In the Wake of *Chevron*’s Retreat
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It is time to take stock of *Chevron*’s retreat. The “*Chevron* two-step” framework for statutory interpretation asks first, whether Congress has answered the precise issue at hand, and second, in the face of congressional silence or ambiguity, directs courts to defer to permissible or reasonable agency interpretations. Recent U.S. Supreme Court opinions, eliding *Chevron* altogether or otherwise declining to defer, have led scholars to proclaim the “terminal” state of the venerable deference doctrine. Some have linked the Court’s hostility to its more general hostility toward the ever-encroaching administrative state. Knocking down *Chevron*, a pillar of the administrative state, promises to protect individual liberty against the alleged threat of over-regulation of the economy and health and safety.

Whether the Court is just in fact chipping away at *Chevron* or signaling its longer-term demise is a question that has attracted much commentary. But what I probe here is the hitherto unexamined issue of what lies in the wake of *Chevron*’s retreat. Unlike traditional approaches, this inquiry entails disaggregating—and then sharply distinguishing—two different ways the Court has retreated. The first, illustrated aptly by the Court’s decision in *King v. Burwell*, entails setting the *Chevron* framework aside, in that case under the so-called “major questions” exception. The move to dispense with *Chevron* altogether gives the court free reign to decide whether regulation comports with congressional statutes, without any input from the underlying regulator whatsoever. By placing more questions outside *Chevron*’s domain at what has been termed the “*Chevron* Step Zero” inquiry, the Court would seem to be situating itself at the helm of a longer-term de-regulatory project.

But there is a second form of retreat—one that is conceptually and fundamentally distinct, and complicates the simplistic anti-regulatory agenda so often ascribed to the Court. This seeming rollback of *Chevron* deference makes room for judicial scrutiny of agency policy-making discretion under the *State Farm* “hard look” review doctrine. Such a *Chevron* retreat thus entails not judicial usurpation of the agency’s role in statutory interpretation, but instead judicial oversight of the reasoned decision-making of the underlying regulator. *State Farm* is, after all, a second pillar of the administrative state. Its relationship vis-à-vis *Chevron* is controversial. Some courts and scholars suggest acoustic separation, with *Chevron* deference applying to the “legal” domain of statutory interpretation and *State Farm* hard look review governing the “policy” sphere of agency actions. Others see hard look review “as a kind of Step Three,” by which courts scrutinize the agency’s exercise of policy-making authority after analyzing it under the two-step *Chevron* framework. Still others argue persuasively that the analytical inquiry called for at *Chevron*’s Step Two—where, having found congressional silence or ambiguity, courts look to the agency’s interpretation—is one that necessarily incorporates and is guided by *State Farm* “hard look” review of whether agency action is “arbitrary or capricious” under the Administrative Procedure Act.

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Michigan v. EPA embraces this interplay between Chevron and State Farm. The majority rejects an EPA regulation at Chevron Step Two—finding the agency’s interpretation of “appropriate and necessary” statutory language unreasonable—while simultaneously relying on State Farm to bolster its determination that the EPA’s failure to consider costs as part of its threshold decision to regulate was unreasonable.

This second form of Chevron retreat—one that opens the gates for the application of State Farm—is fundamentally distinct from setting Chevron aside. It acknowledges that the realms of discretionary agency action, like rulemaking and agency statutory interpretation, can and should be inextricably linked—as is well illustrated by questions pertaining to the role of cost-benefit analysis in agency regulation. Moreover, prospects for improved regulations, with agencies responding to the specter of heightened judicial scrutiny by improving internal decision-making processes, are a most beneficial side effect of this type of Chevron retreat.