beast entirely — *AHA* may retroactively reveal itself as the canary in the coal mine: the harbinger of some kind of doctrinal change to come.

⁹⁰ Bruhl, *supra* note 85, at 760.

⁹¹ 135 S. Ct. 2699, 2707 (2015) (holding that “EPA strayed far beyond” the statutory text and thus should not receive *Chevron* deference).

⁹² 136 S. Ct. 2131, 2144 (2016) (granting *Chevron* deference to the U.S. Patent and Trademark Office’s interpretation of an ambiguous statute).

⁹³ *Cf. Re*, *supra* note 82, at 84 (suggesting that a case like *AHA*, vis-à-vis *Chevron*, could “create a period of precedential tension,” which subsequent experience may resolve).