Chevron and Gorsuch:
The Administrative Law Jurisprudence of Justice Gorsuch and What It Says About the Future Supreme Court

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TABLE OF CONTENTS

INTRODUCTION...................................................................................................................................................... 2

I. CHEVRON DEFERENCE......................................................................................................................................... 4
   A. What is Chevron? ........................................................................................................................................ 4
   B. Justifications for Chevron Deference ......................................................................................................... 7

II. JUSTICE GORSUCH’S ADMINISTRATIVE LAW JURISPRUDENCE......................................................... 9
   A. United States v. Nichols ............................................................................................................................... 10
   B. De Niz Robles v. Nynch ............................................................................................................................. 13
   C. Gutierrez-Brizuela v. Nynch ....................................................................................................................... 15

III. JUSTICE GORSUCH AND THE FUTURE SUPREME COURT ........................................................... 18

CONCLUSION........................................................................................................................................................... 20
INTRODUCTION

On April 10, 2017, Neil M. Gorsuch was sworn in as the 113th Justice of the Supreme Court.¹ It was fourteen months after the death of conservative Justice Antonin Scalia that this nominee of President Donald J. Trump finally replaced the vacancy.² Justice Gorsuch, a former Tenth Circuit Court of Appeals judge, is a well-respected conservative whose legal philosophy resembles that of Justice Scalia.³ He is an originalist, who believes that “the Constitution should be interpreted in accordance with [t]he meaning it had at the time of its enactment.”⁴ He is also a textualist, who believes that such interpretation should be “guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time.”⁵ His recent speech well reflects such philosophy:

> Judges should [s]trive [t]o apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be–not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.⁶

Scholars have conducted research on Justice Gorsuch’s Appeals Court decisions and confirmed that Justice Gorsuch “would rule from Scalia’s ideological right on the

2. See id.
Among others, Justice Gorsuch’s view on separation of powers has received considerable attention, because shortly before his nomination Justice Gorsuch published two opinions in one case evincing his hostility against *Chevron* deference. Justice Gorsuch’s unique skepticism about *Chevron* deference will allow him to serve as the Supreme Court’s leading voice on administrative law matters for several decades. Accordingly, this paper explores Justice Gorsuch’s administration law jurisprudence by closely examining his treatment of *Chevron* deference in prior opinions and provides insight into the future Supreme Court’s decisions with Justice Gorsuch’s addition. Part I examines *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, from which *Chevron* deference originated, and provides two main justifications for *Chevron* deference. Part II explores Justice Gorsuch’s administrative law jurisprudence by introducing the most cited trio of cases on separation of powers to show his reasoning for skepticism about *Chevron* deference. Part III then offers predictions for the future Supreme Court’s direction on *Chevron* deference with Justice Gorsuch’s addition. Finally, this Paper concludes by arguing that in due course *Chevron* deference will be significantly curtailed with Justice Gorsuch playing a huge role on the bench.

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I. *CHEVRON DEFERENCE*

A. What is *Chevron*

*Chevron* deference was first introduced into the administrative law jurisprudence by the Supreme Court’s landmark decision in *Chevron*.11 *Chevron* involved a dispute over the interpretation of Congress’s 1977 Clean Air Act Amendments, which required “States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation” to establish a permit program regulating “new or modified major stationary sources” of air pollution.12 Under the EPA’s definition, the “stationary source” included all of the pollution emitting devices of one facility collectively, which would allow an existing plant to install or modify the facility without meeting the permit requirements as long as the alteration did not increase the total emissions.13 The National Resources Defense Council (NRDC) rejected such interpretation arguing that all devices of the facility must be individually treated as a “stationary source.”14

The D.C. Circuit Court agreed with the NRDC’s interpretation based on the fact that the Clean Air Act “does not explicitly define what Congress envisioned as a ‘stationary source’ to which the permit process [s]hould apply.”15 The Court found that in the absence of contrary congressional intent, the meaning of “statutory source” should be

11. *Id.*
12. *Id.* at 840.
13. *Id.*
defined consistent with the purpose of the Act, which is to improve air quality.\textsuperscript{16} Chevron U.S.A., Inc. intervened and filed a petition for certiorari in support of the EPA.\textsuperscript{17}

Reversing the D.C. Circuit decision unanimously, the Supreme Court found that the lower court made a “legal error” by adopting “a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that decision.”\textsuperscript{18} The Court held that the administrative agency has the power to fill any gap left, implicitly or explicitly, by Congress, and thus when Congress delegates to an agency on a particular issue, the judiciary may not substitute its own construction of a statutory provision for an agency’s reasonable interpretation.\textsuperscript{19}

In reaching the decision, the Supreme Court articulated the \textit{Chevron} two-step test for determining when a court should defer to an agency’s interpretation.\textsuperscript{20} According to the test:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{16} \textit{Id.} 725-26 (quoting ASARCO Inc. v. Envtl. Prot. Agency, 578 F.2d 319, 321 (D.C. Cir. 1978)).
\item \textsuperscript{17} \textit{Chevron}, supra note 10, at n.4.
\item \textsuperscript{18} \textit{Id.} at 842.
\item \textsuperscript{19} \textit{Id.} at 843-44 (quoting Mortin v. Ruiz, 415 U.S. 199, 231 (1974)).
\item \textsuperscript{20} \textit{Id.} at 842.
\item \textsuperscript{21} \textit{Id.} at 842-43.
\end{itemize}
The Court then analyzed the immediate case using the test. First, as the Court of Appeals determined, the Supreme Court found that Congress did not have intent or definition regarding a “statutory source” in the permit program in the 1977 Amendments. Not only that, the legislative history of the 1977 Amendments is “unilluminating,” because it only discloses dual purposes that “Congress sought to accommodate the conflict between economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.” Therefore, the EPA’s interpretation is warranted as long as it “seeks to accommodate progress in reducing air pollution with economic growth.”

Since then, Chevron has been “the most cited case in modern public law.”

Chevron deference, however, is often criticized for essentially restricting the judiciary’s authority under Article III of the Constitution by requiring judicial deference to executive interpretation of statutes. It is inconsistent with the principle of judicial review from Marbury v. Madison, in which Chief Justice Marshall declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Did the Framers ever dream of such “abdication of judicial oversight to unelected bureaucrats

22. Id. at 851.
23. Id. at 862.
24. Id. at 851.
25. Id. at 866.
28. Id. (quoting 5 U.S. 137, 177 (1803)).
running a vast and unfettered regulatory state”? Justice Gorsuch’s answer to the question would easily be negative, but before going into his reasoning, an examination of judicial justifications for *Chevron* deference deserves some merits.

B. Justifications for *Chevron* Deference

Several arguments exist for judicial restraint when Congress delegated the authority to clarify the statutory ambiguity to the agency. First, agencies have technical expertise in their respective fields, and therefore can make judgment on the higher level of specificity as long as Congress sets out a broader policy goal. Requiring Congress to engage in policy-making in light of everyday realities and rapid changes in science would be unrealistic. Furthermore, burdening the courts with such expertise would also be unrealistic, because “judges are not experts in the field.” Thus, such delegation is a balancing act to maintain efficiency under separation of powers. For example, Congress can provide a broad policy aim to improve air quality, but determining “what kind of substances are ‘air pollutant’ and what quantity of them is dangerous to human health” is the job of the EPA with technical expertise.

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30. See Shedd & Garvey, *supra* note 14, at 4; but see Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 514 (1989) (arguing that although agencies have not only intense familiarity with the history and purposes of the legislation, but also practical knowledge of what will best effectuate those purposes, technical expertise is not a valid theoretical justification for accepting the agency’s views, but a mere practical reason).


32. *Chevron, supra* note 10, at 844.

Such expertise of the agency, however, seems to be “week grounds for a blanket rule of deference to agency interpretations.”34 Not only does it require courts to make some level of “inquiry as to whether the agency employed its expertise when issuing the relevant interpretation,” but it also suggests that when a judge feels his expertise in that matter is far more superior, he should decline to defer to the agency.35

Second, agencies are politically accountable, whereas “federal judges–who have no constituency–have a duty to respect legitimate policy choices made by those who do.”36 Although agencies are not directly accountable, they can “properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”37 If the public does not like the judgments, it “may have its voice heard through the democratic process.”38 Courts, however, do not have “responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest.”39 Allowing courts to interpret the meaning of an ambiguous statute will inevitably involve some policymaking, which is exclusively vested in the politically accountable branches by the Constitution.40

So said the Framers. Chevron deference essentially affirms their view by ensuring that even in the modern era policy discretions should remain within the realm of political branches and judges are expected to refrain from intruding the boundary.41 After all, partisanship on the bench is real–although the Justices will deny–as the Justices are

35. Id. at 2046.
37. Id. at 865.
38. Shedd & Garvey, supra note 14, at 5.
40. Note, supra note 34, at 2053.
41. See id. at 2060.
appointed by the politicized presidency. Because the modern judiciary’s role in statutory interpretation quintessentially involves some policy judgment, Chevron deference is supposed to act as a brake to judicial policymaking. To this rationale of Chevron deference, Justice Gorsuch vehemently disagrees.

II. JUSTICE GORSUCH’S ADMINISTRATIVE LAW JURISPRUDENCE

Before examining Justice Gorsuch’s most quoted opinions in administration law jurisprudence, it should be noted that the federal courts of appeals judges, unlike the Supreme Court Justices, do not enjoy much discretion on the bench. Their cases can mostly be “decided uncontroversially by the application of settled principles,” making dissent fairly rare, because circuit judges are tightly bound by precedents. Furthermore, the Tenth Circuit, which consists of six states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, has a “fairly non-controversial docket” itself. Its caseload includes: more than forty percent of criminal law; slightly less than forty percent of private civil matters; seven percent of administrative agency appeals; and the

43. See Note, supra note 34, at 2053.
45. Id. at n.25 (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009)).
rest on various other topics including environmental law and international law. Due to such routine nature, Justice Gorsuch’s opinions do not protrude in certain areas of law, and even if Justice Gorsuch has remained consistent on certain issues, it should not be taken literally to predict how he might side with the issues in the Supreme Court.

That being said, Justice Gorsuch’s opinions on the following trio of cases shed some light on his approach to issues of separation of powers in the administrative law jurisprudence.

A. United States v. Nichols

In Nichols, Justice Gorsuch faced an alien’s petition for rehearing en banc to reconsider the applicability of the Sex Offender Registration and Notification Act (SORNA) to the pre-Act offenders. SORNA “makes it a federal crime for certain sex offenders to ‘knowingly fail] to register or update a registration,’ and requires that offenders who move to a different State ‘shall, not later than 3 business days after each change of name, residence, employment, or student status,” inform in person ‘at least 1 jurisdiction involved … of all changes.” Nichols, a registered sex offender in Kansas, was arrested and escorted to the United States for violating SORNA when he moved to Philippines without updating his registration. Upon found guilty in the district court, Nichols made statutory and constitutional arguments on appeal. First, he argued that the plain language of SORNA suggests SORNA’s updating requirement did not apply to him.

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49. Id. at 6.
50. U.S. v. Nichols, 784 F.3d 666 (10th Cir. 2015).
52. Id.
because he moved to a foreign country, a non-SORNA jurisdiction. 53 Second, he alternatively argued that SORNA’s delegation of authority to the Attorney General to determine the Act’s retroactive application to past offenders was unconstitutional. 54 Although the Tenth Circuit rejected both arguments and affirmed the conviction largely based on statutory interpretation, 55 Justice Gorsuch wrote a dissent highlighting the constitutional delicacy of this case. 56

In SORNA, “Congress left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA’s enactment should be required to register their location or face another criminal conviction.” 57 In fact, the Act provides the Attorney General with such a vast degree of discretion that the Attorney General is even free to “change his mind at any given time or over the course of different administration.” 58 Congress designed it this way to delegate the job of specifying registration requirements to the Department of Justice, 59 and Justice Gorsuch found this problematic as it raises separation of powers questions. 60

Although Nichols does not specifically mention Chevron deference, Justice Gorsuch established his legal philosophy of the non-delegation doctrine in Nichols, which later became solid grounds for his skepticism about Chevron deference. Article I, Section 1 of the Constitution provides that “[a]ll legislative powers herein granted shall

54. Id. at 1230.
55. Nichols, supra note 50, at 667.
56. Id. at 668 (Gorsuch, J., dissenting from denial of rehearing en banc).
57. Id. (citing 42 U.S.C. § 16913(d)).
59. Id. at 669 (quoting Reynolds, supra note 58, at 981).
60. Id. at 669-70.
be vested in a Congress of the United States.”

According to Justice Gorsuch, the Framers were worried about encroachment of Congress’ authority by the Executive, so tried to “limi[t] the ability of Congress to delegate its legislative power to the Executive.” He wrote:

By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty.

In other words, this separation of powers was a carefully designed tool “essential to the preservation of the people’s liberty,” and to abandon the non-delegation doctrine would mean to abandon the foundation of the Constitution.

This does not mean Justice Gorsuch is denying delegation entirely. He acknowledged that delegation is proper where “Congress set both the ‘boundaries’ of the Executive’s discretion and supplied an ‘intelligible principle’ for the exercise of that discretion within those boundaries.” The prefatory statement of SORNA, however, does not provide any intelligible guidance for the Attorney General’s discretion with regard to past offenders, suggesting inapplicability of the delegation doctrine. Accordingly, Justice Gorsuch argued that SORNA gave the Attorney General too much leeway to interpret the law and therefore should be unconstitutional.

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63. Id. (citing Whitman v. Am. Trucking Ass’ns, 531 U.S. 457 (2001)).
64. Id.
65. Id.
66. Id. (quoting Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 332 (2002)).
68. See id. at 675.
unanimously reversed the decision based on the straightforward reading of the statutory text with no mention of the non-delegation doctrine\textsuperscript{69} that is rarely used to invalidate a law in Supreme Court anyway as Justice Gorsuch acknowledged.\textsuperscript{70}

**B. De Niz Robles v. Nynch**

Five months after Justice Gorsuch had reviewed Nichols, similar case came before his docket. This time, Justice Gorsuch took a more aggressive approach to Chevron deference. In *De Niz Robles*, Justice Gorsuch, writing for the unanimous panel, rejected the retroactive application of an agency’s adjudication.\textsuperscript{71} *De Niz Robles* involves two immigration statutes: 8 U.S.C. Sections 1255(i)(2)(A), which grants the Attorney General discretion to adjust the status of an illegal alien to permanent resident,\textsuperscript{72} and 1182(a)(9)(C)(i)(I), which was later enacted to prohibit certain category of people from gaining lawful residency unless they first wait for ten years.\textsuperscript{73} De Niz Robles, who accumulated more than 1 year of unlawful presence in the United States, fell under that category when he attempted to reenter the United States.\textsuperscript{74}

When the Tenth Circuit faced this statutory conflict in *Padilla-Caldera I* in 2005, it decided that Section 1255(i) trumped,\textsuperscript{75} and De Niz Robles filed a petition to adjust the status based on the decision.\textsuperscript{76} In 2007, however, the Board of Immigration Appeals (BIA) found contrary to the Tenth Circuit’s decision and held in *Briones* that Section

\textsuperscript{69} See Nichols, supra note 51, at 1117-18.
\textsuperscript{70} See Nichols, supra note 50, at 677.
\textsuperscript{71} Nolan, supra note 44, at 33 (citing De Niz Robles v. Lynch, 803 F.3d 1165, 1180 (10th Cir. 2015)).
\textsuperscript{72} 8 U.S.C. § 1255(i)(2)(A).
\textsuperscript{73} De Niz Robles, supra note 71, at 1167.
\textsuperscript{74} Id.; see 8 U.S.C. § 1182(a)(9)(C)(i)(I).
\textsuperscript{75} Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1300 (10th Cir.), amended and superseded on reh’g, 453 F.3d 1237 (10th Cir. 2005), disapproved in later appeal sub nom. Padilla-Caldera v. Holder, 637 F.3d 1140 (10th Cir. 2011), as corrected (Mar. 22, 2011) [hereinafter Padilla-Caldera I].
\textsuperscript{76} De Niz Robles, supra note 71, at 1167.
1182(a)(9)(C)(i)(I) trumped. When De Niz Robles’ petition finally reach a BIA agent’s desk in 2013 due to an administrative backlog, the BIA “decided to apply its decision in Briones retroactively to his case, using it to hold him categorically ineligible for an adjustment of status and subject to removal.” It was this retroactive application of the new laws that Justice Gorsuch found problematic.

He held that the presumption of prospectivity applies to new legislations by Congress and its delegates unless Congress has clearly indicated or authorized retroactive application. First, the presumption of retroactivity is at odds with the Constitutional principles of due process and equal protection. New legislation should protect due process interests in “fair notice, reasonable reliance, and settled expectation,” which is “deeply rooted in our jurisprudence.” It should also protect equal protection interests of disfavored individuals against condemnation in society when they have no power to change past conduct. Retroactive application of Briones in this case, however, violated De Niz Robles’ constitutional rights by imposing new legal consequences to his past conduct. In trying to obtain the agency’s interests in uniformity and generality, De Niz Robles’ individual interests were significantly compromised, which presents a “grave and fundamental concern.”

In addition, the Constitution provides the judicial branch with the authority to “mitigate the due process and equal protection concerns associated with the other two

78. De Niz Robles, supra note 71, at 1168.
79. Id. at 1172.
80. See id. at 1169.
81. Id. (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).
82. Id. (citing Landgraf, supra note 81, at 266).
83. Id.
84. Id. at 1179-80.
branches’ retroactive decisionmaking,” because the judiciary is “insulated from partisan influence and retribution.” Justice Gorsuch reasoned that such separation of powers makes it unacceptable to require courts to defer to the agency’s interpretation under Chevron step II “even when doing so means we must overrule our own preexisting and governing statutory interpretation.” Judicial decisions should be reliable, and therefore should not be subject to continuous “revision” by the agency. Otherwise, people’s reliance on the law will be greatly disrupted.

In De Niz Robles, Justice Gorsuch “effectively narrowed the circumstances in which [C]hevron step II was [a]ppropriate” by refusing to apply deference in this case. He cautioned that Chevron deference might allow agencies to encroach on the judiciary’s power by performing rulemaking instead of interpreting the law. And his opinion in De Niz Robles became a precursor to his most recent case among the trio, Gutierrez-Brizuela.

C. Gutierrez-Brizuela v. Nynch

Nowhere has the constitutionality of Chevron been more clearly questioned than in Justice Gorsuch’s “own concurrence to his own majority opinion” in Gutierrez-Brizuela. Like De Niz Robles, Gutierrez-Brizuela involves the same two immigration statutes, but the only difference is that Gutierrez-Brizuela filed a petition after Briones yet before Padilla-Caldera II that “declared Briones controlling and Padilla-Caldera I

85. Id. (citing U.S. Const. art. III, § 1; Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 94-95 (1993)).
86. See id. at 1167.
87. See id. at 1178.
88. Nolan, supra note 44, at 34.
89. See De Niz Robles, supra note 71, at 1172.
90. Nolan, supra note 44, at 33 (citing Gutierrez-Brizuela, supra note 8, at 1142).
effectively overruled.” Justice Gorsuch found that the BIA’s interpretation in *Briones* was not “legally effective” in the Tenth Circuit until the court said so. He even wrote that *Briones* was not “true legislative action.”

His reasoning was simple: the same principles in *De Niz Robles* applied to *Gutierrez-Brizuela*. And then, in his twenty-three-page concurrence, Justice Gorsuch again articulated three reasons why *Chevron* deference is incompatible with the Framers’ intent.

First, *Chevron* deference “risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law’s meaning … all without the inconvenience of having to engage the legislative processes the Constitution prescribes.” The Framers purposefully made the legislative process arduous to protect people’s reliance interests against the politicized executive agencies. *Chevron* deference’s capriciousness rattles “the settled expectations of people by changing policy direction depending on the agency’s mood at the moment.”

Second, *Chevron* deference shrinks a court’s job in interpreting the law. *Chevron* step I merely asks judges to decide whether Congress has directly spoken to the issue by going through the statutory text and legislative history, as if judges were secondary reviewers. In doing so, judges are not allowed to consider the ramification of deference

92. *Gutierrez-Brizuela*, supra note 8, at 1145.
94. *Gutierrez-Brizuela*, supra note 8, at 1145 (emphasis added).
95. *Id.* at 1151 (Gorsuch, J., concurring).
96. *Id.*
97. *Id.* at 1158.
with respect to the individuals’ legal rights.\textsuperscript{98} Similarly, \textit{Chevron} step II asks judges to only decide whether the agency’s interpretation is reasonable. Only after jumping these two hurdles, judges are finally granted an opportunity to independently interpret the law.\textsuperscript{99} To Justice Gorsuch, the Supreme Court dug its own grave by creating a doctrine for “the abdication of the judicial duty” in \textit{Chevron}.

Finally, \textit{Chevron} deference itself is flawed. As radical as it may sound, Justice Gorsuch argued that \textit{Chevron} step I asks the courts to do something that is simply impossible: inferring the intent of Congress composed of 535 members.\textsuperscript{100} By doing what is theoretically impossible under his legal philosophy of textualism and originalism, Justice Gorsuch worried that judges would “cherry pick [a]mong legislative history materials to support their preferred interpretation of the statute being construed.”\textsuperscript{101} Compared to going through pages of the Committee Reports often written by non-lawyer staffs to figure out what was going on behind the curtain,\textsuperscript{102} reviewing articulated precedents set by judges seems safer and less arbitrary to Justice Gorsuch. Such disbelief in legislative history should come as no surprise coming from a conservative Justice whose legal philosophy resembles that of Scalia.\textsuperscript{103} If there is only difference in their approaches to legislative history, while Justice Scalia completely rejected the use of

\begin{itemize}
\item \textsuperscript{98} See id. at 1152.
\item \textsuperscript{99} See id.
\item \textsuperscript{100} Id. at 1153 (citing Lexington Ins. Co. v. Precision Drilling Co., 830 F.3d 1219, 1221-22 (10th Cir. 2016); Kenneth A. Shepsle, \textit{Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron}, 12 INT’L REV. L. ECON. 239, 244-45 (1992)).
\item \textsuperscript{101} Nolan, supra note 44, at 27 (citing United States v. Hinckley, 550 F.3d 926, 946 (10th Cir. 2008) (Gorsuch, J., concurring); Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1184 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring)).
\item \textsuperscript{103} See supra note 3.
\end{itemize}
legislative history as illegitimate, Justice Gorsuch seems a little flexible in considering it in limited circumstances. The difference, however, only comes from the fact that Justice Gorsuch, as a circuit court judge, has been following the Supreme Court’s repetitive direction to employ legislative history when interpreting an ambiguous text.

In Gutierrez-Brizuela, Justice Gorsuch successfully brought the “elephant in the room” to the surface: the unpleasant delegation of judicial power to the Executive. Equipped with his judicial philosophy, he hammered down the elephant and made his stance clear, which led many scholars to believe Chevron deference’s dwindling future with Justice Gorsuch’s addition to the Supreme Court.

III. JUSTICE GORSUCH AND THE FUTURE SUPREME COURT

Justice Gorsuch’s administrative law jurisprudence well reflects his judicial philosophy that pays great respect to the Framers intent. No definitive statements can be made about the future direction of the Supreme Court solely on the basis of the trio of cases examined above. Such prediction on the general direction of the future Supreme Court is outside the scope of this Paper. The trio, however, does present valuable perspectives on the future direction of administrative law cases that will come before the nine Justices.

104. Nolan, supra note 44, at 26; see, e.g., Caplinger v. Medtronic, Inc., 784 F.3d 1335, 1346 (10th Cir. 2015) (using legislative history along with other traditional tools of statutory interpretation to discern Congress’ intent); Hinckley, supra note 101, at 946 (similar).
106. Gutierrez-Brizuela, supra note 8, at 1149.
Without the late Justice Scalia, the only one left on the bench who shares similar legal philosophy as Justice Gorsuch’s is Justice Thomas.\(^{107}\) In fact, a recent study showed that Justice Thomas is “by some measures the most conservative justice in the modern history of the Supreme Court.”\(^{108}\) With Justice Gorsuch’s addition, Justice Thomas’ conservative views on administrative law might gain some weight or even tip the balance.\(^{109}\) This is so especially because Justice Gorsuch served as a former law clerk to Justice Kennedy, “the longtime swing voter,” and will know how to persuade him to the right when the right case comes along.\(^{110}\)

That being said, Justice Gorsuch is likely to push harder on limiting or even overturning *Chevron* deference. Furthermore, the fact that the Supreme Court has been already questioning *Chevron* deference is only going to help him. For instance, during oral argument in *Esquivel-Quintana v. Sessions* on February 2017, Justice Kagan suggested that “there is some middle area where the Court gets to decide just what [i]t thinks is the best construction of the statute.”\(^{111}\) Justice Kennedy likewise said *Chevron*


\(^{110}\) *What Could Gorsuch Mean for the Supreme Court?*, POLITICO MAGAZINE (Feb 1, 2017), http://www.politico.com/magazine/story/2017/02/02/neil-gorsuch-supreme-court-future-214724 (citing Interview with Josh Blackman, a constitutional law professor at the South Texas College of Law in Houston).

deference should be limited to certain agencies with special expertise, such as “in regulating the environment or the forest service or fisheries or nuclear power.”

However, he doubted that the Immigration and Naturalization Services would have any expertise in interpreting the meaning of a criminal statute. Interestingly, Justice Sotomayor, the most extreme liberal among the sitting Justices, was the only one who seemed to firmly believe that the agency’s interpretation is “really the statute,” which shows her endorsement of the delegation doctrine. Therefore, it is fairly certain that when the right administrative law case comes before the Supreme Court, this decades-old doctrine might be seriously curtailed. And it leads to the next question: what will happen then? Justice Gorsuch did not forget to answer this question:

Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is. Of course, courts could and would consult agency views and apply the agency’s interpretation when it accords with the best reading of a statute. But de novo judicial review of the law’s meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election.

CONCLUSION

Justice Gorsuch’s judicial philosophy of originalism and textualism significantly affected his position on separation of powers in administrative law jurisprudence. It shaped his judicial

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112. See Transcript, supra note 111, at 38-39.
113. See id.
114. See Epstein et al., supra note 7, at 3.
115. See Transcript, supra note 111 at 18-19.
116. Gutierrez-Brizuela, supra note 8, at 1158 (emphasis added).
opinions as the Tenth Circuit judge and, as many scholars expect, will shape the future direction of the Supreme Court in gradual ways, as this youngest Justice is likely to serve on the bench for decades to come. In light of his recent decisions in *Nichols, De Niz Robles*, and *Gutierrez-Brizuela*, *Chevron* deference is likely to be the first one under scrutiny to restore the judicial power. Justice Gorsuch’s “demonstrated fidelity to the Constitution”\(^\text{117}\) shows that in due course he will vote to overturn *Chevron*.