CHEVRON UNDER SIEGE

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I. INTRODUCTION

The issues raised by some Justices' stated desire to overrule *Chevron U.S.A., Inc. v. NRDC, Inc.* affect a broad swath of law and society. They are central to larger debates about overregulation, the proper role of textualism in statutory interpretation, and whether, when, and how much courts should defer to agency interpretations of statutes. These issues affect us all, because "virtually every critical government decision that affects our lives" comes out of the administrative agency process: "the air we breathe, the water we drink, the bills for our latest hospital stay, the health or safety of our workplace, the parklands we recreate in, the price of gas."[1] *Chevron* matters.[2]

Outlined in Part II are *Chevron*'s signature rules and the objections to them. The objections include constitutional claims, textualism, the "major question" doctrine, and others. These criticisms are part of a larger conservative political, judicial, and academic attack on the post-New Deal regulatory state.[3] Overregulation is a problem that should be addressed, as

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[1] Patricia M. Wald, Thirty Years of Administrative Law in the D.C. Circuit, Address Before the Administrative Law and Agency Practice of the D.C. Bar (July 1, 1997), *in* 11 Pike & Fischer's Adlaw Bulletin No. 13, at 1, 1 (1999).

[2] *See* Kent Barnett, Christine L. Boyd & Christopher J. Walker, *Chevron Patterns in the Circuit Courts*, 43 ADMIN. & REG. L. NEWS, Summer 2018, at 4 (summarizing survey findings that "*Chevron* deference matters" because "agency-win rates are meaningfully different under different standards of review" so "debates over *Chevron* are worth having."); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (survey of all 2,272 U.S. Circuit Court decisions citing *Chevron* from 2003–2013, finding agency win rates vary by deference standard, ranging from 77.4% under *Chevron* deference (with 39.0% winning after *Chevron* step one and 93.8% after step two) to 56.0% under *Skidmore* deference to 38.5% under de novo review).

[3] *See* Gilliam F. Metzger, *1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 2 (2017); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015) (reviewing the spectrum of assaults now being made on the legitimacy of executive branch power and the administrative state); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (reviewing JOHN D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN

discussed in Part III. Yet a major thesis of this article is that the attacks on *Chevron* are overbroad. The constitutional objections to *Chevron*'s common law principles, in particular, are overstated. Textualism's critiques of *Chevron* rest, at bottom, on the doubtful claim that courts applying *Chevron* commonly err by placing statutory text, legislative history, and *Chevron* agency views all on the same footing. That calls for clarifying the principles of statutory construction, not jettisoning *Chevron*. While some favor kneecapping *Chevron*'s significance with the major question doctrine, that doctrine is subjectively defined, biased against regulation, and unreliable as an arbitrator of agency power.

Chevron's critics are short-sighted in seeking to cripple the institutional powers of agencies. Whichever political party holds the White House will want its president to be able to exercise effective executive branch agency power to achieve his or her legitimate policy objectives. But this would be harder to achieve—for any president—under a textualist approach or the "major question" doctrine, as opposed to under *Chevron*. At the same time, *Chevron*'s regime provides meaningful checks on abuses of agency power. These principles are illustrated by several pending high-profile cases—on Net Neutrality, the Obama program known as Deferred Action for Childhood Arrivals (DACA), and the Obama Clean Power Plan now being repealed and replaced—that are discussed below in Part IV. Observers also note that effective agency power is important to support reasonable health, safety, and environmental regulation.

Textualism, with its "objective reader" approach that presupposes that there is a single best meaning for a statute,[4] limits the field of operation for *Chevron* and opportunities for agencies to adopt new or changed statutory interpretations to justify new regulatory action. Over-extrapolating far beyond its origins in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[5] the new textualism is a distinct minority theory that seeks to bar any reliance on

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REPUBLIC (2017)). *See also* Jeremy W. Peters, *New Litmus Test for Trump's Court Picks: Taming the Bureaucracy*, N.Y. TIMES, Mar. 28, 2018, at A1 ("With surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and regulations, often without being subject to judicial oversight.").

[4] Textualism in statutory interpretation should be distinguished from "originalism" in interpreting the Constitution. They are similar in that they both seek the understanding of the reader/ratifier at the time of enactment. But textualism eschews any reliance on legislative history to interpret statutes, while originalism relies extensively on secondary materials, beyond the constitutional text, to establish meaning. Textualists do not claim sovereignty over constitutional issues because there are many important parts of the Constitution that do not mean what a strict textualist might say they mean. *See* David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 2, 2–5, 16–17 (2015). For example, the First Amendment says: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. No one today argues that that language is confined to Congress, leaving the executive branch free to make rules suppressing free speech.

[5] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

committee reports, sponsor statements, and other legislative history to inform statutory interpretation. By doing so, it zealously seeks to cut back "activist" statutory interpretations by courts and agencies that might provide a springboard for new regulation. But textualism is deeply flawed, as discussed in Part II.C.3. Ambiguity in statutory language is both common and inevitable.[6] Textualists' exclusive focus on statutory text does not solve the problem of how to interpret ambiguous statutory texts.

Other recent attacks on *Chevron*, such as those invoking the Court's recent decisions on cost consideration and the major question doctrine, are discussed in Part II.D. In *Michigan v. EPA*, the Court announced general principles of cost consideration that apply (by virtue of the APA) to all agency rulemaking cases, subject to Congress setting a different cost-consideration standard in a particular statute.[7] This is consistent with *Chevron*. The occasionally-invoked major question doctrine—that some decisions are too critical to leave to agencies, absent clear legislative authorization—is subjective, and often inaccurate, as discussed in Part II.D.2.

Overregulation should be addressed by means other than jettisoning *Chevron*. The White House and congressional critics of *Chevron* so far have had limited impact in reducing overregulation. They have utilized the Congressional Review Act of 1996[8] to override more than a dozen recently-enacted Obama-era regulations. But the major proposals to address overregulation in the 115th Congress were flawed because they focused on stripping or hamstringing federal agency rulemaking power. That approach might simply incentivize agencies to announce rules in piecemeal fashion through case-by-case adjudications rather than through general rules.[9] That would make regulatory compliance more difficult, not less difficult, for regulated parties. Those proposals were not enacted in the 115th Congress.

The Trump Administration's attempts to control agency rulemaking, including its "two-for-one" Executive Order 13771 encouraging deregulation, are discussed in Part III. Other countries' experiences with regulatory budgets are noted, as well as suggestions from the RAND

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[6] *See, e.g.*, EDWARD H. LEVI, INTRODUCTION TO LEGAL REASONING 6 (1949) ("It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three.").

[7] Michigan v. EPA, 135 S. Ct. 2699 (2015).

[8] 5 U.S.C. §§ 801–808 (2012).

[9] *See* Edwin E. Huddleson, Letter to the Editor, *Restoring the Lawful Separation of Powers*, WALL ST. J., Jan 7–8, 2017, at A12. *See also* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947). To avoid "stultify[ing] the administrative process," the Court held, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation [must be] one that lies primarily in the informed discretion of the administrative agency." *Id.*

Corporation and others for improving the Trump Administration's regulatory budget approach.

Part V argues that *Chevron* should survive in the future, both in the short term as a matter of politics favoring agency rulings issued by the Trump Administration, and in the long term because it "more accurately reflects the reality of government, and thus more adequately serves its needs."[10] The Supreme Court may well adjust *Chevron*'s common law principles to alleviate concerns about overly "reflexive" court deference to agency views. This may well cut back judicial deference and agency win rates in contested cases. But the more important issues for the future of executive branch agency power will be whether the Court embraces the major question doctrine or extreme textualism's narrow reading of agency statutory power. If the Court adopts either of those theories, it could dramatically change the status quo and result in invalidating many more agency rules.

II. *CHEVRON* AND ITS CRITICS

Traditional tools of statutory construction include examination of the statute's text, structure, context, and legislative history; consideration of the statute's object, policy, and consequences, and the need to construe the statute to avoid absurd or bizarre results;[11] as well as *Chevron* deference to the views of the agency administering a less-than-completely clear statute. There are disagreements, however, about the precise meaning of these principles and how they fit together.

A. Chevron *Basics: Brand X and Home Concrete*

Ordinarily, the administrative agency that administers a statute enjoys some discretion in interpreting its meaning, so that courts will defer to the agency's reasonable construction.[12] (Courts have also deferred to an

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[10] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

[11] *See, e.g.*, Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984); Intel Corp. v. Advanced Micro Devices, 542 U.S. 241 (2004); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991); Train v. Colorado Pub. Interest Research Grp., Inc., 426 U.S. 1 (1976); Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1067–68 (D.C. Cir. 1998); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 470–73 (1994); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 206 (1967); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71 (1994). *See generally* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

[12] Even an agency's interpretation of the scope of its own statutory authority (that is, its

agency's reasonable interpretation of its own ambiguous regulations).[13] In

jurisdiction) is entitled to *Chevron* deference. *See* City of Arlington v. FCC, 569 U.S. 290 (2013). Yet the courts owe no *Chevron* deference to an agency's interpretation of a statute where the agency's pronouncement is not issued in a formal adjudication or as a formal rule with "lawmaking pretense." *See* United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (holding that agency policy statements and enforcement guidelines, which lack the force of law, fall outside the scope of *Chevron*'s analytic framework). *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–09 (2006). A court owes no deference to the prosecution's interpretation of a criminal law. *See, e.g.*, Abramski v. United States, 573 U.S. 169, 191 (2014). Where an agency's statutory interpretation targets an area in which it has no jurisdiction, such as the scope of judicial review, no *Chevron* deference is appropriate. *See, e.g.*, Smith v. Berryhill, 139 S. Ct. 1765, 1778–79 (2019). Nor is *Chevron* deference owed to an agency interpretation of statute A that limits the scope of another statute B (*e.g.*, the Arbitration Act) that it does not administer. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). Nor does *Chevron* deference apply where more than one agency administers the statute (*e.g.*, the Freedom of Information Act), or where both the agency and private parties may sue to enforce the statute (*e.g.*, the Superfund statute) in a dual government/private enforcement scheme. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990); Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994); Kelley ex rel. Michigan v. EPA, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995). The Court also may soon clarify that *Chevron* deference does *not* apply to an agency's interpretation of a disputed contractual term. *See* Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2 (2017) (statement of Gorsuch, J., with Roberts, C.J., and Alito, J., respecting the denial of certiorari). *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001). Outside of *Chevron's* analytic framework, also, are decisions committed to agency discretion by law. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[13] *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). Even the agency's brief on appeal (even an *amicus* brief presented by the agency itself, as opposed to separate appellate counsel's "*post hoc* rationalizations") may supply the controlling interpretation of an ambiguous regulation or additional support for a challenged agency rule or regulatory interpretation, if it reflects the agency's "fair and considered judgment" that is not plainly erroneous or inconsistent with the regulation. *See, e.g.*, Decker v. Nw. Env't Def. Ctr., 568 U.S. 597 (2013); Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 207–08 (2011). *Cf.* Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) (rejecting agency interpretation that was plainly inconsistent with its own regulation).

After considering extensive criticisms of *Auer* and *Seminole Rock*, the Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), declined to overrule those cases. *Kisor* involved a Veterans Administration interpretation of its own regulation that denied Marine veteran James Kisor over twenty-two years of retroactive veterans benefits for post-traumatic stress disorder. The lower court upheld the VA's denial on the basis of *Auer*. Relying on stare decisis, the Supreme Court majority reaffirmed *Auer* while clarifying and narrowing its scope. The Court vacated and remanded for the lower court to first directly interpret the VA regulation at issue before considering *Auer* deference. Justice Kagan's majority opinion for five Justices (discussed below in Part III.B.) catalogues the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. To the dissenters, the majority's "newly retooled, multi-faceted, and far less determinate version of *Auer*" embellished the doctrine "with so many new and nebulous qualifications that [it] emerges maimed and enfeebled—in truth, zombified." *Id.* at 2425 (Gorsuch, J., concurring). Yet earlier opinions already significantly limited the scope of *Auer-Seminole Rock* deference. They already made it clear that the Court will take into account factors such as whether the agency regulation is vague and open-ended; whether it simply "parrots" the words of a statute; whether it conflicts with a prior agency interpretation or creates "unfair surprise"; and whether it is "nothing more than a convenient litigating position." *See* Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., and Alito, J., concurring, Scalia, J., concurring in part);

assessing the validity of the administrating agency's interpretation of a statute, the courts apply *Chevron*'s famous two-step test. They begin (in step one) by asking "whether Congress has directly spoken to the precise question at issue."[14] If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[15] Yet if the court finds that "the statute is silent or ambiguous with respect to the specific issue, then the court proceeds to step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[16] Though not all judges agree, many courts view the "arbitrary and capricious" standard of the Administrative Procedure Act (APA) as governing whether an agency interpretation is "a permissible construction

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Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring). The United States Government argued in *Kisor* that *Auer* deference should be clarified and narrowed, but not overruled. Other critics of *Auer-Seminole Rock* argued that those cases violate section 706 of the Administrative Procedure Act (APA) directing reviewing courts (not agencies) to decide the meaning of an "agency action"; that they are more difficult to justify on the basis of implicit congressional intent than *Chevron*; that when a court gives controlling weight to an agency's informal interpretation of its own regulations under *Auer-Seminole Rock* it short-circuits the "incentive" structure of the APA requiring notice-and-comment legislative rulemaking (as opposed to informal interpretative agency pronouncements) to create legally binding rules; that *Auer-Seminole Rock* deference should be replaced with non-mandatory *Skidmore* deference (a "persuasiveness" standard, considering multiple factors); and that "the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J. concurring in part and dissenting in part). But these claims were unavailing. *See, e.g.*, *Kisor*, 149 S. Ct. at 2422 ("[E]ven when agency activities take legislative and judicial forms," this "does not violate the separation of powers" because "they continue to be exercises of the executive power.") (internal quotations omitted). To its defenders, *Auer* deference is a common law doctrine that courts have developed over many years through the normal case-by-case method with tailored responses to counter any potential misuse. All agree that *Auer-Seminole Rock* deference stands on a different footing than *Chevron* deference. *See id.* at 2424 (Roberts, C.J., concurring); *id.* at 2425 (Gorsuch, Thomas, and Kavanaugh, JJ., concurring in the judgment).

[14] *Chevron*, 467 U.S. at 842.

[15] *Id.* at 842–43. "[T]raditional tools of statutory construction" should be employed, *Chevron* instructs, to ascertain whether "Congress had an intention on the precise question at issue." *Id.* at 843, n.9. *Compare* Nicholas R. Bednar & Kristin E. Hickmann, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017) (asking, "Which Tools of Statutory Interpretation, and When?"). While courts and commentators have exhaustively dissected *Chevron*, Justice Stevens has commented that his opinion in *Chevron* was simply a fair summary of well-settled common law principles of administrative law. *See* TODD GARVEY, CONG. RES. SERV., R41260, THE JURISPRUDENCE OF JUSTICE JOHN PAUL STEVENS: THE *CHEVRON* DOCTRINE 3 (2010). This is consistent with the original legislative understanding of the APA's scope-of-review provisions. *See infra* note 261 and accompanying text. Given that administrative law covers nearly the entire spectrum of human activity, *see* Henry J. Friendly, *New Trends in Administrative Law*, MD. BAR. J. 9 (1974), it is not surprising that *Chevron*'s two-step analysis would be restated, questioned, supplemented, refined, and developed with the identification of exceptions ("step zero") and nuances (*Chevron* step 1.0, 1.5, and 2.0?), and a renewed recognition of older, different standards that apply where *Chevron* does not apply (*Skidmore* "persuasiveness" or *Christensen* deference) in the myriad different fact settings that are presented by the cases.

[16] *Chevron*, 467 U.S. at 843.

of the statute."[17]

Within reasonable limits, an agency may switch positions about the meaning of a statute that is susceptible to more than one reasonable interpretation. Under *FCC v. Fox TV Stations, Inc.*, when an agency changes position, it must indicate its awareness that it is changing position and that there are good reasons for the new policy. It should explain its choice if "its new policy rests upon factual findings that contradict those which underlay its prior policy" and it should account for any "serious reliance interests" on the old policy.[18] But an agency need not demonstrate to the satisfaction of a reviewing court that the reasons for the new policy are better than the reasons for the old one.[19] Moreover, agency action is not subject to a "heightened" or more searching standard of court review simply because it represents a change in administrative policy.[20] With its decisions in *National Cable & Telecommunications Ass'n v. Brand X Internet* and *United States v. Home Concrete & Supply, LLC* the Court ruled that agencies may adopt their own interpretation of a statute, different from what earlier court decisions have approved,[21] but only where the earlier court decisions left open alternative interpretations and did not declare the one-and-only, "once-and-for-always" true definition of what the statute means.[22]

B. Criticisms from the Justices

1. The *Marbury v. Madison* Critique

Several Justices have objected to *Chevron* on the ground that it undermines the basic principle that courts (and not agencies) should be the ones to "say what the law is."[23] But as stated by Professor Louis B. Jaffe

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[17] *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 52–53, 52 n.7 (2011); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.")

[18] FCC v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009).

[19] *Id.*

[20] *Id.* at 514.

[21] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet, 545 U.S. 967 (2005).

[22] *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) (refusing to extend *Chevron* deference to a Treasury regulation that was based on a statutory construction that was foreclosed by an earlier Supreme Court decision that left no room for any different construction by the agency).

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *See* BNSF Ry. Co. v. Loos, 139 S. Ct. 893,

years ago:

> The judicial power to 'say what the law is' is fully satisfied and exhausted by the courts' power to determine whether the law has committed interpretive authority to an agency. As to factual questions . . . as to legal questions . . . and as to procedural questions . . . judicial review, although independent, decides that the law itself, rightly understood, is best taken to cede judicial authority to agencies.[24]

What *Chevron* and *Brand X* do is articulate judicially enforceable common law limits on these principles. An agency's statutory interpretation will be accepted by a reviewing court, only so long as it is not preempted by "the unambiguously expressed intent of Congress,"[25] and only so long as it is "a permissible construction of the statute,"[26] and only so long as it is not foreclosed by an earlier court decision conclusively declaring the one-and-only "once-and-for-always"[27] interpretation of the statute. Nothing in *Chevron/Brand X* destroys the Judiciary's "checking power"[28] to enforce these limits. Whether and exactly how the common law should sharpen and refine these limiting principles is the question.

Other articulations of the *Marbury v. Madison* criticism assert that *Chevron* is unconstitutional because courts have an Article III duty to exercise their own "independent judgment" in interpreting a statute.[29] As

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904–09 (2019) (Gorsuch and Thomas, JJ., dissenting); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, Thomas, and Kavanaugh, JJ., concurring in the judgment) (stating that there are "serious questions" about *Chevron's* constitutionality and its compatibility with the APA). *See also* City of Arlington v. FCC, 569 U.S. 290, 316–22 (2013) (Roberts, C.J., Kennedy, and Alito, JJ., dissenting) (objecting to *Chevron* deference to an agency's statutory interpretation that would define the scope of the agency's own jurisdiction and statutory authority); Lorenzo v. SEC, 872 F.3d 578, 600–02 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (criticizing *Chevron* and current law's "agency-centric process"), *aff'd*, 139 S. Ct. 1094 (2019); Brett M. Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. (Feb. 1, 2018), https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf (stating that "judges should strive for the best reading of the statute," instead of agonizing over whether a statute is ambiguous enough to open up *Chevron* deference to an agency's reasonable (but not optimal) statutory interpretation).

[24] *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2475, 2478 (2017).

[25] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

[26] *Id.*

[27] Garfias-Rodriguez v. Holder, 702 F.3d 504, 515–16 (9th Cir. 2012) (en banc).

[28] Baldwin v. United States, No. 19-402, 589 U.S. __, slip op. at 4 (Feb. 24, 2020) (Thomas, J., dissenting from the denial of certiorari).

[29] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). *See also* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch and Thomas, JJ., dissenting) (criticizing *Chevron*, noting "mounting criticism of *Chevron* deference" and stating that parties should receive "an independent judicial interpretation of the law"). Relying on the "independent judgment" argument that courts alone must interpret statutes, some state courts have rejected *Chevron* in their review of state administrative

Professor Jonathan Siegel notes, however, *Chevron* deference properly understood does not prevent courts from interpreting statutes: "An interpretation that determines that a statute delegates power to the executive is still an interpretation."[30]

2. Justice Thomas

Justice Thomas's concurring opinion in *Michigan v. EPA* states that the Court should reconsider the broader question of whether, when, and why the Court should ever defer to agency interpretations of federal statutes.[31] Under *Chevron* deference, when courts defer to an agency's interpretation of an ambiguous statute, the courts say they are deferring to any plausible agency interpretation (not "the best" interpretation). According to Justice Thomas, this calls into question the courts' ultimate authority to "say what the law is."[32] Moreover, "agencies interpreting ambiguous statutes typically are not engaged in acts of interpretation at all" but instead are engaged in the "formulation of policy," filling in gaps based on policy judgments made by the agency (not Congress) about which policy goals the agency wishes to pursue.[33] In Justice Thomas's view, this is a "potentially unconstitutional delegation" of Congressional power to an executive branch agency.[34]

These objections to *Chevron* have been largely rejected by the Court to recognize the practical needs of the modern administrative state.[35] Merrick

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interpretations. *See, e.g.*, Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21 (Wis. 2018); King v. Miss. Military Dep't, 245 So.3d 404 (Miss. 2018); Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558 (2014).

[30] Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 942 (2018). *Accord* City of Arlington v. FCC, 569 U.S. at 317 (2013) (Roberts, C.J., dissenting) (explaining why *Chevron* deference comports with the judicial review provisions of the APA in 5 U.S.C. § 706).

[31] *See Michigan*, 135 S. Ct. at 2712–14 (Thomas, J., concurring).

[32] *Id.* at 2712 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)). *See also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring) (stating that the judiciary "is duty bound to exercise independent judgment in applying the law" and that *Seminole Rock* deference "undermines the judicial 'check' on the political branches"); PDR Network, LLC v. Carlton Harris Chiropractic, Inc., 139 S. Ct. 2051, 2056–57 (2019) (Thomas and Gorsuch, JJ., concurring) (suggesting that insofar as *Chevron* requires judicial deference to certain agency statutory interpretations, it is unconstitutional). Justice Thomas authored the majority opinion in *Brand X*—one of the strongest affirmations of *Chevron*—but he has since disavowed it. *See Baldwin*, slip op. at 2 (Thomas, J., dissenting from the denial of certiorari).

[33] *Michigan*, 135 S. Ct. at 2712–13 (Thomas, J., concurring).

[34] *Id.* at 2713.

[35] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372–74 (1989) (describing current law rejecting or severely limiting the nondelegation doctrine: Congressional statutes may allow the executive to make new rules of general applicability, so long as the legislation contains an "intelligible principle" that "clearly delineates the general policy" the agency is to apply and "the boundaries of [its] delegated authority"); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.3.2 (6th ed. 2019) (surveying criticisms of *Chevron*); *id.* at § 2.6 (canvassing the history of the nondelegation doctrine). Nondelegation doctrine might be revisited by the Court in the future. But at

B. Garland, now Chief Judge of the D.C. Circuit, points out that, in many statutory schemes:

> Congress plainly committed to agency discretion the choice of the best means of effectuating the statutory purpose. Adoption of a 'best' policy requirement would all but guarantee substitution of the court's judgment for that of the agency, and the consequent removal from the agency of the discretion Congress intended to confer.[36]

The statutes that give wide latitude to agencies to interpret what the law is—or to choose the best means of effectuating statutory purposes within bounds set by the statute—often do so in order to draw on agencies' technical and policy expertise in fast-changing areas. This helps avoid ossification of the statutory law by preserving flexibility for agencies to come to grips with changes in science, technology, and other new circumstances.

Chevron deference according to Justice Thomas is also "likely contrary to the APA."[37] This criticism overlooks the statutory text and legislative history of the judicial review section of the APA (5 U.S.C. § 706).[38] After canvassing that statutory history, four Justices in *Kisor v. Wilkie* held that the APA does not significantly alter the common law of judicial review of agency action.[39] *Chevron* reflects those common law principles.

The objections raised by Justice Thomas nevertheless confirm that some Justices are prepared to consider checks—including constitutional separation of powers claims, cost considerations, and the major question

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present a majority is not willing to do that. *See* Gundy v. United States, 139 S. Ct. 2116 (2019) (rejecting nondelegation challenge to a criminal statute delegating broad authority to the United States Attorney General); *id.* at 2130–31 (Alito, J., concurring) (stating a willingness to revisit nondelegation issues in an appropriate future case with a full Court, but noting that at present "a majority is not willing to do that"); *id.* at 2131–48 (Gorsuch, Roberts, and Thomas, JJ., dissenting) (supporting revitalizing the nondelegation doctrine, and complaining about "delegation run riot" in *Gundy*—even under the permissive standards of the past). *See also* Paul v. United States, 140 S. Ct. 342 (2019) (statement of Justice Kavanaugh on the denial of certiorari) (commenting that where "major policy questions" are concerned the nondelegation doctrine "may warrant further consideration in future cases").

[36] Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 560 (1985). *See also* Siegel, *supra* note 30, at 942 (explaining that where an agency statute is ambiguous, *Chevron* can be conceptualized as holding either (1) "that Congress has delegated the interpretive power to agencies," or (2) that "the court is to interpret the statute as creating a menu of permissible actions and delegating to the agency the power to choose among them," or (3) that statutory ambiguity confers agency "policymaking power" no different than "policymaking power conferred by express statutory language").

[37] *Baldwin*, slip op. at 4–5 (Thomas, J., dissenting from the denial of certiorari).

[38] *See infra* note 264. The statutory text and history of APA § 706 also rebut Justice Thomas' view that "there is no historical justification for deferring to federal agencies" and that "*Chevron* is inconsistent with accepted principles of statutory interpretation." *Baldwin*, slip op. at 5–8 (Thomas, J., dissenting from the denial of certiorari).

[39] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2419–2422 (2019).

doctrine—on executive branch assertions of agency power under general statutory grants of authority.

3. Justice Gorsuch

One part of the *Chevron* regime that has received particularly harsh criticism concerns whether agencies may "overrule" a court's interpretation of a statute.[40] But this criticism by Justices Gorsuch and Thomas—that *Chevron* improperly allows agencies to "overrule" courts—is unpersuasive because it overlooks the principles stated in *Brand X* and *Home Concrete*.

Brand X and *Home Concrete* hold, as noted above, that an agency may change its interpretation of a statute, switching among valid options to adopt a different construction within reasonable limits allowed by the statute, even if the agency's new interpretation is different from earlier judicial interpretations.[41] This option and flexibility exists for the agency, however, only so long as the courts have not earlier declared definitively that the statute has one and only one true meaning.[42] While agencies can, and occasionally do, deliberately go into conflict with the "once-and-for-always" statutory interpretations of a lower court, hoping for a more favorable ruling from a different court and (ultimately) the United States Supreme Court, they are not permitted to disagree with the "once-and-for-always" statutory interpretations of the Supreme Court.[43] In short, *Brand X*

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[40] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143, 1150 (10th Cir. 2016). In *Gutierrez-Brizuela*, Judge (now Justice) Gorsuch criticizes *Chevron* and *Brand X* on the ground that those cases improperly allow agencies to "overrule a judicial precedent in favor of the agency's preferred interpretation." *Id.* at 1143. *See also* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 43 (2019) (criticizing the Tenth Circuit's decision in *De Niz Nobles* on the same ground—i.e., that the court of appeals in that case improperly allowed "an *executive* agency [to] claim[] the power to overrule a *judicial* decision" (emphasis in original)); *id.* at 75, 77–79, 83 (arguing at length that *Chevron* and *Brand X* should be overruled because those decisions improperly allow agencies to "overrule," "overturn," or "alter and amend" court decisions about the meaning of statutes); *Baldwin*, slip op. at 8–11 (Thomas, J., dissenting from the denial of certiorari) ("*Brand X* likely conflicts with Article III of the Constitution" because "*Brand X* gives agencies the power to effectively overrule judicial precedents."). This view echoes that of Republicans who do "not just target *Chevron*, *Skidmore* and *Auer*. They similarly do not like the *Brand X* doctrine, pursuant to which agencies have some authority to 'overrule' judicial interpretations of statutes." MICHAEL TIEN, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 74 (2016) (citing Orrin Hatch, *Press Release: Senate, House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review* (March 17, 2016) (on file with University of Louisville Law Review)).

[41] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (providing that within limits set by the statute, an agency may switch positions and adopt a new statutory interpretation, even one that is at odds with earlier non-mandatory court interpretations).

[42] *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) (refusing to give *Chevron* deference to a Treasury regulation that was based on a statutory construction foreclosed by an earlier Court decision that left no room for any different construction by the agency).

[43] *See, e.g.*, Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA, 891 F.3d 1041 (D.C. Cir. 2018)

and *Home Concrete* do *not* allow agencies to "overrule" courts.[44]

Justice Gorsuch has suggested that his Article III concerns might be mitigated if *Chevron* were interpreted simply as allowing agencies to engage in interstitial policy-making, within statutory bounds. But this would create a nondelegation issue, he suggests.[45] That view of nondelegation doctrine is unlikely to prevail under current law, unless a majority of the Court is willing to re-examine it.[46]

A well-settled limitation on *Chevron*—that clear statutory text trumps an agency's contrary interpretation—was invoked by Justice Gorsuch in *SAS Institute, Inc. v. Iancu* to reject the Patent Office's interpretation of a patent statute.[47] "[T]raditional tools of interpretation" left no room for the agency's view, the majority held.[48] Moreover, the Court stated that it would not "defer to an agency official's preferences because we can imagine some 'hypothetical reasonable legislator' would have favored that approach."[49]

(discussing the scope of permitted agency non-acquiescence to circuit court rulings); United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012) (providing an example of a Supreme Court decision that left no room for any different construction by the agency).

[44] *Contra Administrative Law—Chevron and Brand X—Tenth Circuit Holds that Certain Agency Interpretations Have No Legal Effect Until Courts Approve*, 130 HARV. L. REV. 1496, 1496 (2017) ("In effect, then, *Brand X* permits agencies to overrule courts when the circumstances are right."). The issue of whether a new permissible agency interpretation of a statute applies "retroactively"—raised in *Gutierrez-Brizuela*—is a separate issue. Ordinarily, a new permissible agency statutory interpretation or policy, first announced in an individual case, applies "retroactively" in that same adjudicative case where it is first announced, as well as prospectively to other cases from the date of its announcement. *See, e.g.*, HICKMAN & PIERCE, JR., *supra* note 35, at § 15.2. In cases where application of the new agency interpretation or policy would unfairly affect reasonable reliance interests that are based upon an earlier court interpretation or an earlier agency interpretation or policy—which Judge Gorsuch suggested was the case in *Gutierrez-Brizuela*—a reviewing court may find it arbitrary, capricious, and impermissible for the agency to apply its new statutory interpretation or policy in those "reliance" cases. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (holding that reliance interests of regulated parties can be considered on court review of a changed agency interpretive rule under the arbitrary and capricious standard of review). The court of appeals in *Gutierrez-Brizuela* could have found, directly and immediately, that application of the agency's new statutory interpretation was arbitrary and capricious as applied to the litigant who relied upon the court's earlier statutory interpretation. *See, e.g.*, Garcia-Martinez v. Sessions, 886 F.3d 1391 (9th Cir. 2018). The opinion remanding to the agency strongly suggests that that is what the agency should find on remand. Well-settled principles of administrative law thus support an equitable outcome in *Gutierrez-Brizuela*, without any need to dismantle *Chevron* or *Brand X*.

[45] *See Gutierrez-Brizuela*, 834 F.2d at 1152–56.

[46] *See* Gundy v. U.S., 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring). In *A Republic, If you Can Keep It*, Justice Gorsuch criticizes "*Chevron*'s inference about hidden Congressional intentions" to delegate, as opposed to "intentions Congress has made textually manifest." NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 80–83 (2019). There, he calls for overruling *Chevron*, or at least restricting it to cases involving explicit, narrowly defined Congressional delegations to legislative authority to an agency. *Id.*

[47] SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018).

[48] *Id.*

[49] *Id.* at 1358–59. This statement rejects Justice Breyer's dissenting view that:

In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-

Five Justices agreed that "whether *Chevron* should remain is a question we may leave for another day."[50] A month later, in *Epic Systems Corp. v. Lewis*, the same five Justices suggested that where "the canons supply an answer, *Chevron* leaves the stage."[51]

4. Justice Kavanaugh

Justice Kavanaugh is a textualist who states that, in determining whether *Chevron* step one or step two applies to court review of an agency action, he "probably appl[ies] something approaching a 65/35 or 60/40 rule. In other words, if [the statutory text] is 60/40 clear, it is not ambiguous, and I do not resort to [*Chevron* deference]."[52] He has criticized *Chevron* for encouraging over-aggressive policy making by agencies.[53] He acknowledges that "*Chevron* makes sense in certain circumstances, usually when it merges with *State Farm* doctrine," in determining the meaning of broad, open-ended statutory terms.[54] An example is Congress delegating authority to an agency "to prevent utilities from charging 'unreasonable' rates."[55] But he decries "the ambiguity trigger in statutory interpretation" that ushers in *Chevron* deference to agency views.[56] This is because

> [t]he simple and troubling truth is that there is no definite guide for determining whether statutory language is clear or ambiguous. . . . We

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> letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. . . . Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.

Id. at 1364 (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.). Justice Kagan did not join that part of Breyer's dissent, perhaps because of her view that executive branch line agencies should be allowed to reflect the view of the President. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[50] *SAS Inst. Inc.*, 138 S. Ct. at 1358.

[51] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

[52] Judge Brett Kavanaugh, *The Joseph Story Distinguished Lecture*, HERITAGE FOUND. 23:45 (Oct. 25, 2017), https://www.heritage.org/josephstory2017.

[53] *See* Judge Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017) ("To begin with, the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.")

[54] *Id.* at 1912.

[55] *Id.*

[56] *Id.* at 1919.

> cannot eliminate all ambiguity in statutes. But we can stop using ambiguity as the trigger for applying these canons of statutory interpretation. In my view, judges should strive to find the best reading of the statute, based on the words, context, and appropriate semantic canons of construction.[57]

Only then would he look at substantive canons of statutory construction such as legislative history (which he would check only to avoid "absurdity").[58]

A further critique of *Chevron* and current modes of statutory interpretation appears in Justice Kavanaugh's book review, *Fixing Statutory Interpretation*.[59] There he writes:

> In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. Moreover, the question of when to apply *Chevron* has become its own separate difficulty. . . . The key move from step one (if clear) to step two (if ambiguous) of *Chevron* is not determinate because it depends on the threshold clarity versus ambiguity determination.[60]

Justice Kavanaugh argues that "some ambiguity-dependent principles of interpretation should be applied as plain statement rules."[61] These clear statement rules include the presumptions that statutes do not apply extraterritorially, that they do not effectuate implied repeal of other statutes, that statutes do not eliminate mens rea requirements, that they do not apply retroactively, and that statutes do not directly alter the federal-state balance unless Congress expressly so states.[62]

Justice Kavanaugh supports the major question doctrine (which he calls the "major rules" doctrine) as a check on executive branch agency action that is not clearly authorized by congressional statute.[63] While criticizing the difficulty of applying *Chevron*'s inquiry into whether a statute is "clear," he endorses the same "clear statute" test to affirmatively establish an agency's

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[57] *Id.* at 1910–13. *Accord* Kavanaugh, *supra* note 23.

[58] *See* Kavanaugh, *supra* note 52, at 39:45–40:15.

[59] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[60] *Id.* at 2150–52.

[61] *Id.* at 2154.

[62] *See id.* at 2154–55.

[63] *See* United States Telecomm. Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017) (rejecting a challenge to the FCC's net neutrality rule); *id.* at 426 (Kavanaugh, J., dissenting) (arguing that, under the major question doctrine, the FCC lacked authority to issue its net neutrality rule); Kavanaugh, *supra* note 52, at 49:30–52:30 (discussing the "major rules" exception to *Chevron*).

authority to act on "major questions"—with an apparent presumption against agency authority.[64] He acknowledges that there are difficulties in defining what is a "major question" (the amount of money at stake? or number of people affected?).[65]

All of these judicial criticisms of *Chevron*, coinciding with Republican Party objections to President Obama's expansive use of executive branch agency power, may or may not persist now that the White House is occupied by President Trump, a Republican. The sweeping objections to *Chevron*, voiced by some Justices, if accepted, would make it more difficult for any President to implement his or her legitimate policy views. This is so for the Trump Administration in such areas as Net Neutrality, DACA, and the Clean Power Plan, as discussed below in Part IV. In their zeal to attack overregulation by agencies in the Obama era, the critics of *Chevron* would diminish the power and flexibility of agencies across-the-board, seriously eroding presidential power.

C. Textualism's Objections to Chevron

1. A Textualist Primer

Textualism argues that judges should interpret statutes by looking at the semantic meaning of the enacted statutory text, and should reject legislative history as authoritative evidence of legislative intent or purpose.[66] According to the conventional wisdom, textualism emerged in the early 1980s, when Justice Antonin Scalia of the Supreme Court and Judge Frank Easterbrook of the Seventh Circuit began spinning out theories of statutory interpretation that focus on statutory text to the exclusion of legislative

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[64] *See* Kavanaugh, *supra* note 59, at 2135.

[65] *See* Kavanaugh, *supra* note 52, at 51:50–52:10.

[66] *See, e.g.*, John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1288 (2010) (reviewing the history of textualism in statutory interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 640–56 (1991) (describing the tenants of the new textualism). Professor Merrill adds:

> Textualism is not simply a revival of the old plain meaning rule. It is a sophisticated theory of interpretation which readily acknowledges that the meaning of words depends on the context in which they are used. The critical assumption is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were. In practical terms, the principal implication of this ordinary reader perspective is to banish virtually all consideration of legislative history from statutory interpretation.

Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 351–52 (1994).

committee reports and sponsors' statements.[67] They claimed that textualism is a more objective method of interpretation than intentionalism, because it focuses on what the ordinary reader of the statute would have understood, with less "agency-liberating ambiguity."[68]

"We're all textualists now," Justice Kagan has stated.[69] But the statutory text is not the be-all and end-all of statutory interpretation. Textualism has influenced the way that the Supreme Court has written its opinions, particularly during Justice Scalia's tenure.[70] But more recent statistical surveys of the High Court's opinions,[71] and a 2016 interview with Justice Stevens, cast doubt on claims about "the rapid spread of textualism

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[67] *See, e.g.*, Manning, *supra* note 66. Textualists contend that multi-member legislative bodies possess no collective intent, and that committee reports and sponsors' statements do not in any case, accurately reflect legislative intent. Furthermore, textualists note, such legislative history does not emerge from the constitutionally mandated process of bicameralism and presentment. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 675 (1997).

[68] Scalia, *supra* note 10, at 521. *See also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). Over time, textualists' supporting theories shifted and evolved in response to criticism, to include (1) interest group theory, which argues that members of Congress, staff, and interest groups manipulate and distort legislative history so that it does not reliably speak for Congress as a whole; (2) social choice theory, which argues that legislative outcomes frequently depend on voting sequence (agenda control) and strategic voting (including logrolling) rather than substantive policy preferences, which suggests that legislative bodies might not have a coherent intent on any question not clearly articulated in the statutory text, *see e.g.*, Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) (warning against confusing one individual legislator's purposes with the reasons for the collective group decisions, and legislative compromises, of the legislature as a whole which are reflected in the statutory text); (3) constitutional concerns emphasized by Justice Scalia starting in the 1990s such as bicameralism and presentment, the structuring of legislative power, and related concerns about nondelegation from Congress to its committees and individuals; and (4) the "second-generation textualism" idea that courts must enforce a clearly worded statutory text even when its semantic import does not fully capture the statute's apparent purpose. *See, e.g.*, Manning, *supra* note 66, at 1292–1305; Manning, *supra* note 67, at 684–89.

[69] Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* 8:28, Address Before the Harvard Law School (Nov. 17, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/. *See also* GORSUCH, *supra* note 44, at 144 ("[T]extualism has come to dominate the interpretation of statutes today.").

[70] Thus some Court watchers proclaimed, in 1994, that statutory textualism was "ascendant" in the United States Supreme Court, based on statistical surveys showing that the High Court's opinions from 1981–1992 made a declining number of references to legislative history and *Chevron*: "Textualism is clearly ascendant. The use of legislative history (a disfavored tool among textualists) is dropping precipitously, while the use of dictionaries (a favored tool) is moving up. The *Chevron* doctrine, in contrast, is not flourishing." Merrill, *supra* note 66, at 354; *id.* at 357 ("[T]here can be no doubt that textualism is in ascendancy and the use of legislative history to discover congressional intent is very much on the decline."); *id.* at 362–63 (noting the "rapid spread of textualism among the Justices"). Other commentators noted that, in the early 1990s, "the salience of 'the legislative history question' receded as the Court reached an apparent equilibrium in which it rejected textualists' calls for the outright exclusion of legislative history, yet curtailed reliance on such materials because of their potential unreliability." Manning, *supra* note 66, at 1304.

[71] *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017).

among the Justices."[72] In the interview, Justice Stevens stated the best explanation for the decline in the number of High Court citations to legislative history, during Justice Scalia's tenure, is not that other Justices have converted to the textualist cause.[73] Instead, it may be that they wished to obtain the supportive votes of Justices Scalia and Thomas by avoiding unnecessary fights with them about the use of legislative history.[74]

2. Origins of Textualism: A Matter of Interpreting the APA

The origins of textualism can be traced back, further than commonly acknowledged, to disputes about the constraining power of statutory text in the 1970s, which culminated with *Vermont Yankee*.[75] There, the High Court rejected the D.C. Circuit's use of continually evolving, judge-made common law for oversight of administrative agency procedures.[76] Instead, it firmly established the statutory text of the Administrative Procedure Act (APA) as the touchstone for interpreting its major procedural requirements.[77] This overruled earlier free-wheeling D.C. Circuit interpretations of the APA that sought to add significant procedural requirements to the statutory scheme as a matter of "common law" that reflected judges' strongly-felt personal policy preferences more than the statutory text.

To be specific, in the 1960s and early-to-mid-1970s, the U.S. Court of Appeals for the D.C. Circuit developed a series of theories to justify the "common law" imposition of additional procedures—over and above those required by the statutory text of the APA or the Constitution—upon agencies engaged in informal rulemaking under 5 U.S.C. § 553 of the APA. These swash-buckling D.C. Circuit opinions appeared in cases, usually in dictum or an otherwise non-reviewable ruling, that invoked an amalgam of considerations. These included: (1) constitutional due process; (2) the needs of judicial review, which allegedly created the need for agency procedures

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[72] Merrill, *supra* note 66, at 363.

[73] *See* John Paul Stevens in Conversation with Carol F. Lee, ALI 93rd Annual Meeting, Washington, D.C. 16:37–19:35 (May 2016), http://www.youtube.com/watch?v=xiRvbKwUBWk.com [hereinafter Stevens Interview].

[74] *See id.* Three Justices—Thomas, Alito, and Gorsuch—are continuing the Thomas/Scalia practice of withholding their votes from opinions (or parts of opinions) that rely on legislative history. *See* Lamar, Archer & Cofrin v. Appling, 138 S. Ct. 1752 (2018). In *Appling*, every Justice joined the opinion except for Part IV-B, which relied on a House Report, to which Justices Thomas, Alito and Gorsuch declined to join without explanation. *Id. See also* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, Alito, and Gorsuch, JJ., concurring).

[75] *See also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

[76] *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

[77] *Id.*

adequate to ensure "reasoned decision-making" and a record adequate to withstand substantial evidence review; (3) the common law power of the courts to supplement the minimum procedures of the APA; and (4) provisions about procedures in the organic statute of the agency.[78] As reviewed in Antonin Scalia's article, *Vermont Yankee: The APA, the DC Circuit, and the Supreme Court*, these D.C. Circuit rulings were applauded by K.C. Davis and other administrative law professors and widely taught to law school students.[79] But they were in profound tension with the administrative law rulings of the United States Supreme Court. They created a "continually evolving judge-made common law" for "oversight of administrative procedures . . . not based upon constitutional prescriptions or rooted in the language of the APA itself."[80]

Textualism, in the sense of greater fealty to the statutory text of the APA, was insisted upon in *Vermont Yankee*. The Court definitively rejected the notion that the APA establishes only "minimum requirements," stating that section 553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[81] *Vermont Yankee* "put to rest the notion that the courts have a continuing 'common-law' authority to impose procedures not required by the Constitution in the areas covered by the APA."[82]

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[78] One high water mark of these creative D.C. Circuit opinions was *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974) (upholding the validity of FAA's mandatory age-60 retirement rule for commercial air line pilots). There, Chief Judge Bazelon wrote extensive dicta reaffirming many of the Court's earlier dicta requiring extra-APA procedures in informal agency rulemakings. Oral argument for the government, which won the case, emphasized the circular reasoning and lack of analytic support for these dicta. For example: Ordinarily, agency rulemaking does not implicate constitutional due process. *See id.* Moreover, it is a circular bootstrap argument to claim that the APA's standard of judicial review can be extracted from the APA and then superimposed upon it to "overrule" other parts of the APA specifying the procedures for agency rulemaking. As government counsel, however, I also noted that the FAA in fact followed extra procedures in this particular case. A series of written and oral communications between Antonin Scalia and myself back in the Justice Department resulted in the first versions of the article, ultimately published as Antonin Scalia, *Vermont Yankee: The APA, the DC Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

[79] *See* Scalia, *supra* note 78, at 348–52, 363–64, 389–96.

[80] *Id.* at 363.

[81] *Vermont Yankee*, 435 U.S. at 524, 542–548; Scalia, *supra* note 78, at 390.

[82] Scalia, *supra* note 78, at 395–96. Equally important, *Vermont Yankee* rejected the litigation tactic of submitting "cryptic and obscure" comments to an agency and then seeking a remand from the reviewing court for further agency proceedings on the theory that the agency failed to adequately consider matters "forcefully presented." *See Vermont Yankee*, 435 U.S. at 553–54. Critics of the D.C. Circuit's pre-*Vermont Yankee* approach were infuriated by that sort of "Monday-morning quarterbacking." After *Vermont Yankee*, judicial review evolved to focus on a more direct evaluation of the substantive merits of agency actions. *See* Garland, *supra* note 36 (describing the slow evolution of court review of agency action to involve more substantive assessments of agency rulings, requiring an

Textualism in interpreting the APA's procedures, and rejection of D.C. Circuit adventurism, was reaffirmed in *Perez v. Mortgage Bankers Association*.[83] Again reversing the D.C. Circuit, the Court held that notice-and-comment rulemaking procedures are not required to reverse an earlier interpretative rule upon which regulated parties have relied.[84] The statutory text of the APA clearly states that the process for revoking or modifying an interpretive rule is the same as the more informal process used for creating it in the first place. Reliance interests of regulated parties can be considered on court review of the changed agency interpretive rule under the arbitrary and capricious standard of review.[85]

Textualism's triumph in *Vermont Yankee* and *Perez* was limited. After *Vermont Yankee*, areas remain (such as informal case-by-case adjudications constituting a large percentage of agency actions) where courts may find that due process requirements fill the vacuum left by the APA's omission of specific procedures. The organic act of an agency may call for additional rulemaking procedures beyond those in the APA. Lower courts may continue to expansively interpret the language of some provisions in the APA itself that do not specify their implementing procedures—for example, the "notice and comment" provision in section 553(b)(3) that courts have interpreted to require an agency to disclose the scientific data upon which a proposed rule relies, and the "statement of basis and purpose" provision in section 553(c) that has been interpreted by the courts to require an agency to answer major arguments against a proposed rule.[86]

Moreover, where the substantive (as opposed to procedural) rules of the APA are concerned, "a number of administrative law doctrines represent substantial judicial elaboration in tension with the APA's text."[87] After *Vermont Yankee* and *Perez*, "extensive administrative common law remains on the books," including *Chevron* deference, *Auer* deference, exhaustion of administrative remedies, ripeness, the presumption of reviewability, "hard look" review, and judicial remedies in administrative law, such as the *Chenery* principle and remand without vacatur.[88] There are many areas of

agency rationale consistent with the statutory purpose, and final agency outcomes that are reasonable in light of the facts, available alternatives, and statutory purpose).

[83] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).

[84] *Id.* at 1203.

[85] *See id.* at 1209.

[86] *See* Scalia, *supra* note 78, at 391–92, 394–95.

[87] Metzger, *supra* note 3, at 38; *see also* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (supporting "administrative common law" as "administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies.").

[88] Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 636–38 (2017); Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 821 (2018) ("Administrative law today is positively saturated with common law doctrines.").

administrative law that have been embellished by "common law" judicial development. But *Vermont Yankee* prohibits courts from the wholesale imposition of "common law" procedural requirements for agency rulemaking, beyond those set forth in the statutory text of the APA.

3. Textualism's Shortcomings

Textualism of the new extreme kind—prohibiting any use of legislative history and downgrading the importance of *Chevron* agency views in statutory interpretation—is overrated. Its many shortcomings include: (a) intrinsic flaws stemming from its own self-definition; (b) oversimplification of the issues and conflicts with mainstream principles of statutory interpretation; (c) denigration of all legislative history as illegitimate or unrepresentative; (d) objecting to common intra-congressional "delegations" of limited authority to committees; and (e) overblown constitutional claims.[89]

a. Intrinsic Flaws

Textualism's intrinsic flaws should be noted. First, textualists' focus on "the ordinary reader's understanding" of statutory text is similar to originalists' focus on the ratifiers' understanding of the Constitution. There is a conflict, however, between the methodologies of statutory textualism (no legislative history allowed) and constitutional originalism (calling for extensive reliance on historical materials, beyond the Constitutional text)[90] about the legitimacy of consulting secondary materials to interpret text. This stark conflict fuels suspicions that statutory textualism and Constitutional originalism are ideologically-driven theories, manufactured to reach conservative end results.

Second, textualists' focus on "the ordinary reader's understanding" of statutory text overlooks the widely experienced fact that human beings (including "the median legislator") are more likely to read and understand a crisp summary (e.g., a committee report, or a sponsor's statement) instead

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[89] Other criticisms of textualism appear in the earlier literature. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1993). *See generally* Jarrod Shobe, *Enacted Legislative Findings and Purposes,* 86 U. CHI. L. REV. 669 (2019) (commenting on the long-standing debate between textualists and "purposivists").

[90] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2235–41 (2018) (Thomas, J., dissenting) (criticizing *Katz*'s "reasonable expectation of privacy" test as distorting "the original meaning of 'search'" and citing as support for his views "the papers of prominent Founders, early congressional debates, collections of early American English texts," and "early American newspapers," as well as "the materials that inspired the Fourth Amendment" and "Madison's first draft of the Fourth Amendment").

of long complex statutory text standing alone. This is true not only for "the median legislator"[91] but also for human beings generally, including the readers of statutes.[92]

There is no good reason to believe (and textualists have provided none) that "the ordinary reader" is more likely to read only long complex statutory text rather than committee reports, or sponsors' statements. Rather, the relevance of legislative history in statutory interpretation is established by long-standing Congressional and judicial practice and legislators' expectations, which inform their actions in considering, crafting, and passing the legislation in the first place.[93] Those common practices and expectancies do not exclude consideration of legislative history. Those items are "evidence" of statutory meaning, not "decisive" or as important as the statutory text but still relevant.

Textualists' emphasis on "the ordinary reader's understanding" in fact supports courts considering legislative history. Unless a specific piece of legislative history is shown to be unreliable, this article submits that the courts should continue to consider a wide variety of legislative history as "evidence" of statutory meaning, not "decisive," and not barring consideration of other available evidence.

Third, textualists argue that there is a single best meaning for a statute and that courts should determine that single best meaning. But many statutes deliberately vest agencies (not courts) with discretion to choose the best means of effectuating statutory purposes.[94] Often this is done in rapidly developing fields, such as those involving high technology, to help forestall

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[91] For example, when Congress was considering and passing the Affordable Care Act, many legislators found the over 2,000 pages of statutory text impenetrable, so congressional committees and staffers gave widely-publicized, extensive briefings to them summarizing different aspects of this complex legislation. Indeed, crisp legislative summaries may be essential to "the ordinary reader's understanding" when a long complex statute contains "more than a few examples of inartful drafting." King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (upholding the Affordable Care Act).

[92] *See, e.g.*, Olga Khazan, *Please Be Brief: Is Blinkist, a Nonfiction-Book Summary App, the Best Way to Cram Information Into My Brain?*, ATLANTIC (Nov. 30, 2015), https://www.theatlantic.com/technology/archive/2015/11/please-be-brief/417894/ (discussing the need for effective "info-cramming" tools in an age where there is much to read but not enough time, and reviewing the relative values of Wikipedia and the Blinkist app as sources for reading book summaries).

[93] We are told by Justice Scalia that Article I, Section 7 of the Constitution "provides that since [the statutory text] has been passed by the prescribed majority (*with or without adequate understanding*), it is a law," whereas no respect should be given to legislative history materials. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34–35 (1997) (emphasis original). But Article I, Section 7 does not distinguish between statutory text and legislative history. Instead, it talks about some of the procedures by which a "Bill" becomes "a Law." What judges may look at in deciding what the "Law" means is not addressed. This may be why later textualists appear to have dropped Scalia's claim based on Article I, Section 7, appealing instead to "the ordinary reader's understanding."

[94] *See, e.g.*, Garland, *supra* note 36, at 560 (stating this principle and, throughout the article, citing numerous statutory examples).

ossification of the law, by allowing agencies to come to grips with new developments and new changed circumstances. Overlooked by Justice Gorsuch's case for textualism is any recognition of these kinds of statutes that deliberately vest agencies (not courts) with authority to flexibly interpret less-than-completely-clear statutory text in the first instance.[95] Nor does his account come to grips with the scope-of-judical-review provision in the APA, codified at 5 U.S.C. § 706, that incorporates the standards of the common law.[96]

b. Oversimplification and Conflicts with Mainstream Statutory Interpretation Principles

Textualism is based on an oversimplified description of the legislative process[97] and statutory interpretation issues. Yes, of course, the starting point for interpreting a statute is the statutory text. As Justice Scalia insisted, the objectively ascertainable meaning of statutory provisions is what counts, not the subjective unarticulated motivations of the authoring legislators.[98] But statutory words must be read "in their context and with a view to their place in the overall statutory scheme."[99] As legal scholars have long noted:

> The actual words used [in a statute] are important but insufficient. The reports of congressional committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may now be looked at. Even the conduct of the litigants may be important in that the failure of the government to have acted over a period of time on what it now suggests as the proper interpretation throws light on the

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[95] *See* GORSUCH, *supra* note 44, at 128–44.

[96] *See infra* note 274.

[97] *See, e.g.*, Shobe, *supra* note 89, at 672–73, 704–08.

[98] *See, e.g.*, Artis v. D.C., 138 S. Ct. 594, 603 n.8 (2018) ("[The] controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written[,] . . . giving each word its ordinary, contemporary, common meaning.").

[99] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (reasoning that the statutory context, history, and purpose of language allowing tax credits for people participating in the Affordable Care Act through exchanges "established by the State" showed that this statutory language must be interpreted to allow tax credits from both state and federal exchanges). *See also* Yates v. United States, 574 U.S. 528 (2015) (holding that the statutory context of 18 U.S.C. § 1519—outlawing the destruction of "any record, account, or tangible object" to impede a federal investigation—shows that it applies only to records that preserve information, not across-the-board to destruction of any physical evidence such as undersized fish that were thrown overboard to frustrate a criminal prosecution for illegal fishing).

common meaning. But it is not easy to find the intent of the legislature.[100]

Other factors also may play a role in statutory interpretation, as they come to light in cases about specific statutes where their relevance becomes apparent.[101] While some of these interpretative tools seek to glean more from the statutory text (e.g., the language canons), others look beyond the statutory text for interpretative guidance (e.g., legislative history and "clear statement" principles). Of course, statutes should be interpreted to avoid absurd or bizarre results.[102] To avoid constitutional infirmity, the Court has sometimes held that a statute may be "interpreted" to contain specific detailed safeguards that nowhere appear in the statutory text.[103] The scope of the heavy handed "constitutional avoidance canon" has been narrowed recently. But the Roberts Court often invokes "avoidance lite," employing other tools of statutory construction to modify the most straightforward reading of the statutory text and avoid discussing or deciding difficult constitutional questions.[104] Other aids to statutory construction, in addition

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[100] LEVI, *supra* note 6, at 28–29. *Contra* Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court,* 130 HARV. L. REV. 1227 (2017) [hereinafter *Fall of Chevron*]. *Fall of Chevron* emphasizes the importance of some general jurisprudential interpretive methods that the Note attributes to various Justices. This shortchanges the importance of the specific details of individual statutes (with all their individual idiosyncrasies and complexities). *See* LEVI, *supra* note 6. It also overlooks the significance of political considerations and consequences in judicial decision-making. *See, e.g.,* Massachusetts v. EPA, 549 U.S. 497 (2007) (interpreting statutory language of the Clean Air Act (CAA)—with political significance and consequences in mind, and contrary to the EPA's protestations that it had no CAA authority to regulate greenhouse gases like CO-2—to give EPA and the courts a say in regulating greenhouse gases and addressing climate change).

[101] These "other factors" include, for example, both statutory and unwritten laws of interpretation (*e.g.,* the statutory rules of interpretation in 1 U.S.C. §§ 1–8 and § 108); "canons of interpretation" that include both semantic or language canons (syntax, grammar); substantive canons such as the rule of lenity, and the constitutional avoidance canon; and a variety of "clear statement" principles (*e.g.,* that statutes generally should not be interpreted to apply retroactively). *See, e.g.,* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xvi (2012) (listing over fifty "canons of interpretation"); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Cannons About How Statutes Are to Be Construed,* 3 VAND. L. REV. 395 (1950) (listing canons and counter canons of statutory interpretation); Kavanaugh, *supra* note 59, at 2154–56 (cataloguing "clear statement" rules that apply in statutory interpretation cases).

[102] *See, e.g., Artis,* 138 S. Ct. at 604 (criticizing the dissent's statutory interpretation on the ground that "the District's reading could yield an absurdity"); *id.* at 612 Gorsuch, J., dissenting) (criticizing the majority's statutory interpretation as leading to "absurdities"); and Veronica M. Dougherty, *Absurdity and the Limits of Literalism,* 44 AM. U. L. REV. 127 (1994).

[103] *See, e.g.,* United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971) (supplementing statutory text with judicial interpretation that adds specific detailed procedures for assessing allegedly obscene imported materials); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy,* 114 MICH. L. REV. 1275 (2016) (commenting on the canon of constitutional avoidance, and defending splitting that canon—as the Court appears to have done in several past cases—into an interpretative canon and a separate principle allowing courts to change the law through "remedial interpretation").

[104] *Compare* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) (holding that the cannon of

to the formal text of a statute, can also emerge from considering real-world congressional drafting practices.[105]

A classic example showing the shortcomings of statutory textualism is antitrust law. It is impossible to take the antitrust statutes (e.g., the Sherman Act and the Clayton Act), to "put them under a lamp post," and then to read all of modern antitrust law come leaping out of the statutory text (e.g., the consumer welfare standard with its emphasis on efficiency; new emerging concepts of antitrust harm; the Herfindahl-Hirschman index for measuring industry concentration in horizontal merger cases; the rules governing the acquisition of failing firms).[106] Instead, the meaning of the antitrust laws is properly determined—as virtually all courts and legal scholars now agree—by looking at the accumulated judicial interpretations of those statutes that have built up over the years.[107]

Professor Krishnakumar's recent study finds that most of the Justices on the Roberts Court refer to legislative history at higher rates than they refer to *Chevron* deference to agency views or substantive canons in construing statutes, and that the canons rarely play an outcome-determinative role.[108] Moreover, "the Court's own precedents—rather than

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constitutional avoidance in statutory construction "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."), *and* Iancu v. Brunetti, 139 S. Ct. 2294 (2019), *with* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019) (chronicling the Roberts Court's regular use of the constitutional avoidance canon from 2006–2012, followed by deemphasis of that canon and increased reliance on other tools such as the rule of lenity, the federalism clear statement principle, and the "mischief" canon limiting a statute's reach to the core purposes/mischief that the statute was designed to remedy, to achieve "a form of stealth constitutional avoidance").

[105] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461 (2018) (holding that Congressional Budget Office estimate of statutory costs reinforces its statutory interpretation); Abbe R. Gluck, *The CBO Cannon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017). *Contrast* Amy Coney Barrett, *Congressional Insiders and Outsiders*. 84 U. CHI. L. REV. 2193 (2017) (arguing that textualists would/should reject "the process-based turn in statutory interpretation" on the ground that textualists "view themselves as agents of the people rather than of Congress" so that the ordinary meaning of the statutory text to a congressional "outsider" should control).

[106] Edwin E. Huddleson, *Chevron, Costs, and the "Major Question Doctrine"* (2016), http://www.edwinhuddleson.com/wp-content/uploads/2009/01/Chevron-Costs-and-the-Major-Question-Doctrine-7.pdf.

[107] *See, e.g.*, New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring) ("Congress . . . intended [the Sherman Antitrust Act's] reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'"); Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) (same). *See also* David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html; Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 Antitrust L.J. 771 (2019).

[108] *See* Krishnakumar, *supra* note 71. This "seems to accord with the preferences of congressional staffers in charge of drafting legislation, who rank substantive canons behind legislative history and rules on agency deference when asked about the usefulness of particular aids." *Id.* at 832. *Cf.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) ("Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'").

substantive canons or legislative history—seem to be the unsung gap-filling mechanism that the justices turn to when confronted with unclear statutory text."[109] According to recent interviews with forty-two federal appellate judges, "[a]ll consult legislative history," most are "willing to consider many different kinds of material" in statutory interpretation cases, and, in general, they seek "to implement what Congress was trying to do, using all available tools."[110]

By contrast, Justices Thomas and Gorsuch seek to downgrade legislative history across-the-board as unreliable and less important than the language canons, while Judge Kavanaugh would consult legislative history only to check whether a statutory construction is absurd.[111] This conflicts with the common understandings that legislators have during the legislative process.

As illustrated by many cases involving disputes about the application of *Chevron*, statutory text alone is often ambiguous or susceptible of more than one reasonable interpretation. Ambiguity in statutory language is inevitable.[112] Textualists, by focusing exclusively on the statutory text, do not solve the courts' problem of how to interpret ambiguous statutory texts.

c. Denigration of All Legislative History

Textualists object—at least rhetorically—to any reliance on legislative history in statutory interpretation.[113] These claims are based on sweeping

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[109] *See* Krishnakumar, *supra* note 71, at 825.

[110] *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench – A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1300, 1302–03 (2018). *Compare* Krishnakumer, *supra* note 71 (listing statutory interpretation aids, in order of preference, by congressional staffers in charge of drafting legislation).

[111] *See, e.g.*, Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783 n.* (2018) (Thomas, Alito, and Gorsuch, JJ., concurring); Kavanaugh, *supra* note 53, at 1912 ("As to legislative history, it should be used primarily to help identify absurdities but otherwise would play a relatively limited role. It bears mention that legislative history already plays a relatively limited role in statutory interpretation.").

[112] *See* LEVI, *supra* note 6, at 6 ("[A]mbiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three."); Wald, *supra* note 1 ("[T]here is just no way in our world of complex arcane regulatory statutes that Congress can make its precise intent absolutely clear in a few well-chosen words in every instance, so that no ambiguities arise when a regulatory instruction is applied to a myriad of often unforeseeable situations.").

[113] *See, e.g.*, Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 90–97 (2017) (overlooking the significance of the fact that legislators know in advance the traditional rules of the game—played out in the legislative process—in which legislative history will count when courts interpret enacted statutes; arguing that committee reports fail to represent "the understanding of the median legislator"; observing that legislative history is not itself legislation enacted by the legislature and signed by the President; and arguing that traditional guides to analyzing legislative history (*e.g.*, weighting committee reports and statements of the sponsors more heavily than statements of dissenting legislators) can be unreliable—"stuff to fool interest groups, perhaps, or to take in

unproven assertions that all legislative history is tainted by special interests, unrepresentative, or somehow illegitimate.[114] Justice Kavanaugh has written that he would demote legislative history to simply a tool to identify absurdities in statutory construction.[115]

But common legislative materials have long been viewed as relevant and helpful in interpreting statutory text. They reflect common practices about delegated authority that many view as essential for Congress to function. There has been no showing that all (or even most) committee reports and sponsor statements are illegitimate. Textualism has failed to justify its sweeping across-the-board condemnation of all types of legislative history that is created by the common decision-making processes of Congress.[116] As stated by eight Justices in *Wisconsin Public Intervenor v. Mortier*:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[W]here the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. *See, e.g.*, Wallace v. Parker, 6 Pet. 680, 686–690 (1832). We suspect that the practice will likewise reach well into the future.[117]

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credulous judges, but not capable of fooling other members of Congress"—if they do not reflect the views of difficult-to-identify "legislators with deal-making or deal-breaking power").

[114] We are simply told, for example, that in all statutory interpretation cases: "Because legislative committees disproportionately include members supported by the most interested interest groups, the explanations found in committee reports or sponsors' statements are quite unlikely to reflect the particular desires or understandings (if any) of the median legislator." Manning, *supra* note 67, at 688.

[115] *See, e.g.*, Kavanaugh, *supra* note 53, at 1912 ("As to legislative history, it would be used primarily to help identify absurdities but otherwise would play a relatively limited role.").

[116] *See* Wald, *supra* note 1 ("[I]f Congress chooses to work through committees, hearings and floor debates, I find it a bit presumptuous for another coordinate branch to repudiate Congress' processes and say we will not even consider such evidence of what they said they were trying to do.").

[117] Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (some internal citations omitted). This statement by eight Justices rejects Justice Scalia's claims that legislative history is "an interpretive device whose widespread use is relatively new" and that "[e]xtensive use of legislative history in this country dates only from about the 1940s." SCALIA, *supra* note 93, at 29–30. Similarly, Justice Stevens, in his interview during the open general session at the American Law Institute's May 2016 annual meeting, commented that all the Justices (except Justice Scalia) rely on legislative history, although in order to avoid unnecessary conflict with him, their opinions may not always use that legislative history. *See* Stevens Interview, *supra* note 73. Justice Stevens also reported that Justice Scalia was not successful in selling his point of view about legislative history to Justice Alito, who found legislative history helpful. *Id.*

When the statutory text changes from A to B to C, even Justice Scalia recognized the relevance of that legislative history.[118] This is one kind of legislative history, which has many different components. These include the historical background of real-life events that gave rise to a statute;[119] a statute's evolution in the legislature, including successful and failed amendments to bill language, and later amendments to the statutory language (or lack of them) over the years;[120] enacted legislative findings and purposes;[121] joint House-Senate Conference Committee reports approved by both Houses of Congress; ordinary committee reports, sponsors' statements and floor debates; and Congressional Budget Office estimates of statutory costs.[122] Not all of these different kinds of legislative history are disputed sources of information. Only some of them—such as statements inserted into the Congressional Record after the legislative debate is over, isolated witness statements from committee hearings, and floor statements made in a later Congress—have been widely criticized as unreliable.[123]

Three Justices (Thomas, Alito, and Gorsuch) specifically questioned the reliability of committee reports in statutory interpretation in the recent "whistleblower" statutory interpretation case, *Digital Realty Trust, Inc. v. Somers*.[124] Their separate concurring opinion expressed "serious[] doubt that a committee report is a 'particularly reliable source' for discerning Congress' intended meaning."[125] They noted that legislative history is not enacted law, it is often written by congressional staff, it is often not voted

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[118] *See, e.g.*, Morales v. TWA, 504 U.S. 374, 378–79 (1990). *Accord* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch and Thomas, JJ., dissenting) (recognizing the value of "the record of enacted changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning"). The same conclusion should apply to enacted legislative findings and purposes. *See* Shobe, *supra* note 89, at 669.

[119] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633–49 (2018) (Ginsburg, J., dissenting).

[120] *See, e.g.*, Lamar, Archer & Cofrin v. Appling, 138 S. Ct. 1752 (2018); Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881 (2019) (viewing statutory amendments, considered and rejected over time since initial statutory enactment, as relevant to statutory meaning).

[121] *See* Shobe, *supra* note 89, at 669 (commenting that enacted legislative findings and purposes—a hybrid type of text that is enacted by Congress and signed by the President in many statutes, but which looks like legislative history—should be given more weight in statutory interpretation than unenacted legislative history).

[122] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461 (2018).

[123] *See, e.g.*, Bruesewitz v. Wyeth, LLC, 562 U.S. 223, 242 (2012) ("Post-enactment legislative history . . . is not a legitimate tool of statutory interpretation."); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("[W]e can all agree that 'excerpts from committee hearings' are 'among the least illuminating forms of legislative history' . . . especially . . . where the witness statements do not comport with official committee reports that are consistent with the plain and ordinary meaning of the statute's terms.").

[124] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).

[125] *Id.* at 783 n.* (Thomas, Alito, and Gorsuch, JJ., concurring).

on or subject to amendment, and it may not even have been read by Members of Congress.[126] Overlooked by this account is the fact that the members of Congress often do not read the statutory text. This is particularly true for long, complex statutes.[127]

The separate opinion of Justices Sotomayor and Breyer in *Digital Realty Trust* explains why a Senate Report is an appropriate source for the Court to consider when interpreting statutes.[128] They note that committee reports are typically circulated at least two days before a floor vote in Congress and

> provide Members of Congress and their staffs with information about 'a bill's context, purposes, policy implications, and details,' along with information on its supporters and opponents. These materials 'have long been important means of informing the whole chamber about proposed legislation,' a point Members themselves have emphasized over the years.[129]

Thus, "legislative staffers view committee and conference reports as the most reliable type of legislative history."[130] According to Justices Sotomayor and Breyer, legislative history "can be particularly helpful when a statute is ambiguous or deals with especially complex matters. But even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text."[131]

Justice Kavanaugh has stated that judges today either do not consider

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[126] *Id.* (providing an excerpted transcript of a Senate floor conversation).

[127] *See, e.g.*, Erica Werner & Mike DeBonis, *House Passes Budget Bill with Little Time to Read It*, WASH. POST, Mar. 23, 2018, at A1 ("And in another about-face GOP leaders tossed aside their own rules and past complaints about Democrats to rush the legislation through the House ahead of a Friday night government shutdown deadline. Lawmakers of both parties seethed, saying they had scant time to read the mammoth bill, which was released less than 17 hours before they voted."); Paul Kane, *With Vote on Budget, House GOP Has Its Own 'Read the Bill' Moment,* WASH. POST, Mar. 23, 2018, at A4 ("I just haven't—2,200 pages—I just haven't had a chance to read it," said Rep. James B. Renacci (R-Ohio)."). In 2010, Republicans

> accused Democrats of moving too quickly for members to fully understand [the Affordable Care Act's] impact. . . . So Republicans created the 'three-day rule,' which mandated that a bill should not be voted on until the third day after its unveiling. Over the past seven years, both Boehner and Ryan have violated that rule because of imminent deadlines and potential doom of delay. But Republicans had never broken the rule on something of this magnitude—legislation funding every corner of the federal government.

Id.

[128] *Dig. Realty Tr., Inc.*, 138 S. Ct. at 782–83 (Sotomayor and Breyer, JJ., concurring).

[129] *Id.* at 782 (internal citations omitted).

[130] *Id.* at 783.

[131] *Id.*

legislative history at all, or else look at it "only when a statute is ambiguous."[132] This is not an accurate description, of course, of Justices Breyer, Sotomayor, and many other judges. In Justice Kavanaugh's view, however: "As to legislative history, it should be used primarily to help identify absurdities but otherwise would play a relatively limited role. It bears mention that legislative history already plays a relatively limited role in statutory interpretation."[133] Yes, legislative history has more limited force than statutory text, but it is not irrelevant or as severely limited as Justice Kavanaugh would have it, according to common practice in courts and the Congress, and their reasonable expectancies about statutory interpretation.

Technically, legislative history is "evidence" of statutory meaning, not as "decisive" or "authoritative" as statutory text.[134] Professor Eskridge adds, "If legislative history is simply evidence contributing to the Court's understanding of a statute, it is hardly usurpation of judicial duties."[135] Where there is no better or contrary evidence available, then (contrary to textualists' assertions) it is reasonable to give significant weight to committee reports and sponsors' statements in statutory interpretation.

Textualism's attempt to change the rules "in the middle of the game" of statutory interpretation also upsets the common understandings that govern functioning legislatures and the actions of legislators (including "median legislators" and "legislators with deal-making or deal-breaking power"). All legislators know, from the outset, the "rules of the legislative game" in which they must express their views on the legislative record or risk having them discounted. Moreover, in its zeal to stamp out overregulation that is rooted in courts and agencies overreading their statutory authority, textualism ignores the fact that many statutes deliberately vest agencies (not courts) with authority to flexibly interpret less-than-completely-clear statutory text in the first instance. There is no sound reason to deny agencies the flexibility that Congress deliberately gave them to change regulatory approach in light of new technologies, new market developments, or other changed circumstances.

d. Objections to Common Intra-Congressional "Delegations"

Textualists' objections to intra-Congress "delegation" of limited authority to congressional committees[136] similarly fail to acknowledge the

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[132] Kavanaugh, *supra* note 53, at 1911.

[133] *Id.* at 1912.

[134] *See, e.g.*, *Dig. Realty Tr., Inc.*, 138 S. Ct. at 782–83 (Sotomayor and Breyer, JJ., concurring).

[135] Eskridge, *supra* note 89, at 375.

[136] *See* Manning, *supra* note 67, at 698, 706–31. *See also id.* at 699 (contrasting intra-congressional delegations, which textualists object to, with "constitutionally routine delegations of lawmaking

practical need for committees in the group decision-making processes of the Congress. Ordinary committee reports (as opposed to joint House-Senate Conference Committee reports) do not purport to speak for the Congress as a whole. Nor is it accurate to claim that traditional methods of statutory interpretation require Congress, courts and agencies to view committee reports and sponsor statements as "decisive," "authoritative," or anything other than relevant evidence about statutory meaning.

Textualists' concerns call for clarifying the role of legislative history in statutory interpretation, not jettisoning *Chevron*. Throughout American history to the present day, as noted in *Wisconsin Public Intervenor*,[137] most of the Justices find legislative history helpful and rely on it. There is a well-established hierarchy for crediting some aspects of legislative history more than others—for example, crediting Joint House-Senate Conference Committee reports passed by both houses of Congress more than preliminary committee reports; and crediting sponsor statements more than the views of dissenters in floor debate.

e. *Textualists' Constitutional Claims Based on Nondelegation, Bicameralism, and Presentment*

Textualists claim that reliance on legislative history and *Chevron* agency views violates the requirements of Bicameralism and Presentment.[138] This claim rests on the premise that courts commonly err by improperly placing legislative history and agency views on an equal footing with statutory text.

These objections evaporate, however, when legislative history is properly viewed simply as "evidence" of statutory meaning, not as important as statutory text, not "decisive," and not barring consideration of other available evidence. Textualists' stated concern here can be addressed by improving statutory construction to conform to well-settled principles, not by overthrowing *Chevron*.

4. Third-Generation Textualism?

Textualism of the *Vermont Yankee* variety reasonably limits the extent to which courts and agencies can make wholesale common law additions to statutory text. Textualism of this kind provides a reasonable basis for courts

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authority to agencies and courts").

[137] Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991).

[138] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (stating that even where *Chevron* allows the Court to "escape the jaws of Article III's Vesting Clause, it runs "headlong into the teeth of Article I."); Manning, *supra* note 66, at 1297; Manning, *supra* note 67, at 673.

to refuse to rely on general statutory purposes to plug the holes in statutory text that—however deplorable—are not accidental oversights.[139]

The majority opinion in *Epic Systems* suggests that agency statutory interpretations may be further demoted in the future, so that where the canons of statutory construction supply an answer, "*Chevron* leaves the stage."[140] This seems reasonable only to the extent it places more emphasis on the courts' own assessment of statutory meaning, before it turns to evaluate an agency's statutory interpretation. But it does not accord with long-standing Congressional and judicial practice and legislators' expectations, which inform their actions in considering, crafting, and passing the legislation in the first place.

D. Other Criticisms of Chevron

1. Cost Considerations

All nine Justices agreed in *Michigan v. EPA* that costs are highly relevant in agency rulemaking.[141] Five Justices held that an agency should consider costs at the outset, before deciding whether to embark on a regulatory program, not later on down the line in deciding how much to regulate. Justice Scalia's majority opinion states that an agency has discretion (within reasonable limits set by the statute) to decide how to account for cost.[142] A "formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value" is not necessarily required.[143] Other cases, like *American Textile Manufacturers Institute v. Donovan*, confirm that agency rulemakings need not include an extensive, full-blown cost-benefit analysis unless Congress "has clearly indicated such

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[139] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding overall statutory policy insufficient to fill gaps that Congress deliberately left in text of National Labor Relations Act).

[140] *Id.* at 1630.

[141] In the *Michigan* case, the EPA argued that it need not consider cost when first deciding *whether* it was "appropriate and necessary" to regulate coal and oil-fired power plants under the Clean Air Act, requiring them to reduce mercury emissions and other toxic air pollutants, because the agency could consider cost later when deciding *how much* to regulate them. Justice Scalia's majority opinion flatly rejected this EPA claim, stating that "agencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *Michigan*, 135 S. Ct. at 2707 (majority opinion); *id.* at 2716–17 (Kagan, Ginsburg, Breyer, and Sotomayer, JJ., dissenting) ("[C]ost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing 'a standard-setting process that ignore[s] economic considerations."). But the dissenters thought that EPA "acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter." *Id.* at 2714.

[142] *Id.* at 2711.

[143] *Id.*

intent on the face of the statute."[144]

There are exceptions to these general rules where a statute sets out different directives about cost consideration. In *Whitman v. American Trucking Associations*, the Court found that the Clean Air Act directed EPA's ozone rulemaking to proceed in two stages: first, set standards for protection of human health, without regard for costs (technology forcing standards); and then second, consider costs/feasibility later.[145]

Trends in recent court decisions, culminating with the *Michigan* case, thus require agencies to consider costs in deciding whether and how much to regulate.[146] These rulings seem to limit agency rules to those that implement statutory goals at reasonable costs (when compared with benefits), while requiring fresh congressional legislation to authorize other agency action.

The Trump administration's plans to build a coast-to-coast wall along the southern U.S. border, for example, might be difficult to justify as administrative action authorized by a statute that required consideration of cost. The southern border stretches nearly 2,000 miles, only 700 of which are walled or fenced.[147] Widespread abuse and overstaying of U.S. visas appear to cause more illegal immigration than unlawful entry along the southern border.[148] Most of the illicit drugs smuggled into the United States

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[144] Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510 (1981). *See also id.* at 509 (holding that a "cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is").

[145] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76, 493–94 (2001) (holding that where section 109(b) of the Clean Air Act (CAA) directs EPA to set initial ozone standards based on a factor that does not include cost, and where other sections of the CAA state that cost consideration is required or permitted, the Act should not be read as allowing EPA to consider cost anyway in setting initial ozone standards).

[146] *See Michigan*, 135 S. Ct. 2699 (2015); Am. Textile Mfrs. v. Donovan, 452 U.S. 490, 510 (1981); EPA v. EME Homer City Generation, 572 U.S. 489 (2014) (upholding EPA's "cost-effective allocation of emission reductions among up-wind States" as a "permissible, workable and equitable interpretation" of the "Good Neighbor" provision in the Clean Air Act); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) (holding EPA may use cost-benefit approach when determining the "best technology available for minimizing adverse environmental impact" under the Clean Water Act, where statutory language was silent not only with respect to cost but with respect to all potentially relevant factors).

[147] *See* Laris Karklis, Ann Gerhart, Joe Fox, Armand Emamdjomeh & Kevin Schaul, *BORDERLINE: Navigating the Invisible Boundary and Physical Barriers that Define the U.S.-Mexico Border*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/graphics/2018/national/us-mexico-border-flyover/ (providing an interactive satellite-photograph map of the entire southern border, with notations showing—by border section—the types of barriers now in place (some barring foot traffic, others barring only vehicle traffic), miles of barrier, as well as migrant deaths and border patrol apprehensions at different crossing points).

[148] *See* Dave Seminara, *No Wall Will Keep Visitors From Overstaying Their Visas*, WALL ST. J. (Jan. 17, 2018) (reporting that, as of January 10, 2017, about 545,000 foreigners were suspected of overstaying their visas and still being in the country. To stop illegal immigrants will require more thorough screening by consular officers overseas—which "wouldn't cost taxpayers a dime").

from Mexico pass undetected through legal ports of entry.[149] Terrorists who enter the U.S. do so primarily through airports and across the northern border with Canada.[150] No solid data supports President Trump's claim that illegal immigrants commit crimes at a higher rate than U.S. citizens.[151] And a wide range of studies reject the claims that immigrants "steal jobs" from American workers and are a net drain on the U.S. economy.[152] Whole families are now attempting to cross the southern border, seeking to be arrested and processed for admission into the United States, in order to escape "gang violence, hunger, poverty, and corruption."[153]

Nevertheless, the Trump administration supports a coast-to-coast wall to respond to these problems. Overall cost estimates for a southern wall range widely from $18 billion to $70 billion, depending on its length.[154] The Trump administration has issued a barrage of executive orders and regulations (all challenged in court) cracking down on immigration and asylum seekers. It is also pressuring countries across the region to accept more immigrants to slow the flood tide of people seeking entry into the

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[149] Eugene Kiely, *Will Trump's Walls Stop Drug Smuggling?*, FACTCHECK.ORG (Aug. 30, 2017), https://www.factcheck.org/2017/08/will-trumps-wall-stop-drug-smuggling/.

[150] *See, e.g.*, Salvador Rizzo, *The Trump Administration's Misleading Spin on Immigration, Crime and Terrorism*, WASH. POST (Jan. 7, 2019); Calvin Woodward, *AP Fact Check: Trump's Mythical Terrorist Tide from Mexico*, BOS. GLOBE (Jan. 8, 2019).

[151] *See* Lauren Carroll, *Trump Immigration Claim Has No Data to Back it Up*, POLITIFACT (July 6, 2015), https://www.politifact.com/factchecks/2015/jul/06/donald-trump/trump-immigration-claim-has-no-data-back-it/.

[152] Whether immigrants "take jobs away from US citizens" is disputed, as is whether they represent a net gain or loss for the US economy. *Compare, e.g.*, Brennan Hoban, *Do Immigrants "Steal" Jobs from American Workers?*, BROOKINGS (Aug. 24, 2017), https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/, *and* Mary Jo Dudley, *These U.S. Industries Can't Work Without Illegal Immigrants*, CBS NEWS (Jan. 10, 2019), https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/, *with* Steven A. Camarota, Jason Richwine, and Karen Zeigler, *There Are No Jobs Americans Won't Do*, CTR. FOR IMMIGR. STUD. (Aug. 26, 2018), https://cis.org/Report/There-Are-No-Jobs-Americans-Wont-Do, *and Illegal Aliens Taking U.S. Jobs*, FED'N FOR AM. IMMIGR. REFORM (June 2019), https://www.fairus.org/issue/workforce-economy/illegal-aliens-taking-us-jobs. The surveys and studies generally find that immigrants have a positive, and sometimes essential, impact on the U.S. economy. *See, e.g.*, Gretchen Frazee, *4 Myths About How Immigrants Affect the U.S. Economy*, PBS NEWS HOUR (Nov. 2, 2018), https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy (reporting that immigrants contribute more in tax revenue than they take in government benefits; they often take jobs that boost other parts of the economy; and immigrants are a key to offsetting a falling U.S. birth rate).

[153] Alicia A. Caldwell, *U.S. Border Struggles with Crush of Families*, WALL ST. J., May 9, 2019, at A1.

[154] *See* Sinéad Baker, *A US Government Watchdog is Warning That Trump's Border Wall Could Cost Billions More Than He Claims*, BUS. INSIDER (Aug. 7, 2018), https://www.businessinsider.com/trump-border-wall-billions-unseen-costs-gao-report-2018-8; Ron Nixon, *Border Wall Could Cost 3 Times Estimates, Senate Democrats' Report Says*, N.Y. TIMES (Apr. 18, 2017), https://www.nytimes.com/2017/04/18/us/politics/senate-democrats-border-wall-cost-trump.html.

United States. But President Trump's emphasis remains on the wall.[155]

The wisdom of a coast-to-coast southern border wall is questionable. The cost-benefit aspect of the debate[156] focuses on the questions: Is a coast-to-coast physical "wall" stretching across 2,000 miles a waste of money? What is the cost-effectiveness (or lack of it) of different kinds of walls/fences/physical barriers, as compared with technology and other means of achieving southwest border security?[157] There already are more than 600 miles of physical barriers on the southwest border. About half are designed to stop vehicles from crossing, while the other miles are aimed at blocking pedestrians as well.[158] The *New York Times* reported that in 2011 the Obama Administration cancelled—as ineffective and too costly—a multi-billion-dollar contract with Boeing to construct a 2,000 mile wall along the Mexican border after spending $1 billion on just 53 miles of border in Arizona.[159] Three University of Chicago Law School professors argued that President Trump's wall would flunk the cost-benefit analysis implicitly required by the Secure Fence Act of 2006.[160] Yet it appears that sections 102(a), (b), and (c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended, provides statutory authority—within the broad discretion of the Secretary of Homeland

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155 *See, e.g.*, Nick Miroff & John Dawsey, *No Barrier Too High in Pursuit of Wall*, WASH. POST, Aug. 28, 2019, at A1, A3 ("Trump conceded last year . . . that a wall or barrier is not the most effective mechanism to curb illegal immigration[, b]ut he told lawmakers that his supporters want a wall and that he has to deliver it. . . . Trump has repeatedly promised to complete 500 miles of fencing by the time voters go to the polls in November 2020."); Vivian Salama & Juan Montes, *Trump Raises Tariff Threat On Guatemala*, WALL ST. J., July 24, 2019, at A9; Eileen Sullivan, *The Wall and the Shutdown, Explained*, N.Y. TIMES (Dec. 21, 2018), https://www.nytimes.com/2018/12/21/us/politics/build-the-wall-border-facts-explained.html.

156 The southern-border-wall debate "has crystalized a deep cultural divide" over "whether immigration adds to or detracts from the character of America." Gerald F. Seib, *Wall Marks Deep Divide for Americans*, WALL ST. J., Jan. 22, 2019, at A4.

157 *See, e.g.*, Erica Werner, John Wagner & Mike DeBonis, *Democrats Offer No Money for Border Wall*, Wash. Post, Jan. 31, 2019, at A1 (quoting Rep. Pete Aguilar (D-Calif.): "We've seen that walls can and will be tunneled under, cut through or scaled. . . . We cannot focus on archaic solutions in order to address this very modern problem. Technology works for securing the border."); Nick Miroff, *At border, wall no match for storms*, WASH. POST, Jan. 31, 2020, at A1 ("[S]ummer torrents mean open gates – and access – for months at a time.").

158 *See* Erica Werner, *Congress Won't Give Trump Funds He Wants for Wall*, WASH. POST, Feb.9, 2019, at A1.

159 *See* Danielle Ivory & Julie Creswell, *Trump Sees a Wall, Contractors See Windfalls*, N.Y. TIMES, Jan. 29, 2017, at BU 1 (commenting that, without contrary regulatory directives, "the United States could ultimately wind up paying Mexican citizens and Mexican-owned businesses to construct the wall").

160 *See* Daniel Hemel, Jonathan Masur & Eric Posner, *How Antonin Scalia's Ghost Could Block Donald Trump's Wall*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/opinion/how-antonin-scalias-ghost-could-block-donald-trumps-wall.html; Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 948 n.46 (2018).

Security to waive all legal requirements including cost/benefit concerns—for construction of President Trump's southwest border wall, subject only to the availability of Congressionally-appropriated funding.[161] Thus, cost-benefit considerations about the southwest border wall appear to be left for Congress.[162]

Over many years, commentators have pointed out the limitations and shortcomings of cost-benefit analysis.[163] What quantifiable value does cost-benefit analysis place on religious liberty? Or environmental and esthetic benefits, and quality of life? Yet refined cost-benefit analysis is now generally accepted as a useful tool in shaping agency regulatory policy.[164] As Justice Scalia's opinion states in *Michigan v. EPA*, an agency has discretion in deciding "how to account for cost" consistent with any directions about cost consideration that appear in the controlling statute.[165] Where a governing statute calls for cost consideration by the administering agency, cost-benefit analysis provides a useful check against poorly-conceived or evidence-free agency action.

Trump agencies seeking deregulation or reversal of Obama-era regulations must go through new notice-and-comment rulemaking, and pass muster in court review to ensure that enthusiasm for cost-cutting does not swamp congressional safety and health purposes, if the agency itself (as

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[161] *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43975, BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS (2017). The court in *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018), *aff'd* 915 F.3d 1213 (9th Cir. 2019), rejected arguments by environmental groups and the State of California that the IIRIRA statute violates constitutional separation of powers principles embodied in the non-delegation doctrine, the Presentment Clause, and the Take Care Clause. The Secretary has issued waiver determinations under IIRIRA on several occasions. Several waiver determinations have been the subject of unsuccessful constitutional challenges. *See, e.g.*, Def. of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008) (rejecting nondelegation and Presentment Clause challenges to IIRIRA).

[162] The courts will rule on President Trump's disputed claim that, by declaring a national emergency, he can obtain additional money to build the southwest border wall, over and above the limited sums directly appropriated by Congress (with limitations) for the wall. *See, e.g.*, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (staying injunction against using military funds for the wall).

[163] *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE COST OF EVERYTHING AND THE VALUE OF NOTHING (2015); CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 211–14 (2018) (noting that cost benefit analysis may not account for unemployment effects, welfare gains, the focused or diffuse distribution of costs, uncertainties and unintended consequences).

[164] *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating."); *see also* Stephen F. Williams, *Squaring the Vicious Circle*, 53 ADMIN. L. REV. 257 (2001); Matthew D. Adler, *Risk, Death, and Time: A Comment on Judge Williams' Defense of Cost-Benefit Analysis*, 53 ADMIN. L. REV. 271 (2001); Eric A. Posner, *Cost-Benefit Analysis as a Solution to a Principal-Agent Problem*, 53 ADMIN. L. REV. 289 (2001); Cass R. Sunstein, *Is Cost-Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299 (2001).

[165] Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015).

opposed to Congress) seeks to implement a major policy reversal.[166] It may be no easy task to repeal and replace some Obama-era regulations.[167]

Theoretically, at least, cost-consideration analysis can provide a check on ideologically-driven, weakly-supported agency regulations, while administrative law principles limiting cost-cutting to a degree consistent with statutory health and safety purposes can check ideologically-driven, weakly-supported agency deregulation.

2. The Major Question Doctrine

Occasionally, the Supreme Court seems to recognize a federal major question doctrine, under which courts require a clear statement from the legislature to bring issues of great economic, social, or political consequence within the scope of an agency's regulatory authority. The major question doctrine—that some decisions are simply too critical to leave to agencies, at least absent clear legislative intent to delegate—has been inconsistently applied[168] and to date it has been invoked by the High Court in only five cases: *King v. Burwell*,[169] *UARG v. EPA*,[170] *Gonzales v.*

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[166] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 41–42 (1983) (rejecting the National Highway Traffic Safety Administration's rescission of its occupant crash protection rules, holding that the same standards of court review apply to both rescission and promulgation of such rules); FCC v. Fox TV Stations, Inc., 556 US. 502, 515 (2009) (change of agency position must be supported by good reasons and agency awareness that it is changing position); Mid Continental Nail Corp v. United States, 846 F.3d 1364 (Fed. Cir. 2017) (holding notice and comment requirement applies to withdrawal or repeal of an existing regulation).

[167] *See* Amy Harder & Ryan Tracy, *Donald Trump's Pledge to Loosen Regulations on Businesses Is a Heavy Lift*, WALL ST. J. (Dec. 14, 2016), https://www.wsj.com/articles/donald-trumps-pledge-to-loosen-regulations-on-businesses-is-a-heavy-lift-1481711412 ("[C]onservative and liberal legal experts agree Mr. Trump's EPA will likely have to go through new rule-making processes to eliminate [two EPA] rules. That process could take two years because a notice of public comment is required while the EPA justifies its decision from both a policy and legal perspective."); Garland, *supra* note 36, at 509 (observing that a significant focus of court review of regulatory reversal and deregulatory agency decisions is ensuring "fidelity to congressional intent"); *id.* at 519, nn.79–82, 527 (summarizing multiple grounds for court review of agency deregulation decisions).

[168] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (holding that the EPA has regulatory authority over greenhouse gases, despite lack of explicit congressional authority).

[169] In *King v. Burwell*, 135 S. Ct. 2480 (2015), the Court ruled that the structure, context, and history of the Affordable Care Act show that statutory language referring to exchanges "established by the State" is effective to provide tax credits to people whether they sign up on Federal or State exchanges. This issue of statutory construction involves billions of dollars each year; it is a question of deep "economic and political significance" that is central to the statutory scheme; and there is no IRS expertise in crafting health insurance policy. Accordingly, the Court held: "This is not a case for the IRS. It is instead our task to determine the correct reading of the Affordable Care Act." *Id.* at 2489.

[170] In *UARG v. EPA*, 573 U.S. 302, 303 (2014), the Court invalidated one part of the EPA's greenhouse gas regulations, on the ground that some agency rules were unreasonable because they purported to rewrite clear statutory language setting specific numerical thresholds for regulating pollutants and would "bring about an enormous and transformative expansion in EPA's regulatory

Oregon,[171] *FDA v. Brown & Williamson,*[172] and *MCI Telecom v. AT&T.*[173]

Well-settled principles of statutory construction, independent of the major question doctrine, can explain the Court's rulings in all these cases. The major question doctrine functions as an additional rationale, stated in dictum, and not essential to the decisions. But these dicta about the major question doctrine have troubled commentators as unsound and biased against ambitious agency action.[174]

Other means of achieving reasonable stability in the law, more faithful to implementing the objectively ascertainable public meaning of a statute, are available. Instead of following the subjective, unpredictable major question doctrine, courts should pay attention to what the late Judge Harold Leventhal called the structure, history, and "mood" of the statute: Does the text reflect a spirit of wide-open delegation of discretion to the agency implementing the statute?[175] Or instead, does it more tightly constrain the implementing agency?[176] The statutes enacted by Congress might better

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authority without clear congressional authorization." We are told in *Fall of Chevron, supra* note 100, that "[b]y concluding that policy consequences trump clear text, *UARG* more closely tracks *Holy Trinity* purposivism than legal process purposivism." *Id.* at 1234. Yet in *UARG*, Justice Scalia's majority opinion relied upon clear statutory text, setting specific numerical triggers for EPA regulation of pollutants, to invalidate part of EPA's greenhouse gas regulations that set numerical triggers different from those in the CAA statute. What EPA's different numbers were attempting to do was to obey *Massachusetts v. EPA*; 549 U.S. 497 (2007) (holding that the CAA statute requires EPA to regulate greenhouse gases like CO-2 if (as EPA later found) those gases endanger human health and safety) while "adjusting" the statute's numerical triggers to make them apply more rationally to CO-2 emissions that are orders of magnitude greater than those from conventional pollutants, for which the statutorily-designated numerical triggers were written. But the Court held that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 573 U.S. at 328. The Court's "policy override" came earlier in *Massachusetts v. EPA*, not in *UARG*.

[171] In *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006), the Court rebuffed the US Attorney General's claim of authority to regulate physician-assisted suicide, and to change his statutory interpretation, given only "oblique" legislative authorization and the "importance of the issue . . . which has been the subject of an 'earnest and profound debate' across the country."

[172] In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court rejected FDA's claim of jurisdiction to regulate tobacco products and advertising for them, in the absence of a clear congressional statement granting that authority, given the pattern of past congressional laws affecting the tobacco industry that refused to grant FDA such authority.

[173] In *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994), the Court ruled that it was "highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion."

[174] *See, e.g.*, Note, *Major Question Objections*, 129 HARV. L. REV. 2192, 2212 (2016); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017). The concern is that the major question doctrine (or Judge Kavanaugh's "major rules" variant of it) "loads the dice" against any future expansion of environmental, consumer or workplace regulation, while potentially threatening many regulations already in place. *See id.*

[175] *See, e.g.*, 31 U.S.C. § 5318(h)(2) (outlining the broad discretion of agencies under the anti-money-laundering provisions of Title III of the USA Patriot Act).

[176] *See, e.g.*, *Brown & Williamson*, 529 U.S. at 156-59 (rejecting the FDA's argument that it had authority, under 21 U.S.C.S. § 353(g)(1), "to regulate tobacco products as customarily marketed").

indicate subject-by-subject, as they can and often do, how much deference they intend to accord to executive branch agency interpretations.

Overbroad, the major question doctrine errs in positing that Congress never deliberately vests agencies with discretionary authority to choose the best means to effectuate statutory purposes on "major questions."[177] It is a subjective doctrine: What is a "major question" is in the eye of the beholder. So is whether statutory authorization is "clear" enough for an agency to act on a "major question." The major question doctrine is also needlessly destructive of Presidential power, and the flexibility that agencies need to adopt new statutory interpretations (within the bounds allowed by the statute) that permit reasonable change, reform and innovation by agencies responding to new technology, or other new circumstances, including new policies from a newly-elected President.

3. Legislative Critics

Opposition to Obama-era regulations was reflected in a wide range of Congressional bills that aimed to overrule certain agency rules and cut back executive branch agency power generally. The outcome yielded no significant regulatory reform legislation, although the 115th Congress killed more than a dozen Obama-era regulations under the Congressional Review Act.

a. Constitutional Amendment?

One part of the Republican Party's 2016 platform supported a constitutional amendment—the Regulation Freedom Amendment (RFA)—to curb over-regulation. It reads: "Whenever one quarter of the Members of the U.S. House or the U.S. Senate transmit to the President their written declaration of opposition to a proposed federal regulation, it shall require a majority of the House and Senate to adopt that regulation."[178] This proposed constitutional amendment responds to the Supreme Court's decision in *INS v. Chadha*, 462 US. 919 (1983). There, the court struck down a statute that would have allowed a single House of Congress to overturn an agency

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[177] *See, e.g.*, Garland, *supra* note 36, at 560 ("Under most of the statutory schemes considered in this Article, Congress plainly committed to agency discretion the choice of the best means of effectuating the statutory purpose. Adoption of a 'best' policy requirement would all but guarantee substitution of the court's judgment for that of the agency, and the consequent removal from the agency of the discretion Congress intended to confer.").

[178] *Regulation Freedom Amendment*, BALLOTPEDIA, https://ballotpedia.org/Regulation_Freedom_Amendment (last visited Nov. 1, 2019).

rule.[179] More broadly, *Chadha* holds that Congress cannot act except through bicameral passage of a legislative bill that must be presented to the President.[180]

b. Congressional Legislation

Within the past several years, Congress has considered many regulatory reform bills introduced by Members of Congress from both political parties.[181] Not surprisingly, the 115th Congress again considered legislative bills to cut back federal agency power.

Foremost among them was the Regulations from the Executive in Need of Scrutiny ("REINS") Act,[182] which would have revolutionized our system of government. The central provision would require all major rules promulgated by federal agencies to receive affirmative Congressional approval by both Houses of Congress, and signature by the President, before becoming effective.[183] It would strip rule-making power from executive branch agencies for "major rules," which are rules with an estimated annual impact of $100 million or more.[184] With few exceptions,[185] the REINS Act would demote proposed major agency rules to simply ideas for congressional consideration about whether to enact them in a statute. Congressional inaction—failure to enact a joint resolution of approval

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[179] INS v. Chadha, 462 US. 919, 959 (1983) (holding the one-house congressional veto provision in §244(c)(2) of the Immigration and Nationality Act to be unconstitutional).

[180] *See id.* at 948–59.

[181] All the regulatory reform bills introduced in the 112th, 113th, 114th and 115th Congresses, as well as many regulatory reform bills introduced in the current 116th Congress, are listed and briefly summarized in three memoranda prepared by the Administrative Conference of the United States. *See* ADMIN. CONFERENCE OF THE U.S., REGULATORY REFORM LEGISLATION MEMO 112TH – 115TH CONGRESSES (Feb. 1, 2019), https://www.acus.gov/sites/default/files/documents/CURRENT%20Regulatory%20Reform%20Legislation%20Memo%20112th-115th%20Congresses_0.pdf; ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE LAW REFORM BILLS: 115TH CONGRESS (Nov. 28, 2018), https://www.acus.gov/memorandum/administrative-law-reform-bills-115th-congress; ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE LAW REFORM BILLS: 116TH CONGRESS (May 21, 2019), https://www.acus.gov/memorandum/administrative-law-reform-bills-116th-congress.

[182] H.R. 26, 115th Cong. (2017).

[183] *See id.*

[184] *See id.* § 804(2).

[185] Outside the scope of House-passed HR 26 are regulations that concern monetary policy issued by the Federal Reserve System or the Federal Open Market Committee. HR 26 also would have allowed a major rule to take effect for "one 90-calendar-day period" if the President issues an executive order that the regulation is necessary for national security, criminal law enforcement, compliance with international trade agreements, or "necessary because of an imminent threat to health or safety or other emergency." H.R. 26, § 801. Turning to non-major agency rules, with an impact less than $100 million a year, HR 26 set time limits for both Houses of Congress to consider a joint resolution of disapproval, which would have to be presented to the President for approval before it became statutory law that rejected a nonmajor agency regulation. *See* INS v. Chadha, 462 US. 919 (1983).

within seventy legislative days—would kill the proposed major rule. Other parts of the House-passed H.R. 26 would require each agency promulgating a new rule to repeal an existing rule or rules to offset annual costs.[186] H.R. 26 also proposed a process for Congress to act over a ten-year period to review all agency rules currently in effect.[187]

Over the many years that it has been pending before Congress, the REINS Act has been criticized as bad policy no matter which party holds the White House, since it would undercut the President's power and effectiveness. Moreover, critics say the REINS Act is "hopelessly impractical," given Congress' political contentiousness and its lack of time and expertise to micromanage the myriad issues that are now handled by agencies (as a matter of practical necessity) in our complex modern society.[188] Were it to be enacted, the REINS Act might simply incentivize agencies to announce general rules through case-by-case adjudications rather than through rulemaking procedures.[189] That would make regulatory compliance more difficult, not less, for regulated parties. Though the scope of the REINS Act was refined, skeptics still say the bill would result in paralysis of all regulatory activity, creating an unmanageable workload for Congress and overly politicizing the rulemaking process.[190] The REINS Act failed to pass the 115th Congress.

The Regulatory Accountability Act[191] would have abrogated *Chevron* and *Auer* by eliminating judicial deference to agency interpretations of constitutional, statutory and regulatory provisions.[192] It also would have imposed extraordinary burdens on agency rulemaking: requiring formal rulemaking procedures for many agency rules (with evidence taken on-the-record after a hearing), as well as additional Advance Notices of Rulemaking, new evidentiary standards for assessing agency rules (best evidence/least cost/assessment of alternatives), and new opportunities for judicial review and intervention in agency proceedings.[193] Agencies would

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186 H.R. 26, § 808.

187 The REINS Act has been reintroduced in the 116th Congress. *See* S. 92, 116th Cong. (2019); H.R. 1332, 116th Cong. (2019).

188 *See* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 174–79 (2013).

189 *See id.*

190 The implications and undesirable consequences of the REINS Act's power grab from the executive branch might include, for example, a vast expansion of the need to make campaign contributions to Congress—short of quid pro quo bribery for concrete results, *see* McDonnell v. United States, 136 S. Ct. 2355 (2016)—to obtain needed regulatory actions.

191 H.R. 5, 115th Cong. (2017).

192 The same proposals appear in the Separation of Powers Restoration Act of 2019. S. 909, 116th Cong. (2019); H.R. 1927, 116th Cong. (2019).

193 *See generally* H.R. 5, 115th Cong. (2017).

be barred from implementing new rules until all legal challenges to them are resolved.[194] The measure would require agencies to find the lowest-cost option for new rules, and it would increase public input into the rulemaking process. These features of the Act would ensure careful agency deliberation. They also would ensure full employment for industry lawyers. They have been criticized as overly burdensome to the point of stifling all agency rulemaking.[195]

Adopting a narrower approach was the Portman-Heitkamp Regulatory Accountability Act of 2017.[196] It would have left intact *Chevron* deference to an agency's statutory interpretations, while replacing *Auer* deference with weaker *Skidmore* deference to an agency's interpretation of its own regulations.[197] With its extensive requirements for extra rule-making procedures,[198] The Act was criticized as "significantly onerous and resource consuming for agencies" and as threatening to "stop [all] regulation in its tracks."[199]

The old 115th Congress did not enact any of these measures, whose immediate impact would have taken power away from Trump-era agencies. The odds are that they will never become law.

Taking some deregulatory action, the old 115th Congress acted under the Congressional Review Act (CRA) of 1996[200] to override more than a dozen Obama-era regulations.[201] The CRA has limited scope: only so-called "midnight regulations" issued late in a President's term-of-office (on or after June 13, 2016 in the case of President Obama's second term) were CRA-reviewable by Congress.[202] Older Obama agency rules presented to Congress before June 13, 2016—including many regulations on the

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[194] *See* H.R. 5, 115th Cong., §402 (2017). *See also* REVIEW Act of 2019, S. 442, 116th Cong. (2019).

[195] *See, e.g.*, Richard L. Revesz, *Challenging the Anti-Regulatory Narrative*, REG. REV. (July 23, 2018), https://www.theregreview.org/2018/07/23/revesz-challenging-anti-regulatory-narrative/.

[196] S. 951, 115th Cong. (2017).

[197] *See* S. Rep. No. 115-208 (2018). See also Barnett, Boyd, & Walker's recent survey of circuit court decisions from 2003–2013, *supra* note 2, showing that "agencies will likely prevail less often under *Skidmore* than *Auer*, but still much more often than under *de novo* review." Walker, *supra* note 88, at 669.

[198] *See* S. 951, §§ 2–3 (2017). S. 951 also imposed higher evidentiary standards on the agency before it could issue high-impact rules with an expected annual economic impact of $1 billion or more. *Id.* at § 2(16).

[199] Metzger, *supra* note 3, at 12–13.

[200] 5 U.S.C. §§ 801–808 (2012).

[201] *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA) (2018), ("The CRA has been used to overturn a total of 17 rules: 1 in the 107th Congress (2001–2002) and 16 in the 115th Congress (2017–2018).").

[202] *See* 5 U.S.C. §§ 801–808; MAEVE P. CAREY ET AL., CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS (2016).

Republicans' "to-undo list"[203]—were outside the coverage and beyond the reach of CRA-review. Only CRA "resolutions of disapproval" that are passed by both Houses of Congress and signed into law by the President are effective. Ordinarily, Congress can invoke CRA-review only within sixty legislative days of the final publication of earlier midnight regulations,[204] each of which must be given up to ten hours of Senate floor debate. The CRA contains fast-track procedures: A CRA resolution of disapproval needs to be passed by the House and by only fifty-one Senate votes (not sixty) for passage before transmission on to the President. Once an agency regulation has been CRA-disapproved, with the disapproval signed by the President, the CRA statute bars an agency from creating a substantially similar regulation.[205]

Other proposals in the Midnight Rules Relief Act of 2017 would have liberalized the CRA by allowing Congress to CRA-disapprove multiple agency rules en bloc, rather than one at a time as required by the current CRA statute.[206] Time limits in the CRA would be expanded to cover "rules submitted during the final year of a President's term."[207] Neither this bill nor the CRA statute disturbs the status quo ante on institutional questions

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[203] The *Wall Street Journal* reported that Republicans' "to-undo" list includes the Volker Rule (banning banks from "proprietary trading" or making speculative bets with their own funds), the Department of Labor's Fiduciary Rule (requiring brokers to act in their clients' best interest when offering retirement savings advice, as opposed to a looser standard of offering "suitable" financial products), Obama's Clean Power Plan (Obama's signature climate initiative, issued in 2015, imposing federal limits on carbon emissions from power plants, stayed by the Supreme Court), the EPA's Waters of the United States rule (bringing more waterways under federal protection), and the Interior Department's Methane Rule (limiting the amount of methane that oil and natural gas operations can emit on public lands). Harder & Tracy, *supra* note 167.

[204] Time limits for Congress to invoke CRA review involve more than simply counting "legislative days." The CRA may cover more regulations than was earlier appreciated, because many recent regulations were never submitted to Congress to start the running of the 60-legislative-day time limit. *See* Opinion, *Draining the Regulatory Swamp*, WALL ST. J., Mar. 1, 2017, at A18 ("The CRA explains that Congress's review period begins either on the date the rule is published in the Federal Register, or the date Congress receives the report—whichever comes later. . . . But a 2014 study by the Administrative Conference of the United States found at least 43 'major' or 'significant' rules that had never been reported to Congress."). This created significant additional time for CRA review and repeal of those rules. *See, e.g.*, Indirect Auto Lending and Compliance with Equal Credit Opportunity Act, Pub. L. No. 115-172, 130 Stat. 1290 (2018) (President Trump signed the CRA repeal); *Auto-Lending Lemon Repeal*, WALL ST. J., Apr. 13, 2018, at A 14. *See generally* CAREY & DAVIS, *supra* note 201; VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RESEARCH SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH 'RULES" MUST BE SUBMITTED TO CONGRESS (2019).

[205] *See* 5 U.S.C. § 801(b)(2); CAREY ET AL., *supra* note 202.

[206] *See* H.R. 21, 115th Cong. (2017).

[207] Rebecca Buckwalter-Poza, *Deregulation Nation: Congress Wants to Let Corporations Take Charge*, CTR. FOR AM. PROGRESS (Jan. 27, 2017), https://www.americanprogress.org/issues/democracy/news/2017/01/27/297417/deregulation-nation-congress-wants-to-let-corporations-take-charge/. The same provisions for en banc review and expanded CRA time limits appear in the newly reintroduced Midnight Rules Relief Act of 2019, H.R. 87, 116th Cong. (2019).

about the metes and bounds of executive branch agencies' latitude to interpret less-than-precise congressional statutes.

4. Inflexibility

Older academic critiques of *Chevron* recognized the value of considering agency views in statutory interpretation, while lamenting the rigidity with which some courts apply the famous *Chevron* two-step analysis.[208] The vast majority of new *Chevron* criticisms seem to be part of a larger conservative political, judicial, and academic attack on the post-New Deal regulatory state.[209]

One recent commentary argues that the major question doctrine, and the Court's cost-consideration decisions, foretell the Fall of *Chevron*. We are told that "*King*'s expansion of the so-called 'major question' exception threatens *Chevron*'s predominance," because "[t]he exception's trigger—'deep economic and political significance'—is vague and difficult to administer," and it creates an exception that threatens "to swallow *Chevron*'s rule."[210] "More basically," we are told, the major question exception—that some decisions are too critical to leave to agencies, at least absent clear legislative intent to delegate—is inconsistent with *Chevron*'s fundamental premise that "Congress would prefer . . . expert, politically accountable agenc[ies]" (as opposed to generalist, unelected judges) to fill

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[208] *See, e.g.*, Merrill, *supra* note 66, at 374 ("The practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of administrators; it injects an element of flexibility into statutory interpretations; and it helps assure nationally uniform constructions."). A chief objection to *Chevron* is that it is "a kind of jurisprudential straightjacket" that "tends to make deference an all or nothing proposition," either insufficiently deferential (in step one) or over-deferential (in step two), with no in-between. *Id.* at 360 n.31. In addition, *Chevron* allegedly "makes traditional contextual factors that have guided courts—such as whether the agency interpretation is longstanding, contemporaneous with enactment of the statute, well-reasoned, or the product of an express delegation of rulemaking authority—largely irrelevant." *Id.* Overlooked by these criticisms is the flexibility inherent in *Chevron*, which is fundamentally a synthesis and summary of settled common law principles of administrative law. *See supra* note 15. *Chevron* does not "straightjacket" a court or prevent it from considering all relevant factors in assessing the validity and weight to be accorded to an agency interpretation. "Traditional contextual factors" such as whether an agency interpretation is a long-standing consistently held agency view—once considered under the pre-*Chevron* regime of *Udall v. Tallman*, 380 U.S. 1 (1965)—were put to one side in *Rust v. Sullivan*, 500 U.S. 173 (1991), to make more room for discretionary changes in agency policy by Republican President George H.W. Bush. Yet the significance of "traditional contextual factors" could be reemphasized by courts in the future in applying *Chevron* step two to ensure that it is not overly deferential. *See infra* Part V.

[209] *See, e.g.*, Hamburger, *supra* note 29; Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled*, 42 CONN. L. REV. 779 (2010); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J. L. & LIBERTY 475 (2016). *See also* sources cited *supra* note 3.

[210] *See Fall of Chevron*, *supra* note 100, at 1239.

in ambiguous statutory language.[211]

What the Supreme Court's statutory interpretation decisions actually show, however, is that Congress' intentions, concerning judicial deference to an administrative agency's interpretations of a statute, vary from statute to statute and from subject matter to subject matter. Where those legislative intentions can be objectively discerned, a court should honor them.[212] No congressional intention to defer to an expert agency was apparent in *King*, the Affordable Care Act case, where the IRS had no expertise in crafting health care policy. The opinion for the Court did not need to rely on the major question doctrine. That doctrine is not only subjective and unpredictable, it is also overbroad. Some statutes want agencies to fill in the meaning of ambiguous statutory language on "major questions," while other statutes do not. The major question exception should be rejected,[213] particularly insofar as it operates to disregard discernable legislative intent about an agency's authority to interpret a statute.

Nor do the cost-consideration holdings in *Michigan v. EPA* undermine *Chevron*.[214] To be sure, the Court split 5–4 in requiring up-front consideration of costs before an agency embarks on a major regulatory program. But the majority opinion in *Michigan v. EPA* announces general principles of cost consideration that appear to apply (by virtue of the APA) to all agency rulemaking cases, subject to Congress setting a different cost-consideration standard in a particular statute.[215] As Justice Scalia's opinion for the Court in *Michigan v. EPA* states, an agency has discretion, within reasonable limits set by the statute, to decide how to account for cost—a "formal cost-benefit analysis in which each advantage and disadvantage is

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[211] *Id.*

[212] *See, e.g.*, Scalia, *supra* note 10, at 516.

[213] *See, e.g.*, Heinzerling, *supra* note 174.

[214] We are told that *Michigan v. EPA* "departed from prior cases in which the Court concluded that ambiguous language permits agencies to choose whether or not to consider cost because *either* choice is reasonable under *Chevron* step two." *Fall of Chevron*, *supra* note 100, at 1242. Further: "Those cases respected *Chevron's* core tenet that ambiguous language connotes a congressional preference for administrative, not judicial, decision making; *Michigan*, by contrast, effectively imposed a de novo standard of review." *Id.* Not so. The "prior cases"—*EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014) and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009)—did not purport to allow agencies to choose whether or not to consider cost. To the contrary, the agency did in fact consider costs in those cases, and the Court upheld the agency's cost-consideration approach in both cases. Absent a specific statutory exemption from considering costs, it should be clear after *Michigan v. EPA* that an agency rule could not survive judicial review under the APA if it ignored cost altogether. As even the four dissenting Justices recognized in *Michigan v. EPA*: "cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing a standard-setting process that ignore[s] economic considerations." Michigan v. EPA, 135 S. Ct. 2699, 2716–17 (2015).

[215] *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 440–42 (2015).

assigned a monetary value" is not necessarily required.[216] None of these cost consideration rulings foreshadows the Fall of *Chevron.*

III. TRUMP ADMINISTRATION LIMITS ON AGENCIES

Overregulation is a problem that should be addressed by means other than savaging *Chevron.*[217] To date, Congress has not undercut executive branch power across-the-board by enacting the REINS Act or the Regulatory Accountability Act. Nor has the Trump Administration made a frontal assault on *Chevron* in Congress or in the courts. Instead, President Trump and Trump Administration agencies have taken a wide range of deregulatory actions, and they have slowed the pace of issuing new regulations. Their consistent failure to adequately explain their regulatory reversals has led to "an extraordinary record of legal defeat"[218] in the courts, including failed attempts to delay the impact of existing regulations.[219] Yet the Trump Administration is unmistakably embarked on an ambitious deregulatory effort.[220] This includes President Trump issuing executive

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[216] *Michigan*, 135 S. Ct. at 2611.

[217] Overregulation and under-regulation both cause problems, of course. What is the disease, and what is an appropriate remedy, all depend on the specific issue being analyzed. Yet as a practical matter it is impossible to dispense with government by agency in modern American society. *See* Wald, *supra* note 1 and accompanying text.

[218] Fred Barbash & Deanna Paul, *Trump's Agenda Hits Wall in Courts*, WASH. POST, Mar. 20, 2019, at A1 (reporting "63 adverse rulings in [the] past two years" and that "[j]udges frequently cite disregard of basic rules"). *See Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, NYU SCH. OF L. (Aug. 6, 2019), https://policyintegrity.org/deregulation-roundup.

[219] *See, e.g.*, Council of Parent Att'ys and Advocs. v. Devos, 365 F. Supp. 3d 28 (D.D.C. 2019) (rejecting U.S. Department of Education's attempt to delay special-ed regulations). *See generally* Lisa Heinzerling, *Laying Down the Law in Rules Delays*, REG. REV. (June 4, 2018), https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays/.

[220] *See Tracking Deregulation in the Trump Era*, BROOKINGS (Aug. 14, 2019), https://www.brookings.edu/interactive/tracking-deregulation-in-the-trump-era (status report and summary of a large selection of deregulatory actions taken by the Trump Administration); Susan E. Dudley, *Regulatory Year in Review*, FORBES (Dec. 18, 2018), https://www.forbes.com/sites/susandudley/2018/12/13/regulatory-year-in-review/#485336376af6; *President Donald J. Trump is Following Through on His Promise to Cut Burdensome Red Tape and Unleash the American Economy*, WHITE HOUSE FACT SHEET (Oct. 17, 2018) (stating that the Trump Administration issued 176 deregulatory actions last year, eliminating 12 regulations for every new one, achieving $33 billion in regulatory savings, and highlighting its efforts to roll back Corporate Average Fuel Economy standards, the EPA's "Waters of the United States" rule, and Obama's Clean Power Plan), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-following-promise-cut-burdensome-red-tape-unleash-american-economy/. *See also* Juliet Eilperin & Damian Paletta, *Ax Falls on 860 Obama Regulations*, WASH. POST, July 21, 2017, at A17. *But see* Alan Levin & Jesse Hamilton, *Trump Takes Credit for Killing Hundreds of Regulations That Were Already Dead*, BLOOMBERG BUSINESSWEEK (Dec. 11, 2017); Connor Raso, *What Does $33 Billion in Regulatory Cost Savings Really Mean?* BROOKINGS (Jan. 10, 2019), https://www.brookings.edu/research/what-does-33-billion-in-regulatory-cost-savings-really-mean/ (asserting that Trump Administration claims of cost savings

orders that aggressively require agencies to reduce the number and burden of regulations and to deregulate cost-effectively, and the Department of Justice refusing to enforce policy guidelines issued by federal agencies.

A. Two-for-One: Executive Order 13771

The signature deregulatory action of the Trump Administration is Executive Order 13771 (EO 13771), issued January 30, 2017. Together with its accompanying Office of Management and Budget (OMB) Interim Guidance memoranda, EO 13771 adopts a "two-for-one" regulatory budget that requires agencies "unless prohibited by law" to identify two old rules for possible repeal (with notice-and-comment rulemaking often required to actually make the repeal thereafter) for every new rule they propose.[221] For every dollar of new cost imposed on the private economy, each agency will have to propose cutting back its own regulations to find two dollars of burden to relieve. The *Wall Street Journal* reports that this is similar to laws in the United Kingdom that require the costs of new rules to be offset by deregulation of comparable net value.[222] Trump's two-for-one order is endorsed by the *Journal*, which notes that, according to a working paper for George Mason's Mercatus Center, the economy might be about twenty-five percent larger (more than $4 trillion a year, or $13,000 per person) if the level of U.S. regulation had stayed constant since 1980.[223]

Trump's two-for-one order—if properly refined, implemented, and overseen by OMB's five Resource Management Offices (RMOs) and OMB's Office of Information and Regulatory Affairs (OIRA) (these are no simple tasks)[224]—seeks to maximize benefits within a regulatory budget, while scaling back on the overall number of regulations. It would encourage agencies to minimize regulations and to be the judge (at least initially, subject to review by OIRA and the courts) of the importance and cost-

often improperly ignore foregone benefits from repealing rules); Glenn Kessler, *Trump's Shaky Claim Deregulation Saves Households $3,000 a Year*, WASH. POST, Aug. 25, 2019, at A4 (arguing that Trump's claims about deregulation are misleading and that the supposed benefits will take decades to accumulate and measure).

221 Exec. Order No. 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (Jan. 30, 2017). *See also* Exec. Order No. 13777, *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285 (Feb. 24, 2017). *Cf.* S. 442, 116th Cong. (2019); H.R. 575, 116th Cong. (2019).

222 But note that the United Kingdom program did not apply the two-for-one (later three-for-one) rule to European Union mandated regulations—which were most of them.

223 Editorial, *Trump Dams the Regulatory Flood*, WALL ST.J., Jan.31, 2017, at A14.

224 Trump's two-for-one order states that any agency "eliminating existing costs associated with prior regulations under this [order] shall do so in accordance with the Administrative Procedure Act and other applicable law." Exec. Order No. 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9339 (Jan. 30, 2017). Ordinarily, this would entail notice-and-comment rulemaking (which may take two years or more) for eliminating old regulations. *See* Harder & Tracy, *supra* note 167.

effectiveness of their own rules. The order has limited scope.[225] Nevertheless, the Brookings Institution characterizes EO 13771 as an "important opportunity" for reform.[226] The RAND Corporation's analysis is similar. After noting some of the difficulties with benefit-cost analyses, and earlier attempts to implement a regulatory budget in the United States, RAND analysts note that while EO 13771 seeks to reduce costs, and provides mechanisms for prioritizing between regulations,[227] it does not address the concern of critics that bureaucracies tend to overestimate the benefits and underestimate the costs of regulations (of course, business interests often do just the opposite). The RAND analysts further comment:

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[225] OMB's "Interim Guidance" memorandum specifies: The two-for-one order applies only to "significant regulations" (generally, major rules costing $100 million/year or more); it does not apply to independent agencies like the SEC (though OMB encourages them to voluntarily comply); it explicitly applies only to fiscal year 2017 (ending September 30, 2017) although it establishes a regulatory budgeting program for OMB to set incremental agency budgets for issuing regulations in FY 2018 and beyond; and it has several exemptions, including regulations required to be issued by statute or court order, deregulation rules, and regulations relating to the military, national security or foreign affairs. OMB also may grant case-by-case waivers for new regulations related to "critical health, safety or financial matters." Memorandum from OMB to Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (Feb. 2, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related ombmaterial/eo_iterim_guidance_reducing_regulations_controlling_regulatory_costs.pdf.

[226] Ted Gayer, Robert Litan & Philip Wallach, *Evaluating the Trump Administration's Regulatory Reform Program*, BROOKINGS (Oct. 20, 2017), https://www.brookings.edu/wpcontent/uploads/2017/10/evaluatingtrumpregreform_gayerlitanwallach_102017.pdf (providing an overview of less ambitious regulatory reform efforts by Presidents Carter, Reagan, Clinton, George W. Bush, and Obama; comparing President Trump's plan with regulatory budgets implemented in Canada and the United Kingdom; reviewing legal and practical challenges to Trump's regulatory budget; describing the difficulties of measuring costs; speculating about outcomes of EO 13771 ranging from worst to best case scenarios; and noting the importance of distinguishing between regulations that do and do not enhance social welfare, as well as bringing old regulations up to date with modern realities and clearing out "accumulated detritus").

[227] RAND analysts describe the operation of EO 13771 as follows:

> Once OMB assigns new caps on regulatory costs on each agency, EO 12866 and the predecessors it builds on dictate that each agency should comply with its new cap in a way that maximizes the net benefits it can achieve within the cost cap that it has been assigned. Put another way, although EO 13771 does not explicitly mention regulatory benefits, it embeds its new regulatory budget in a preexisting approach to managing regulations in which benefits continue to play a central role. . . . Overall, the relationship between EO 13771 and the existing regulatory regime means that even though EO 13771 focuses entirely on costs, cost-benefit analysis will continue to play a role in determining which regulations agencies opt to enact.

Benjamin M. Miller et al., *Inching Toward Reform: Trump's Deregulation and Its Implementation*, RAND CORP. 9 (2017) (on file with the University of Louisville Law Review). Turning to how OMB might distribute regulatory cuts across agencies, RAND states: "OMB should give the largest regulatory budget to agencies that have regulations with the highest net benefit per dollar of cost on the margin to be cut." *Id.* at 7.

While aspects of reform, such as the call for retrospective analysis in EO 13771, can be a key part of instituting the cultural changes necessary to make a regulatory budget effective, the "two-for-one" approach of EO 13771 reinforces a regulatory mindset that focuses on which regulations to cut rather than how to most efficiently reduce regulatory burden. Without further changes in guidance, regulators are unlikely to focus on the kinds of changes in *how* to regulate that have accounted for most of the cost savings generated by the UK's regulatory budget.[228]

Effective implementation of a regulatory budget, RAND analysts suggest, requires focusing on *how* to regulate, rather than just *what* to regulate. They suggest that regulatory costs can be reduced without gutting critical protections, by writing regulations that set goals rather than specific mechanisms to achieve those goals, by "simplifying forms and processes,"[229] and by streamlining inspections. They also point out that consumer protection "regulations are not necessarily harmful to industry. The reputation of quality held by U.S. regulations imparts a competitive advantage to U.S. businesses" in global markets.[230] Without further refinement, RAND cautions, reducing costs by simply eliminating regulations can lead to serious consequences for U.S. consumers and U.S. manufacturers.[231]

Opponents, including Public Citizen, have filed suit challenging Trump's two-for-one order as violative of the APA and the Constitution.[232] They make several claims including: many health and safety statutes do not authorize agencies to consider this sort of cost reduction; and the two-for-one order arbitrarily ignores any consideration of the comparative and net benefits obtained from the rules being considered.[233] These objections

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[228] Miller et al., *supra* note 227, at 13. The "regulatory culture" needs to be considered, RAND states, "with appropriate changes to the reward and recognition system to ensure career support for regulatory experts involved in retrospective analysis and switching to a 'how to regulate' mindset." Summary of *Inching Toward Reform*, RAND CORP. (2017), https://www.rand.org/pubs/perspectives/PE241.html [hereinafter RAND Summary].

[229] Miller et al., *supra* note 227, at 10 ("For example, allowing publicly traded companies to use electronic versions of their annual reports saved British business more than £180 million.").

[230] RAND Summary, *supra* note 228.

[231] *See id.*

[232] *See* Miller et al., *supra* note 227, at 8; Pub. Citizen, Inc. v. Trump, 297 F. Supp. 3d 6 (D.D.C. 2018); and Holly L. Weaver, *One for the Price of Two: The Hidden Costs of Regulatory Reform Under Executive Order 13,771*, 70 ADMIN. L. REV. 491 (2018) (arguing that the two-for-one order is both unconstitutional and arbitrary and capricious).

[233] *See* SUNSTEIN, *supra* note 163, at 21 (criticizing Trump's two-for-one order: "What matters is not whether the agency has added to the total amount of costs, or whether it has added more regulations than it has taken away, but whether it has produced benefits on balance."). Compare this with RAND's analysis of Executive Order 13771, which sets out criticisms and suggests improvements but does not suggest that cost-benefit analysis bars the Administration from adopting a regulatory budget approach

overlook important limitations already in EO 13771, which vow to deregulate in accord with the APA and other applicable law,[234] which includes following notice-and-comment rulemaking procedures for repeal of old regulations. These objections also slight the "central role" of comparative and net benefits that RAND analysts find already in EO 13771.[235] Nevertheless, Public Citizens' objections, as well as other criticisms by Brookings and RAND, should be addressed in future clarifications and refinements of EO 13771. The United States District Court in the District of Columbia dismissed Public Citizen's suit, for lack of Article III standing to bring suit.[236]

Other critics of EO 13771 embrace cost-benefit analysis (CBA) to the point that they appear to object to the idea of a limiting regulatory budget.[237] Emphasizing "the crucial importance of seeing cost-benefit analysis as a spur and a prod, not merely a check and a veto," Professor Cass Sunstein argues that

> the right approach is not 'one in, two out' but a careful check on issuing

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that limits the total amount of costs imposed by agency regulations. *See supra* notes 227–28 and accompanying text.

[234] *See supra* note 224 and accompany text.

[235] *See* Miller et al., *supra* note 227, at 9.

[236] *See Pub. Citizen, Inc.*, 297 F. Supp. 3d at 40.

[237] A similar criticism of Executive Order 13771 notes that discretionary agency rules have been required since 1981 to have a positive cost-benefit (CBA) rating. The implication that some commentators suggest is that there can be no valid deregulation of any of these existing agency rules with a positive CBA rating. *See, e.g.*, Masur & Posner, *supra* note 160, at 942–43, 981. But courts should recognize that the Trump Administration has lawful power to order executive branch agencies to assess their own regulations in order to maximize benefits within a regulatory budget, while considering the deletion of "least best" regulations through appropriate APA procedures (often notice-and-comment rulemaking), within the scope allowed by congressional statutes. There is no doubt that changes in the market, or in science and technology, may render old agency rules obsolete. *Cf.* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) ([Where technological change is dramatic, reasonable regulatory solutions] "adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."). Miller et al., *supra* note 227, at 11 ("[Rapid advancements in science and medicine support] updating and/or eliminating outdated regulations," listing, as an example, repeal of outdated, counterproductive regulations of tampons). An initial positive cost-benefit assessment may be mistaken or become outdated. *See, e.g.*, Todd Rubin, *News from ACUS*, 43 ADMIN & REG. L. NEWS, Fall 2017, at 22 (describing SEC's 2004 re-examination of the "Uptick Rule," which the SEC eventually eliminated two years later). Or market changes may make regulation less expensive. *See, e.g.*, *supra* Part IV.C (discussing Obama's Clean Power Plan). There is considerable uncertainty in conducting cost benefit analysis, in any event, since it is not a simple, mathematically precise endeavor. *See, e.g.*, Garland, *supra* note 36, at 524 n.98 ("Just as an agency must often base its regulations on little more than expert predictions, it may also need to deregulate on the basis of similar evidence."); Rubin, *supra* (noting that "Agencies promulgate regulations under conditions of great uncertainty," particularly given the risk of "substantial negative unintended consequences," and discussing the option of "regulatory experimentation"); Editorial, *A New Cost-Benefit Regulation Test*, WALL ST. J., (Oct. 2, 2018), https://www.wsj.com/articles/a-new-cost-benefit-regulation-test-1538436507 (commenting on disputes about how EPA calculates "co-benefits").

> new rules, with the help of cost-benefit analysis—accompanied by an insistence on issuing those rules if the benefits justify the costs and an ambitious program to scrutinize rules on the books to see if they should be scrapped.[238]

That is a policy argument. But given the imprecisions in cost-benefit analysis,[239] it would be surprising if the courts invoked CBA to invalidate a regulatory budget approach and require an agency to issue expensive, budget-busting regulations. Opponents of EO 13771 might more plausibly challenge particular deregulatory agency actions or (more broadly) an agency's overall pattern of regulatory and deregulatory activity, if it dramatically fails to obtain the biggest "bang for the buck" within the limits of a regulatory budget.

B. U.S. DoJ's Rule Against Civil Enforcement of Agency Policy Guidelines

The United States Justice Department's (DoJ's) 2018 memorandum, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," continues the Trump Administration's efforts to check agency overreach.[240] The memorandum states that DoJ litigators may no longer rely on "guidance documents"[241] issued by federal agencies for the purpose of affirmative civil enforcement litigation.[242] This is significant for practitioners.

The EPA and many other agencies have often claimed that regulated businesses violated an ambiguous statute or regulation because they violated a clarifying "guidance document" that the agency issued without notice and comment rulemaking. Moreover, consent decrees between private parties and agencies, as well as unilateral administrative orders, have often required compliance with guidance documents. Yet the DoJ's new policy clarifies the point that the DoJ may not use its enforcement authority to effectively convert agency guidance documents into binding

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[238] SUNSTEIN, *supra* note 163, at 210–11. Taking up some of these ideas, S. 1420, 116th Cong. (2019) would require agencies to retrospectively evaluate their own regulations every ten years.

[239] *See supra* Part II.D.1.

[240] Memorandum from Rachel Brand, U.S. Assoc. Attorney Gen., to Heads of Civil Litigating Components, United States Attorneys (Jan. 25, 2018), https://www.justice.gov/file/1028756/download [hereinafter Rachel Brand Memo].

[241] *Id.*

[242] Technically, the memorandum does not apply to administrative cases that an agency handles itself in administrative law tribunals, or to independent agencies with federal court litigating authority independent of DoJ. But the DoJ's new memorandum underlines the point—for all agencies—that agency "guidance documents" issued without going through notice and comment rulemaking do not have the force and effect of binding, legally enforceable law. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

rules.[243]

IV. *CHEVRON* DURING THE TRUMP ADMINISTRATION

While the Supreme Court said in *Epic Systems* that it may revisit *Chevron*, an immediate judicial revolution overthrowing *Chevron* seems unlikely given conservative political support for the agency rulings that are currently being issued by the Trump Administration. Traditional administrative law checks and balances on agency action, under the APA and *Chevron*, are likely to continue. They provide meaningful safeguards against both over-expansive assertions of agency power, and over-enthusiastic deregulation or cost-cutting at the expense of statutory objectives. They also allow agencies the flexibility to adopt new regulatory approaches, and to change them within statutory and constitutional limits, rather than sticking rigidly to a single "best" statutory meaning. Trump Administration policies, seeking changes in policy within lawful bounds, would be harder to implement under the major question doctrine or a textualist approach than under *Chevron*'s regime. The following discusses this point in the contexts of Trump Administration policies relating to net neutrality and two Obama-era policies, Deferred Action for Childhood Arrivals (DACA) and the Clean Power Plan.

A. Net Neutrality

The outcome of litigation over the FCC's new "net neutrality" rules may illustrate agencies' substantial discretion to change regulatory course under *Chevron*'s regime, even when the reasons for the change are bitterly contested new policy views.[244] This sort of switch in the FCC's position, to adopt policies favored by the new Trump Administration, might be more difficult to achieve under a textualist regime where courts (rather than agencies) determine "what the law is" by announcing the single "best" interpretation of a statute.[245] Were the "major question" doctrine to be

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[243] *See* Rachel Brand Memo, *supra* note 240.

[244] The odds are that, under the principles of *Fox TV Stations* and *Brand X*, the courts will affirm the FCC's contentious new policy partially repealing net neutrality, since the FCC's decision indicates that it is aware that it is changing position and that there are good reasons (though disputed ones) for its new policy. *See* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (upholding the FCC's repeal of net neutrality); FCC Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (reclassifying internet service as an "information service"—rather than a common carrier telecommunications service, i.e., a public utility—and overturning Obama-era "net neutrality" regulations from 2015 that had required internet service providers to treat all internet traffic equally, without "throttling" or slowing content for some sites and services or providing fast lanes for others).

[245] Obama's net neutrality rules were upheld in United States Telecom Ass'n v. FCC, 825 F.3d 674

adopted by the High Court, it might invalidate Trump's new FCC policy as beyond the agency's statutory power.

B. DACA

Trump's decision to wind down the Obama DACA program[246] properly triggered agencies' obligation under *Fox TV Stations* to address serious reliance interests that were created by the old DACA policies that are being reversed.[247] The outcome of the politically fraught DACA cases in the

(D.C. Cir. 2016), *rehearing denied* 855 F.3d 381 (2017), *cert. denied* 139 S. Ct. 475 (2018). There, the Supreme Court, by a 4–3 vote, went beyond denying certiorari and explicitly turned down the Trump Administration's request to vacate as moot, and eliminate the precedential value of, the court of appeals' decision upholding Obama's net neutrality rules. There appears to be more than one permissible way for the FCC to interpret and implement the statutes at issue. Thus, in its turn, the FCC's new rule also seems likely to survive judicial review and become the new federal standard, preempting conflicting state laws. *See* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019). The extent of the preemption is unsettled. *See id.* Yet several states have issued executive orders that, drawing on the state's power as a purchaser rather than as a direct regulator, require Internet Service Providers to follow the old net neutrality rules if they want to be eligible to sell internet service to state agencies. *See, e.g.*, Brian Fung, *States May Have Figured Out a Way to Get Around FCC on Net Neutrality*, WASH. POST, Feb. 19, 2018, at A12. Moreover, both the European Union and Canada have chosen to stick with the old net neutrality rules for the internet. Thus in a few years it may be possible to compare the actual results from these two competing systems and to determine what system, or combination of systems, is in fact best for consumers. Vincent Cerf and Robert Kahn—the fathers of the internet—are divided on this issue. *Compare* Andrew Orlowski, *Father of Internet Warns Against Net Neutrality*, REGISTER (Jan. 18, 2007), https://www.theregister.co.uk/2007/01/18/kahn_net_neutrality_warning/, *with* Matt Weinberger, *The Googler Known as the "Father of the Internet" Defends an Institution That's at Risk under the Trump Administration*, BUS. INSIDER (Mar. 10, 2017), www.businessinsider.com/google-cloud-vint-cerf-on-fcc-and-net-neutrality-2017-3.

[246] Obama's Department of Homeland Security adopted the DACA program in a 2012 memorandum to postpone the deportation of undocumented immigrants brought to America as children and, pending action in their cases, to assign them work permits allowing them to obtain social security numbers and to pay taxes. DACA was adopted as a "guidance" without any notice or opportunity for public comment. Unlike the larger, now terminated Deferred Action for Parents of Americans (DAPA) program, which would have delayed deportation of millions of undocumented aliens, DACA provides no pathway to citizenship or lawful residency in the United States. The older, larger DAPA program was ended by DHS in June 2017 after it was preliminarily enjoined in *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd sub nom.* United States v. Texas, 136 S. Ct. 2271 (2016).

[247] To date, the courts have not accepted DHS' argument that rescinding DACA is an unreviewable decision about "nonenforcement" that is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2012). Trump's winding down and termination of DACA is a species of deregulation, eliminating a government regulatory program that was earlier in place. DACA affects nearly 700,000 immigrants, luring them out of the shadows, and creating equities and reliance interests among both DACA immigrants and the many groups (universities, employers) who economically benefit from the continued presence of DACA immigrants in this country. The standards in *Fox TV Stations* and *Encino Motorcars*, requiring agencies to justify changes in policy, require the government to recognize and come to grips with these serious reliance interests. *See* Encino Motorcars, LLC v. Navarro, 136 U.S. 2117, 2125 (2016) (quoting *Fox TV Stations*, Inc., 556 U.S. 502, 515 (2009)). The United States District Court for the District of Columbia ruled in late April 2018 that, in seeking to rescind the DACA program,

Supreme Court is uncertain. But at least so far, in the lower courts, the DACA cases also illustrate the point that the major question doctrine—relied upon by Trump's Department of Homeland Security (DHS) to question the power of Obama's DHS to create the DACA program in the first place[248]—is mistaken in insisting upon clear congressional authority before it recognizes any agency authority whatsoever on "major questions."[249] Even though there is no clear, explicit statutory authority for

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Trump's DHS is *required* to recognize these reliance interests by winding down the DACA program, as opposed to immediately terminating it. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 238–40 (D.D.C. 2018), *reaff'd*, 315 F. Supp. 3d 457 (D.D.C. 2018), and 321 F. Supp. 3d 143 (D.D.C. 2018).

[248] Ordinarily, one would not expect the executive branch to question its own authority. The opinions of three federal district courts—in California, New York, and Washington, D.C.—indicate that DACA could validly be wound down if President Trump took political responsibility for a discretionary policy decision to do so. Yet the major claim of Trump's DHS was and is, instead, that it validly revoked DACA on the "legal" ground that Obama's DHS lacked power and authority to create the DACA program in the first place. *See, e.g.*, Regents of the Univ. of Cal. v. DHS, 279 F. Supp. 3d 1011, 1036–37 (N.D. Cal. 2018) and 298 F. Supp. 3d 1304 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (No. 18-587). This "legal" claim by Trump's DHS was rejected by those three federal district courts and by the Fourth and Ninth Circuits. *See id.*; Casa de Maryland v. DHS, 924 F.3d 684 (4th Cir. 2019); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018), *cert. granted*, 139 S. Ct. 2779 (2019) (No. 18-588); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); and Batalla Vidal v. Duke, 295 F. Supp. 3d 127 (E.D.N.Y. 2018), *cert. granted sub nom.* McAleenan v. Vidal, 139 S. Ct. 2773 (June 28, 2019) (No. 18-589). The courts in California and New York issued nationwide preliminary injunctions against termination of the DACA program. Meanwhile, a court in Texas found DACA likely invalid, but it refused to preliminarily enjoin the program, because of the harm that an immediate injunction would cause to DACA recipients and the public. *See* Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018). The Supreme Court has consolidated Nos. 18-587, 18-588, and 18-589 ("the DACA cases") for briefing and oral argument. *McAleenan*, 139 S. Ct. (No. 18-589).

[249] The opening Supreme Court brief for the Government in the DACA cases splits its "legal" objections to DACA into three parts: first, a "practical" concern about unlawfulness; second, a "policy" decision to "terminate a legally questionable nonenforcement policy"; and third, its "legal" view that DACA is unlawful. *See* Brief for Petitioners, McAleenan v. Vidal, No. 18-589, 2019 WL 3942900, at *15. Yet all three of these DHS rationales are rooted in its "legal" objection. As Justice Kavanaugh noted during oral argument, DHS's "policy" reasons are "intertwined" with its "legal" considerations. Transcript of Oral Argument at 84, *McAleenan*, No. 18-589 (U.S. Nov. 12, 2019). This is a far cry from stating independent "policy" grounds that could stand alone, with DHS' "legal" objection out of the picture. *Compare* NLRB v. Wyman-Gordon, Co., 394 U.S. 759, 766–67 n.6 (1969); Mass. Trustees v. United States, 377 U.S. 235, 245–46 (1964); *and* Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 209–17, 222–23 (1969) (supporting the *Chenery* rule—which requires a remand when an agency ruling is based on a wrong reason—since remand allows not only agency reconsideration based on proper criteria but also the opportunity for the agency to make qualifications and exceptions). To be valid, any independent "policy" ground must be articulated and "owned" by DHS itself, not just by counsel in the Justice Department (the SG). *See id.* at 201–02; SEC v. Chenery Corp., 318 U.S. 80, 87, 92 (1943). A critical question for the High Court is thus whether DHS' change of position—ostensibly made in Secretary Nielson's June 22, 2018 memorandum responding to the D.C. district court's invitation to further explain DHS' decision to terminate DACA—is a valid assertion of independent "policy" grounds that justify DHS' decision, or instead simply a set of post hoc rationalizations by counsel rehashing DHS's central "legal" rationale. *See, e.g.*, NAACP v. Trump, 315 F. Supp. 3d 457 (D.D.C. 2018) and 321 F. Supp. 3d 143 (D.D.C. 2018). One of President Trump's negotiating positions—which presumes that

it, DHS appears to have at least some valid authority to create the DACA program: The statutory and constitutional authority for DACA "deferred action" seems fairly discernable, since it traces its origins back through many decades of executive branch discretionary relief programs, under both Republican and Democratic administrations, and it has long been recognized as a "regular practice" by the Supreme Court and congressional statutes.[250]

C. Clean Power Plan

Trump's EPA has issued a new Affordable Clean Energy rule (ACE)[251] to replace Obama's hotly contested Clean Power Plan (CPP), regulating air pollution from electric power plants. The EPA's new rule repeals the old CPP on the ground that it was issued without statutory authority.[252]

DACA is a lawful, valid program—was that he would extend the DACA program in exchange for Congress funding the southern wall. Winding down DACA, Chief Justice Roberts commented, may not require invalidating all of the consequences of DACA. Transcript of Oral Argument at 38, *McAleenan*, No. 18-589. Taking this point into consideration, as well as Henry Friendly's views (above), has merit: Applying the *Chenery* rule to remand the DACA cases to DHS (in a remand without vacatur) would allow the agency to meaningfully consider (as the APA requires) the several different kinds of DACA reliance interests at stake (held by the military, cities, businesses, and health-care providers, as well as Dreamers); and whether qualifications and exceptions to Trump's new policy are warranted for any of them. Oral argument in the consolidated DACA cases was held November 12, 2019, with a decision expected in 2020.

250 To create the DACA program in 2012, Obama officials relied on the regular practice of immigration officials to grant "deferred action." DACA provides no pathway to citizenship or lawful permanent residency. Historically, DACA grew out of a long agency history of discretionary relief programs—including actions by Presidents Eisenhower, Ronald Reagan, and George W. Bush: Beginning as early as 1975, immigration officials have utilized discretionary "deferred action" (based on both statutory and non-statutory powers) to postpone deportations. The United States District Court for the Northern District of California found that, while "[d]eferred action . . . began without express statutory authorization," it has now been recognized as a "regular practice" by the Supreme Court and Congressional statutes. Regents of the Univ. of Cal. v. DHS, 279 F. Supp. 3d 1011, 1019 (N.D. Cal. 2018). The Ninth Circuit agreed. *See* Regents of the Univ. of Cal. v. DHS, 908 F.3d 476 (9th Cir. 2018).

251 *See* Repeal of the Clean Power Plan, 84 Fed. Reg. 32520 (June 19, 2019). This could be one way for the EPA to comply with *Massachusetts v. EPA*, which holds that, together with the EPA's finding that greenhouse gases endanger human health, the Clean Air Act requires some sort of EPA action to address CO-2 and other greenhouse gas emissions. *See supra* note 168.

252 *See* 84 Fed. Reg. at 32523–32. The Congressional Research Service reported that "[p]reviously in its proposed repeal of the CPP, EPA acknowledged multiple possible 'readings' of the scope of its [CAA] section 111 authority, but in its repeal, the agency takes a more definitive stance and claims its revised and final interpretation is the 'only permissible reading'" of the statute. LINDA TSANG, CONG. RESEARCH SERV., LSB10325, EPA REPLACES THE CLEAN POWER PLAN WITH THE AFFORDABLE CLEAN ENERGY RULE 2 (2019). While litigation against the CPP was proceeding in the court of appeals, the Supreme Court enjoined the CPP until all court challenges to it are resolved. *See* North Dakota v. EPA, 136 S. Ct. 999 (2016). That order suggests that a thin majority of five Justices thinks EPA lacked statutory authority to issue the old CPP. *See, e.g.*, Winter v. NRDC, 555 U.S. 7 (2008) (noting that the criteria for issuing a preliminary injunction include consideration of the likelihood of prevailing on the merits).

According to the ACE, the Clean Air Act (CAA) bars the EPA from issuing rules like the CPP that extend "outside the fence" by forcing utilities to consider compliance measures such as carbon capture and storage, emissions trading, and shifting from coal to natural gas and renewable generation facilities.[253] Instead, the ACE focuses solely on reducing emissions plant-by-plant from *existing* coal-fired power plants "inside the fence."[254] While the CPP set specific numerical targets for each state to reduce CO-2 and other greenhouse gas emissions, state-by-state, the ACE leaves it primarily to each state to decide emission standards for its own existing coal-fired power plants. In setting standards, states may consider "source-specific factors," including the remaining useful life of older coal-fired utility facilities.[255] The EPA's new rule considers the fact that new market realities (the availability of cleaner energy sources, rather than government regulations) are now driving utilities to switch from oil and coal to "greener" fuels.[256] More controversially, EPA's new rule asserts that there was "likely to be no difference" between a future scenario with the old CPP and one without it.[257]

The validity of the ACE hinges on several issues. First, were the courts to conclude that, contrary to a major premise of the ACE, the EPA did have statutory authority to issue the old CPP,[258] then a remand to the EPA might be necessary to allow the EPA to reassess the ACE in light of a correct understanding of the scope of the EPA's statutory powers. Yet five Justices appear to think that the old CPP was beyond the EPA's statutory authority

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[253] *See* 84 Fed. Reg. 32520.

[254] *Id.*

[255] *Id.* at 32521.

[256] *See* 84 Fed. Reg. at 32521, 32553; *id.* at 32544–46 (concluding that natural gas repowering, co-firing, or refueling is not the "best system of emission reduction" (BSER) for *existing* coal-fired plants); *id.* at 32555 (compliance mechanisms). Market forces (not EPA regulations) are now the major factor driving utilities to switch from oil and coal to "greener" fuels. *See, e.g.*, Bradley Olson & Cassandra Sweet, *Companies Stay Course on Emissions*, WALL ST. J., Dec. 9, 2016, at B1 ("Big utilities that burn coal, such as AEP, say they will continue their transition to cleaner energy sources—even if Mr. Trump makes good on his pledge to reverse the Clean Power Plan."); Joby Warrick & Steven Mufson, *Ruling Fails to Stun Electricity Providers*, WASH. POST, Feb. 12, 2016, at A2 ("Move to cleaner power is proceeding, regardless of Supreme Court's stay.").

[257] 84 Fed. Reg. at 32561.

[258] The *West Virginia* litigation on the CPP raised the question: Without the thumb-on-the-scales approach of the major question doctrine, is the statutory language of section 111(d) of the Clean Air Act—which calls for EPA to determine the "best *system* of emission reduction [BSER] for States to meet the emission standards—broad enough to authorize the Obama Clean Power Plan's strategy, which included fostering renewable energy? *See* Petitioners' Nonbinding Statement of the Issues to Be Raised, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Dec. 18, 2015). The D.C. Circuit has since dismissed the litigation as moot. West Virginia v. EPA, No. 15-1363, 2019 U.S. App. LEXIS 29593 (D.C. Cir. Sep. 17, 2019).

under the Clean Air Act.[259] That conclusion would eliminate the power of future Administrations to resurrect the old CPP and issue EPA regulations reaching "outside the fence." To the extent that the new ACE seeks to go beyond that judgment condemning the old CPP, and more generally "tie the hands of future Administrations" as to "what the EPA can and can't do" under the Clean Air Act,[260] it may be subject to substantial challenges in court. This is because under the CAA, a future administration's EPA may set more demanding minimum federal emission standards for utilities.

Were Trump's ACE found to be based simply on the desire to reduce industry costs, without adequate regard for the Clean Air Act's public health purposes, then the courts might well invalidate it.[261] The basic underlying principle was developed by the courts over many years to ensure that over-enthusiastic agency deregulation and cost-cutting do not overwhelm statutory public health goals.[262]

Yet another factor to consider, supporting wide EPA discretion to choose an appropriate regulation, is that electric utility generators are not the only sources of CO-2 and greenhouse gas emissions. Especially considering rapid market developments favoring "greener" societal practices, the EPA should have some discretion to decide which industries and regulatory initiatives to pursue, how fast, and in what combinations, to comply with the general directive in *Massachusetts v. EPA* that the Clean Air Act requires the EPA to address CO-2 and other greenhouse gas emissions in some fashion. This flexibility that the High Court read into the Clean Air Act might have been much harder to achieve under a rigid textualist regime.

V. *CHEVRON*'S FUTURE

The outpouring of partisan attacks on Obama Executive Branch agency

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259 *See supra* note 252.

260 Lisa Friedman, *E.P.A. Establishes Plan on Climate Friendly to Coal*, N.Y. TIMES, June 20, 2019, at A1 (quoting a utility representative interviewed for the article).

261 More than twenty states, as well as various cities and health organizations, have sued to vacate the ACE, claiming (among other things) that it is ineffectual in implementing the CAA's statutory purpose of protecting human health. See Petition for Review, *State of New York v. EPA*, No. 19-1165 (D.C. Cir. Aug. 13, 2019); Petition for Review, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. July 8, 2019). *See* Garland, *supra* note 36, at 510–12, 516, 519 n.72 (listing court cases invalidating deregulatory agency actions that were taken to reduce industry costs without adequate regard for statutory goals).

262 As Judge Garland writes, case law "reject[s] the suggestion that agencies may deregulate without regard to original congressional intent simply because they have struck a new 'balance.' Until the statute itself is amended, the cases insist, the original congressional intent—and not the shifting political tide—is the source of the agency's legitimacy." Garland, *supra* note 36, at 585–86.

power, and criticisms of *Chevron* from academics, Congress, and some judges, have not undermined the practical considerations that support *Chevron*'s retention in the long term.[263] Technical expertise, held by politically accountable agencies more than generalist federal judges, is desirable in administering increasingly complex and scientifically dependent statutes.[264] Under *Chevron* and *Fox TV Stations*, agencies can change position and implement new policies to come to grips with changes in science, technology, and other new circumstances. By contrast, insisting that federal court judges resolve all statutory ambiguities by announcing the single "best" interpretation of a statute would produce "ossification of large portions of our statutory law."[265] Under *Chevron*, the extent to which courts defer to agency interpretations of law ultimately depends on "Congress' intent on the subject as revealed in the particular statutory scheme at issue."[266] And Congress has repeatedly invested agencies with discretionary power to make policy and undertake day-to-day administration of the regulatory programs that Congress itself has neither the time nor the expertise to administer.[267]

"[W]hether *Chevron* should remain is a question we may leave for another day," the Court states in *SAS Institute*.[268] One of Justice Kennedy's last opinions, concurring in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), expressed "concern with the way" that *Chevron* "has come to be understood and applied."[269] He called on courts to engage in more than "cursory analysis" before "reflexive deference" to agency statutory interpretations, particularly as applied to questions about agency jurisdiction and substantive agency powers.[270] Justice Kennedy stated that, given the concerns raised by Justices Thomas and Gorsuch,[271] the Court should reconsider "the premises that underlie *Chevron* and how the courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should

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[263] *See, e.g.*, Bednar & Hickman, *supra* note 15; Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretations*, 126 YALE L.J. 908 (2017). *Contra* Hamburger, *supra* note 29.

[264] *See, e.g.*, Harold Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U. PA. L. REV. 509, 510 (1974).

[265] United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting).

[266] Scalia, *supra* note 10, at 516.

[267] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372–74 (1989).

[268] SAS Inst., Inc. v. Iancu, 136 S. Ct. 1348, 1358 (2018).

[269] Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

[270] *Id. Accord* Zurich Am. Ins. Grp. v. Duncan, 889 F.3d 293, 307–08 (6th Cir. 2018) (Kethledge, J., concurring in the judgment) (writing that judges should make "every effort to discern for ourselves the statute's meaning" before accepting that a statute is ambiguous and the agency's interpretation is reasonable).

[271] *See, e.g.*, BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 904–09 (2019) (Gorsuch and Thomas, JJ., dissenting) (criticizing *Chevron*).

accord with constitutional separation-of-powers principles and the substance and province of the Judiciary."[272]

These commonsense clarifications could be readily accepted in the future. The opinion in *Chevron* sets out, and applies, the common law concerning court review of agency statutory interpretations.[273] The statutory provisions and legislative history of section 706 of the APA support that common law approach.[274] The Court may modestly tweak its common law standards, as it has done in the past,[275] to address any reasonable concerns that have been raised about *Chevron.*

To be specific, the High Court may well clarify *Chevron* step one to specify that reviewing courts first should undertake an energetic independent assessment of statutory meaning before considering an agency's interpretation.[276] Then *Chevron* step two could be clarified to take account more explicitly of whether the agency's view is "reasonable" in light of what a reviewing court thinks is the best statutory interpretation. This would link the two steps and ensure that they are not viewed as separate watertight compartments specifying either no deference or "excessive" deference to agency views.[277] When assessing an agency interpretation of an ambiguous statute, a reviewing court should consider

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[272] *Pereira*, 138 S. Ct. at 2121.

[273] *See supra* note 15; *infra* note 274.

[274] The scope-of-review provision in the APA (codified at 5 U.S.C. § 706) was understood to be a "restatement" of existing law. *See* S. DOC. NO. 248, at 39 (1946) (explaining, in the legislative history of the Act, the need to restate the scope of review). *Accord* S. REP. NO. 752, at 224 (1945) ("[The APA] restates the law governing judicial review"); *id.* at 229 ("[Section 706] declares the existing law concerning judicial review."); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) ("This restates the present law as to the scope of judicial review."). Existing pre-APA law permitted judicial review, "[i]n some instances at least, [to] be limited to the inquiry whether the administrative construction is a permissible one." S. DOC. NO. 77-8, at 78 (1941). "[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body." *Id.* at 90. *Accord* Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (canvassing the legislative history of the judicial review of section 706 and concluding that the APA does not significantly alter the common law of judicial review of agency action).

[275] *See* discussion of *Rust v. Sullivan supra* note 208.

[276] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (directing the lower court, on remand, to follow an approach similar to the one advocated in this article: independently assess the meaning of an agency regulation before turning to examine whether the agency's interpretation of its own ambiguous regulation is reasonable and entitled to *Auer* deference); Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv., 139 S. Ct. 361 (2018) (avoiding discussion of *Chevron* and remanding case for further consideration under correct statutory standards).

[277] *Cf.* Merrill, supra note 66, at 360; *Administrative Law—Review of Agency Interpretations of Law—Supreme Court of Canada Clarifies Standard of Review Framework*, 132 HARV. L. REV. 1772, 1772–76 (2019) (suggesting an approach, different from the one suggested in this Article, that would apply "as the *Chevron* era ends," to "help the *Chevron* debate escape the deferential-judicialist divide in which it is trapped.").

the statute, traditional tools of statutory interpretation,[278] and insights from the common law (including insights that address concerns about the way that *Chevron* has come to be understood and applied). These insights are properly considered under *Chevron*'s common law regime. They support considering, among other things: (1) whether the statute grants discretion (how explicitly, and how much) to the agency to choose the best means of effectuating statutory goals; (2) whether the agency's statutory interpretation is based upon its special knowledge and expertise; (3) warnings from Chief Justice Roberts against agency self-aggrandizement on the scope of agency jurisdiction and power; and (4) traditional contextual factors recognized in earlier times, whose relevance can become apparent in particular cases (e.g., whether the agency interpretation is longstanding, contemporaneous with enactment of the statute, well-reasoned, or the product of an express delegation of rulemaking authority,[279] and whether a statute charges the agency "with the duty to make and implement" national policy[280]).

The odds are that *Chevron* will survive in the future because it is flexible, because it reflects the wisdom of the common law, and because it "more accurately reflects the reality of government, and thus more adequately serves its needs."[281]

Were *Chevron* simply overruled, without more, court review of agency action might lapse back to the older, weaker standard in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), under which courts accord measured respect to agency views, short of mandatory deference, after considering a variety of factors.[282] Yet this might shortchange the importance (recognized in

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[278] Traditional tools of statutory interpretation, as used here, include the statutory text, structure, context, enacted legislative findings and purposes, legislative history, any earlier Supreme Court decisions specifying "the one-and-only" "once-and-for always" meaning of a statute, and all the many "other factors" that can properly be considered in statutory interpretation. *See, e.g.*, LEVI, *supra* note, 6 (discussing mainstream statutory interpretation principles). The specific numbered items in the text above are *not* exclusive. Instead, they simply list some factors that *Chevron*'s critics often overlook—in particular, that a statute may commit interpretive authority to an agency. *See* Garland, *supra* note 36, at 560 (canvassing many statutory schemes where "Congress plainly committed to agency discretion the choice of the best means of effectuating the statutory purpose"). The selected considerations listed in the text also include, on the other hand, "traditional contextual factors" that critics say are often overlooked or undervalued under *Chevron*'s regime. *See supra* note 205. To the extent that concerns about *Chevron* are reasonable—and overbroad separation of powers objections, extreme textualism, and the major question doctrine are *not* reasonable—those reasonable concerns can be readily incorporated into *Chevron*'s common law regime as insights from the common law.

[279] *See supra* note 208.

[280] Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1978) (holding that an agency should enjoy greater discretion in interpreting a statute that charges it "with the duty to make and implement . . . national policy").

[281] Scalia, *supra* note 10, at 521.

[282] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944). *Skidmore* has been described as "the

administrative law developments since 1944) of permitting Congress to allow agencies to change position about the proper interpretation of a statute, to allow agencies to come to grips with new developments and new changed circumstances. Alternatively, the standard of court review post-*Chevron* might be the "arbitrary and capricious" standard of *State Farm*.[283] But that is so similar (if not identical) to the standards of *Chevron* step two, that one would expect very little (if any) difference in litigation outcomes.[284] That outcome seems unlikely, because the Justices criticizing *Chevron* generally want to cut back the weight accorded to agency views. The option recommended by this article is retaining *Chevron*, with modest refinements, injecting flexibility and more emphasis on the court's own interpretation of the statute. The most dramatic weakening of agency power would occur—invalidating many more agency rules as beyond the agency's statutory authority—if the High Court were to adopt the major question doctrine, or textualists' narrow reading of agency statutory power, and simultaneously downgrade the significance of agency views about statutory interpretation. Those are critical issues for the future of executive branch agency authority.

We should expect some clarification or restatement of *Chevron*'s flexible common law standards, emphasizing that courts should first seek to interpret a statute before turning to examine the acceptability of an agency's interpretation. But the major question doctrine and the new textualism—calling for the exile of all legislative history and the severe devaluation of agency views in all statutory interpretation cases—should be rejected. Those doctrines are overbroad and needlessly destructive of the President's power to take effective action through executive branch agencies.

VI. CONCLUSION

Traditional tools of statutory construction—including a look at past precedent, the statutory text, structure and "mood" of a statute about delegation to the implementing agency, enacted legislative findings and

persuasiveness standard" as opposed to *Chevron*'s "reasonableness standard" that (in step two) directs a reviewing court to accept any reasonable agency view that is consistent with the statutory text, whether or not the reviewing court regards it as the "best" interpretation. *See* Brief for Professor Thomas Merrill as Amicus Curiae Supporting Reversal, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15), 2019 WL 446519. Other scholars claim that *Skidmore* has allowed a wide variety of approaches by different judges. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250–71 (2007). Chief Justice Roberts points out that there is a difference between persuasion and deference. *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part).

[283] *See supra* note 17.

[284] *See* Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 79 (2018) (arguing that, if the Court abandons *Chevron*, "the framework that ultimately would replace [it] would be likely to operate, in practice, a fair bit like that in *Chevron* itself").

purposes, legislative history, and the views of the agency implementing the statute—should carry more weight than extreme textualism and the major question doctrine, in deciding the amount of discretion enjoyed by an agency in interpreting a statute. Over time, as early court decisions flesh out the meaning of less-than-completely-precise statutory provisions, later court rulings will assimilate those early decisions and proceed more narrowly down the path that was earlier established.[285] As Justice Scalia reminded us, all this still leaves much for a matter of interpretation. But some principles of statutory interpretation are better than others. Overstated claims made for the major question doctrine and extreme textualism should not obscure their shortcomings or the continuing importance of other tools of statutory interpretation and *Chevron* deference to reasonable agency views.

[285] *See* LEVI, *supra* note 6, at 32–33, 54, 57.