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THE CHEVRON DOCTRINE: CONSTITUTIONAL AND STATUTORY QUESTIONS IN JUDICIAL DEFERENCE TO AGENCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

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HOUSE OF REPRESENTATIVES

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http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104665

THE CHEVRON DOCTRINE: CONSTITUTIONAL AND STATUTORY QUESTIONS IN JUDICIAL DEFERENCE TO AGENCIES

TUESDAY, MARCH 15, 2016

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 2:24 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Issa, Collins, Ratcliffe, Bishop, Johnson, Conyers, DelBene, and Jeffries.

Staff Present: (Majority) Daniel Flores, Chief Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Minority Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. I apologize. First of all, we had votes and tried to get through them as quickly as possible.

Without objection, the Chair is authorized to declare a recess of the Committee at any time. We welcome everyone here to today's hearing on the Chevron Doctrine: Constitutional and Statutory Questions of Judicial Deference to Agencies. And I now recognize myself for an opening statement.

Today's hearing on the 30-plus-year-old *Chevron* doctrine presents interesting questions on the current state of the separation of powers, and the role of today's administrative state. These questions directly address the way our tripartite system of government works. For one, has judicial review of agency action evolved in a manner that respects the Constitution and the roles intended for the legislative, executive, and judicial branches? If there are issues, what can and should Congress do to address them?

In *Chevron*, the Supreme Court established a framework for how courts should review an agency's interpretation of a statute it administers. As a threshold matter, the court must determine whether the statute at hand clearly speaks to the question addressed by the agency action. If it does, then the court must conclude that the agency acted as Congress willed it. But if the statute is silent, or ambiguous, and congressional intent is not clear, then the court must consider whether or not the agency's interpretation is based

on a permissible instruction of the statute. If it is, then the court defers to the agency's interpretation.

Although the *Chevron* doctrine is not as glamorous or headline worthy as some other issues we face in Congress, its indirect effect on the everyday lives of Americans cannot be understated. Its implications for the balance between the three branches of our government can be quite severe. In fact, many of the most significant decisions of the Supreme Court, in recent memory, centered on questions of administrative law. The focus is often on how agency officials interpreted a statute, rather than the substance of a statute itself as enacted by elected Members of Congress.

In this environment, *Chevron* and the cases that followed have caused confusion, instead of stability in the rulemaking process. In *Marbury v. Madison*, among the earliest precedents set by the Court, Chief Justice Marshall declared that, "It is the province and duty of the judicial department to say what the law is." By mandating deference to agency interpretation of statutes, however, the judiciary has arguably stripped its own ability and charge to do just that. For those of us up here on the dais, *Chevron* raises additional concerns.

Throughout my time in Congress, and as a Member of the Judiciary Committee, I have decried the breadth and decree to which Congress has ceded its power to the executive branch and its agencies. Over 30 years of *Chevron* deference, we have seen the gradual creep of executive agencies from administrators of the legislative process to becoming legislators themselves.

As Justice Thomas noted in his concurrence to the Court's *Michigan v. EPA* decision from last summer: "Statutory ambiguity thus becomes an implicit delegation of rulemaking authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress."

In short, rather than executing the will of Congress, as set forth clearly through statute, agencies now have the freedom to define the law as they see fit. Some may argue that even the use of *Chevron* could be avoided by clearer legislation. This is true, and should be a goal for all in Congress. But, as long as *Chevron* stands, it still will not eliminate the opportunity and incentives for unelected bureaucrats, removed from the effects of their actions to set policy for our entire Nation. And we have seen it with just a small sample of overreaching EPA regulations like the Clean Power Plan, Waters of the U.S., and the Utility MACT rule found invalid in *Michigan v. EPA*.

A possibility of *Chevron* deference encourages a search, by those inside and outside of government, for ambiguity in a statute that allows them to engage in creative rulemakings to accomplish whatever goals an agency or organization may have. Today, we get to examine all of these results. We are fortunate to have an excellent panel of witnesses before us to present a variety of views. I look forward to hearing from each of you.

The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, my friend, Mr. Johnson from Georgia, for his opening statements.

Mr. JOHNSON. Thank you, Mr. Chairman, and welcome everyone to this very riveting issue. Judicial review of final agency action is a hallmark of administrative law and is critical to ensuring that agency action does not harm or adversely affect the public.

As the Supreme Court clarified recently, this significant policy concern has long supported a general rule favoring judicial review of agency action for arbitrariness and abuse of discretion subject only to rare exceptions. But as the Supreme Court held in *Chevron v. Natural Resources Defense Council*, reviewing courts may only invalidate an agency action when it violates a constitutional provision, or when the agency's rule exceeds its statutory authority to issue the rule as clearly expressed by Congress.

For the past 30 years, this seminal decision has required deference to the substantive expertise and political accountability of Federal agencies. Professor Ron Levin, chair of the Judicial Review Committee for the Administrative Conference Of the United States, explains that this doctrine is born from principles of separation of powers, noting that it "recognizes that Congress often decides to entrust policymaking authority in certain areas when it does so, and the agency acts within the scope of that delegation as the court understands it, a court is obliged to honor the legislature's expectations by upholding a rational exercise of that authority, even where the agency reaches a conclusion that the reviewing court would not have reached."

Although *Chevron* has taken on talismanic qualities in recent years, courts retain an important role in determining whether an agency action is permissible or arbitrary and capricious under the Administrative Procedure Act.

In 2011, the court indicated that at the very least, there is substantial overlap between the second step of *Chevron* and "hard look reviewing," under the APA. And while there is no shortage of debate on the principles of judicial deference as the American Bar Association administrative law section noted in 2012, Judicial Review largely remains stable today concluding that, "Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent."

I similarly oppose any attempt to abolish judicial deference through legislation. While I consider myself an ardent protector of the courts, it is a well-established doctrine that the province of the courts is deciding matters of the law, not substantive matters specifically delegated to agencies by Congress.

Since the 112th Congress, many of the majority's deregulatory bills we have considered will enlist generalist courts to supplant the expertise and political accountability of agencies in the rulemaking process. Compare this approach with other deregulatory bills passed by Congress which would greatly diminish judicial review over deregulatory actions. For example, the House adopted an amendment to H.R. 8, the "North American Energy Security and Infrastructure Act of 2015," which reduced the statute of limitations for judicial review to just 90 days for certain energy claims. Immunizing certain energy projects from public accountability. In other words, the majority wants it both ways.

When it benefits corporate interest, the regulatory legislation dramatically increases the judicial review of new regulations, threatening to impose years of delay and untold cost on taxpayers. When it benefits the public or our environment, deregulatory legislation closes the courthouse doors through sweeping restrictions on the court's inability to provide relief. So we have one set of rules for consumers, and one set of rules for corporations.

These proposals, which are transparently the design of the donor class to minimize their exposure to legal accountability, are just another example of how some not only want to allow the fox to guard the chicken coop, they want the fox to install the chicken wire as well.

In closing, I look forward to testimony from our esteemed panel. Pardon my attempt at humor. I thank the witnesses for their testimony, and I yield back.

Mr. MARINO. The Chairman of the full Judiciary Committee, Chairman Goodlatte, has been detained. He may show up, but in the event he does not, without objection, I offer his opening statement to be entered into the record.

Hearing none, so ordered.

[The prepared statement of Chairman Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

The modern federal administrative state is an institution unforeseen by the Framers of our Constitution and rapidly mushrooming out of control. Today's hearing focuses on one of the pillars of that state—the *Chevron* doctrine, under which federal courts regularly defer to regulatory agencies' interpretations of the statutes they administer.

In perhaps the most famous of the Supreme Court's early decisions, *Marbury v. Madison,* Chief Justice Marshall declared for a unanimous court that, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."

Since the *Chevron* doctrine allows judges to evade saying what the law is, and instead defer to agencies' interpretations, one must ask—is *Chevron* faithful to *Marbury* and the separation of powers?

In the Administrative Procedure Act of 1946, often called the "constitution" of administrative law, Congress provided for judicial review of agency action in terms that, like *Marbury,* were plain and direct. It stated that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions[.]"

That standard is consistent with *Marbury* and the separation of powers. But since *Chevron* allows judges to escape interpreting statutory provisions themselves, one must ask—is *Chevron* unfaithful, not only to *Marbury,* but also to the Administrative Procedure Act?

These are not just academic questions. They are fundamental questions that go to the heart of how our government works and whether the American people can still control it.

The genius of the Constitution was that, by separating the legislative, executive and judicial powers into three distinct branches, the ambitions of each branch would check and balance the ambitions of the others. As long as the separation is kept strong, that system of checks and balances preserves liberty—as the Framers intended.

But judicial deference under *Chevron* weakens the separation of powers, threatening liberty. It bleeds out of the Judicial Branch power to say what the law is, transfusing that power into the Executive Branch. And, it tempts Congress to let the hardest work of legislating bleed out of Congress and into the Executive Branch, since Congress knows judges will defer to agency interpretations of ambiguities and gaps in statutes Congress did not truly finish.

This leads us down the dangerous slope James Madison warned against in Federalist 47—"[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," that "may justly be pronounced the very definition of tyranny."

This is what Americans across our Nation feel in their bones to be dangerous when they fear a federal regulatory bureaucracy growing beyond limits and spinning out of control. They fear a government emboldened to burst our system of checks and balances, trespass without limit on their liberty, and threaten their way of life—all at the whim of "swarms of administrators" in a far-off capital.

I look forward to the testimony of our witnesses as we explore the *Chevron* doctrine and what can be done in response to strengthen the separation of powers. I yield back the balance of my time.

Mr. MARINO. The Chair now recognizes the full Judiciary Committee Ranking Member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. My colleagues, today's hearing focuses on whether the Supreme Court's articulation of judicial deference in *Chevron* is a concept that should be retained in Federal administrative law. I believe the *Chevron* doctrine should be retained for several reasons: First, enhanced judicial review would make rulemaking even more costly and time-consuming for agencies. The Federal rulemaking process is already deeply ossified, as they say.

As the Nation's leading administrative law scholars have long observed, agency rulemaking is hampered by burdens imposed by both the courts and Congress. Indeed, Professor Richard Pierce, one of our witnesses, noted that more than 20 years ago, that the judicial branch is responsible for most of the ossification for the rulemaking process. Heightened judicial review would only worsen this problem because it would force agencies to formulate even more detail, factual records and explanations.

Enhanced judicial review could also have the perverse effect of undermining agency accountability and transparency. It could encourage agencies to conduct rulemaking out of the public view, to issue guidance documents in lieu of rulemaking, or to cause them to avoid rulemaking altogether.

I'm also concerned that the enhanced judicial review will undermine public participation in the rulemaking process. As the nonpartisan congressional research service has observed, public participation and agency decisionmaking is highly sensitive to cost and delay. And applying greater judicial scrutiny of agency rulemaking will favor those who can afford these greater costs.

Large corporate interests, which are accountable only to shareholders and devoted to maximizing profits, already have the edge with their vast resources to bury an agency in paperwork demands and litigation with a goal of weakening regulatory standards. Rather than providing even more opportunities for the voices of corporate interests to prevail, we should be considering ways to ensure the voices of the public are strengthened in the rulemaking process.

And finally, enhanced judicial review would encourage judicial activism. A less deferential judicial review standard would allow judges, in my view, to effectively make public policy from the bench while lacking the specialized expertise that agencies possess.

The Supreme Court has had numerous opportunities to expand judicial review of rulemaking, but it has consistently rejected this approach. This reflects its long-held belief that generalist courts lack the subject matter expertise of agencies, are politically unaccountable, and should not engage in making substantive determinations from the bench. Enhanced judicial review, on the other hand, would allow general courts to impose their rules, to impose their personal policy preferences.

It's ironic that the majority, which has long decried judicial activism, now seeks to give the judiciary a greater role in agency rulemaking. And what would be the impact on slowing down the rulemaking process? It means that rules intended to protect the health and safety of American citizens would take longer to promulgate and become effective. This means a delay for regulations that protect the quality of the air we breathe, and the safety of the water we drink, and the food we consume. And, so, I welcome the witnesses. I look forward to their testimony and return any time that I may not have used.

Thank you.

Mr. MARINO. Without objection, other Members' opening statements will be made part of the record. I will begin now by swearing in our witnesses before I introduce you. So you would please stand and raise your right hand.

Do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God? You may be seated.

Let the record reflect that all the witnesses have responded in the affirmative.

I'm going to go through each one of your bios and then we'll come back and start with questions. Jonathan Turley is the Shapiro Professor of Public Interest Law at the George Washington University Law School. He has served as counsel in some of the most notable case of the last two decades. He has served as a consultant on Homeland Security and constitutional issues, and is a frequent expert witness for Congress on constitutional and statutory issues.

As a nationally recognized legal scholar, Professor Turley has written extensively in a range of areas. His articles have appeared in a variety of leading law journals and national newspapers. And he also contributes regularly to nationally syndicated news outlets. He is ranked 38 in the top 100 most public intellectuals, and was found to be the second most cited law professor in the country. Professor Turley earned his bachelor's degree from the University of Chicago, and his law degree from Northwestern University. Welcome, Professor.

Mr. TURLEY. Thank you, sir.

Mr. MARINO. John Duffy is the Samuel H. McCoy Professor of Law at the University of Virginia Law School. Prior to joining UVA's law school, Professor Duffy taught at the George Washington, Benjamin N. Cardozo and William & Mary Schools of Law as well as the University of Chicago. Professor Duffy also served as an attorney adviser in the Department of Justice's office of legal counsel and practiced law with the firm of Covington & Burling. Professor Duffy is widely published and the coauthor of the casebook on patent law. Professor Duffy earned his bachelor's degree in

physics from Harvard University, and has a law degree from University of Chicago, where he served as article's editor of the law review.

Professor Duffy clerked for Judge Steven Williams on the U.S. Court of Appeals for the D.C. Circuit, and for the late U.S. Supreme Court justice, Antonin Scalia.

Mr. Shepherd is a professor at the Emory University School of Law. Prior to that, he served as a visiting professor of law at the University of Dresden in Germany and a lecturer for Kaplan Bar Review. Mr. Shepherd practiced commercial litigation and bankruptcy law at the firm of Howard Rice in San Francisco, California. Professor Shepherd's articles, working papers, and books have been featured in various national publications and leading law journals. He has appeared as an expert witness before various panels as well as the Senate Committee on the Judiciary. Professor Shepherd graduated Summa Cum Laude from Yale with a degree in economics. He holds a law degree from the Harvard Law School, and a Ph.D. in economics from Stanford University. Welcome, sir.

Richard Pierce is the Lyle T. Alverson Professor of Law at George Washington University Law School. He has taught and researched in the fields of administrative law and regulatory practice for 38 years. Professor Pierce has taught at many law schools, including Columbia, SMU, the University of Kansas, the University of Virginia and the Pittsburgh School of Law. Professor Pierce has published widely on administrative law and regulatory policy. His books and articles have been cited in hundreds of agency and court opinions, including over a dozen opinions of the United States Supreme Court. He is a member of the administrative conference of the United States.

Professor Pierce served our country in the U.S. Coast Guard in various capacities. He earned his bachelor's degree in economics from Lehigh University, he holds a law degree from the University of Virginia School of Law where he graduated Order of the Coif and served as managing editor of law review. Professor, welcome.

Emily Hammond is the associate dean for Public Engagement and Professor of Law at the George Washington University law school. Professor Hammond previously taught at several universities, including Wake Forest, the University of Oklahoma College of Law, the University of Texas, Florida State University and the University of Georgia. Professor Hammond practiced law with Bondurant——

Ms. HAMMOND. Bondurant, yes.

Mr. MARINO [continuing].—Mixson & Elmore in Atlanta, Georgia. As a former environmental engineer, her expertise included electricity markets, regulatory jurisdictions and the various responses of legal institutions to scientific uncertainty. Professor Hammond's articles have appeared in numerous top ranked journals and she is the coauthor of one of the Nation's leading energy law texts. She is an elected member of the American Law Institute, a chair elect of the Association of American Law Schools Administrative law section, and a member scholar of the Center for Progressive Reform. She has served as a hearing examiner for state administrative proceedings and has provided service to the International Atomic Energy Agency. Professor Hammond earned her bachelor's degree in

economics from Virginia Tech and a JD from the University of Georgia. Welcome, Professor.

Jack Beermann is the Harry Elwood Warren Scholar at the Boston University School of Law. He previously taught at various universities, including Harvard, DePaul, the Interdisciplinary Center in Herzliya, Israel, and the Chinese University of Political Science and Law.

Professor Beermann is published widely in top-ranked journals. He has authored and coauthored four books on administrative law, including a widely-used case book and the Emanuel Law Outline on the subject. Professor Beermann earned his bachelor's degree in political science and philosophy from the University of Wisconsin at Madison. He holds a law degree from the University of Chicago Law School, where he was elected Order of the Coif and served as an editor of the Law Review. Professor, welcome.

We're going to begin with opening statement, Professor Turley, before we do, there are lights in front of you, and I'm sure that several of you know what those lights are for. I'm colorblind, so I don't know what colors they are. So I'd ask you to keep your statements 5 minutes or less. And if you start to go over 5 minutes, I will diplomatically raise this little thing and tap here to get your attention. So I thank you, and I'd like to start with Professor Turley.

TESTIMONY OF JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY

Mr. TURLEY. Thank you, Chairman Marino, Ranking Member Johnson, Ranking Committee Member Conyers, Members of the Subcommittee, it is a great honor to appear before you today to talk about the *Chevron* doctrine, its constitutional implications for our system. It is a particular pleasure to appear on this esteemed panel with these academics, including my colleagues from GW, Dick Pierce and Emily Hammond, and my former colleague from GW, John Duffy, who left us to join some nest of Jeffersonians south from here, but we appreciate you allowing him to come back to the big city on occasion.

This is obviously a very important question for many of us. When look at it from different perspectives, I think what you're going to see today is sort of a microcosm of the field. How *Chevron* is viewed differs, whether you view it from a constitutional standpoint, or from an administrative law standpoint, or perhaps a hybrid of those two areas.

From my perspective, *Chevron* is a deeply problematic subject. I'd like to say, as Woody Allen once said, that I wish I could leave you with a positive point, but ask if you'd accept two negative points instead. From a Madisonian standpoint, I'm afraid the best you can hope for is to get two negative points to make a positive, but it doesn't quite work. And I would like to explain why.

I previously testified and written about what is called the Rise of the Fourth Branch, and how that has created an imbalance in our system, and, particularly, drained away some of the authority from Congress, which is so important to the balance of our three branches.

To take a look at the administrative state as it is sometimes called, it is obvious that our system has changed. When this republic started, we only had about 1,000 people in non military positions. Obviously, it was quite small.

In 2007, Congress enacted 138 public laws, in that same year Federal agencies enacted about 3,000 rules. To put it in a judicial standpoint, judges that year in a given year handled about 100,000 cases. Federal agencies have adjudicatory proceedings ranging around 1 million.

The question then becomes is the dominant source of law making or law giving in the country? I think it is obvious that we have had a shift in gravity in our system toward this administrative state. The implications of that are worthy of discussion, they create new pathways and power centers in a system that wasn't designed for them.

Now, my colleagues and I have different views of the implications of that. *Chevron* is one of those subjects that will deeply divide most academics, but, in my view, *Chevron* was solving a problem that didn't exist. It, on its face, sought to limit the role of judges, which is not a bad thing in terms of agency decisions. But it had sort of Trojan Horse aspects to it. It arrived in a benign form, and it became more aggressive and, indeed, menacing in time. *Chevron* allowed a very permissive standard for agencies. As allowed the administrative state to be insulated to a degree that I think is, in fact, dangerous.

Now, before *Chevron*, we didn't have a period of utter confusion or tyranny under the *Skidmore* standard. Agencies were given "respect" and considerable weight in their interpretations; that's why some of us view it as solving problem that didn't really exist.

And indeed, recently, the court has almost a buyer's remorse in how it has tried to limit *Chevron*. You've seen in the Christensen case, for example, this limitation of *Chevron* to a force of law cases. You've seen in other cases how the Court has tried to distinguish circumstances where *Skidmore* and *Ellis* would apply as opposed to *Chevron* analysis.

But I think one the most problematic aspects of *Chevron* is seen in the City of Arlington case, where that deference was given to an agency in defining its own jurisdiction. In my testimony, I've recommended a series of possible approaches of Congress based on the delegation theory of *Chevron* that I recommended, and I'd be happy to talk about those to the Committee.

And I will simply end by saying that I don't believe you need to treat *Chevron* as a fait accompli, or have a fatalistic view of *Chevron*. *Chevron* is not evil, it is not tyrannical, but that doesn't mean that it cannot be improved. And so I'm happy to answer your questions.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
George Washington University

"The *Chevron* Doctrine:
Constitutional and Statutory Questions in Judicial Deference to Agencies"

Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives

March 15, 2016

I. INTRODUCTION

Chairman Marino, Ranking Member Johnson, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the *Chevron* Doctrine and its constitutional implications for our system of government.

It is a particular pleasure to appear today with this esteemed body of academics, including my colleagues Dick Pierce and Emily Hammond, and my former GW colleague John Duffy. The panel reaffirms what I have always maintained that there really is no need for Congress to go outside George Washington for all of its legal needs. Indeed, we are just short of a faculty quorum today.

I have long written about the rise of a "fourth branch" in our system and I cannot pretend that this trend is insignificant or benign. Indeed, as Woody Allen once observed, "I wish I could think of a positive point to leave you with" but asked if the crowd would "take two negative points" instead. There are many defenders of the Administrative State who, while admitting that our system has changed, insist that it has changed for the better. However, this is a case where two negatives do not make a positive – at least from a Madisonian perspective. Indeed, what you are likely to discern today is how *Chevron* is viewed differently from constitutional law and administrative law perspectives. I tend to view the doctrine through the lens of the separation of powers. Some of my colleagues tend to view the doctrine through the lens of agency powers.

The unavoidable fact is that our system is changing in a fundamental way and that change is occurring without public debate or consent. That is why this hearing is so important. No case better reflects this new governmental model than *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, an administrative law case that has come to embody the role of federal agencies in not just enforcing but creating law. If our system is to be returned to its original moorings, we must be able to address, and alter, the *Chevron* doctrine in how it affects the balance of power within our federal system.

I come to this issue as someone who often agrees and supports the work of federal agencies. Indeed, law professors have a natural affinity toward agencies, which are

usually directed by people with advanced degrees and public service values. The work of federal agencies is critical to the preservation of our health and security as a nation. This is not a debate about the importance of the work of the agencies, but rather the accountability of agencies in carrying out that work. The agreement with the work of agencies – or for that matter with this Administration as a whole – should not blind us to the implications of the growing influence and independence of federal agencies. To that end, I would like to begin by briefly discussing the concern surrounding the growing independence of federal agencies and the emergence of a type of "fourth branch" of government. I will then turn to the doctrine itself in both its original conception and later evolution. Finally, I will suggest a few areas where Congress can act to realign the system and restore some of the original balance between the branches. As will be clear, I believe that the Supreme Court has made a colossal mess of this field with ill-defined and at times conflicting standards. Indeed, it imposed a solution to a problem that did not really exist and, in doing so, created a host of greater problems for our system. If the Court was judged under the medical standard that the first duty is "to do no harm," *Chevron* would be viewed as nothing short of legal malpractice. I believe that Congress can play a key role in restoring the system and addressing the negative (and unintended) consequences of *Chevron*.

II. THE RISE OF A FOURTH BRANCH IN A TRIPARTITE SYSTEM.

I have previously written[1] and testified[2] about the rise of the Fourth Branch and

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[1] *See, e.g.*, Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); *see also* Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013) (discussing the separation of powers consequences in the reduction of legislative authority).

[2] *See Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf; *Enforcing The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *see also Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of

the growing imbalance in our governmental system. The American governmental system obviously has changed dramatically since the founding when the vast majority of governmental decisions rested with state governments. In 1790, the federal government was smaller than most modern city governments with just 1,000 nonmilitary workers. By 1962, it had grown to 2,515,000 federal employees. We now have roughly 2,840,000 federal workers in 15 departments, 69 agencies, and 383 nonmilitary sub-agencies.[3] This does not count the millions of contractors and subcontractors working for the government. The growth in the size of the federal government resulted in a shift in the center of gravity for our system as a whole. Massive federal agencies now promulgate regulations, adjudicate disputes, and apply rules in a system that often has relatively little transparency or accountability to the public. All but a tiny fraction of these actions are (or can be) reviewed by Congress, which has relatively few staff members and little time for such reviews. As a result, it is the Administrative State, not Congress, which now functions as the dominant "law giver" in our system. The vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unseen bureaucrats. For example, in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.[4] Agencies now adjudicate most of the legal disputes in the federal system. A citizen is ten times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. This does not mean that these regulations and adjudications are inherently tyrannical or that Congress has no influence over agencies. Rather, it states the obvious: this system is adopting new pathways and power centers that were never anticipated in the design of our system.

Obviously, the rise of a massive administrative state within the previously tripartite system is a transformative change from the original design of our system. James Madison viewed the separation of powers of the three branches in quasi-Newtonian terms – as three bodies locked in a stable orbit with the public at the center. The carefully balanced powers of the three branches allowed inverse pressures to check abuses of power. The separation of powers doctrine was first and foremost a protection of individual rights from the concentration of power in any single branch or single person. Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison's view, "the interior structure of the government"[5] distributed the pressures and

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confirmation hearings to address separation of powers issues).

[3] Turley, *Recess Appointments in the Age of Regulation*, *supra* note 1, at 1533; WALTER E. VOLKOMER, AMERICAN GOVERNMENT 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4,837 employees. Deanna Malatesta, *Evolution of the Federal Bureaucracy*, *in* 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

[4] Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

[5] THE FEDERALIST NO. 51, at 320 (James Madison).

destabilizing elements of nature in the form of factions[6] and unjust concentration of power.[7] He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" and for the republican government to function in a stable and optimal fashion.[8]

The structure of this system represents more than just the rigid lines defining interbranch powers. The structure is meant to transform factional interests into majoritarian compromises. I have previously written about what I call a "conarchitectural" approach to constitutional interpretation and understanding the separation of powers.[9] In architecture, the concept of structure has been developed to a far greater extent than in the law despite our long-standing debate of form and functionalism. It is well understood that structure does not just protect those within but also directs their interrelationships. As Winston Churchill once said that "[t]here is no doubt whatever about the influence of architecture and structure upon human character and action. We make our buildings and afterwards they make us."[10] The design of the structure both reflects and directs the action within it. In both architectural and constitutional theory, form follows function. The separation of powers forces a greater array of participating actors, and therefore interests, to be considered in the shaping of laws. A conarchitectural approach treats the structure itself as the expression of the Framers' vision of human nature and the optimal space for political deliberations.

As in architecture, constitutional structure plays the same determinist role in shaping perspective and choice. The structural lines and spaces created by the Framers are best seen as a recognition of the need to frame not just the inherent powers but the perception of power within a system. By structuring political decision-making, constitutional structure funnels decision-making and political dialogue along particular pathways. The confines of the tripartite system serve much of the same function as "choice architecture" in funneling political energies and actions. By maintaining separation, the Framers likely sought to achieve stability even within the dynamic and divisive political environment. The guarantees of separation ideally discouraged dysfunctional choices that Congress or a President might make in an effort to circumvent one another or "go it alone" through unilateral action.[11] The structure was not just shaped

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[6] *See* THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man.").

[7] *See* THE FEDERALIST NO. 51, *supra* note 5, at 320 (James Madison); *see also* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

[8] THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

[9] *See, e.g.*, Turley, *Madisonian Tectonics*, *supra* note 1; Jonathan Turley, *A Fox in the Hedges*, *supra* note 1.

[10] Paul Goldberger, *Why Architecture Matters* 1 (Yale 2009) (quoting Churchill's address to the English Architectural Association in 1924).

[11] The controversy over the nonenforcement of federal law is a direct result of "bad choices" made in the absence of clear lines of separation as I have previously discussed

by human realities, but the structure also would shape those realities. The limitations on executive, legislative, and judicial powers were meant to limit the horizons of power: to influence the range of choices and expectations within the system. When viewed from this perspective, the rise of a system of federal agencies within the constitutional structure changed how those within it interact and react. The tripartite design of the Madisonian system is carefully calculated to resolve divisions in a pluralistic society.

The danger of the addition of the equivalent of a Fourth Branch is obvious. Social and political divisions were never meant to be resolved through an array of federal agencies, which are insulated from the type of public participation and pressures that apply to the legislative branch. A recent example is the intervention of a small federal office to force a result in the long-simmering public debate over the name of the Washington Redskins football team.[12] The Trademark Trial and Appeal Board voted to rescind federal trademark protections for the Redskins – a decision that could ultimately decide the controversy over the 80-year-old name. There are perfectly good reasons to be offended by this name, but the public remains deeply divided. Social and market pressures may still result in a name change but it should not come by some administrative edict of the little-known administrative body of a little-known board. The problem is that the board had at its disposal a ridiculously ambiguous standard that allows the denial of a trademark if it "may disparage" a "substantial composite" of a group at the time the trademark is registered. Congress should have addressed that ill-defined standard years ago, but the overreach of the board was breathtaking. We have seen other examples of agencies intervening in political or social controversies in ways that undermine the legislative process as the means for resolving such conflicts, as I have previously discussed.[13]

While the future of the Redskins name is hardly a threat to our system of government, the circumvention of political process in such controversies could well be. We are gravitating to the de facto creation of an English ministry system in this case. Academics often treat the rise (and dominance) of the Administrative State as an inevitability and, accordingly, view those of us who cling to the Madisonian model as hopelessly naïve and nostalgic. However, until the American people decide to adopt a bureaucracy or technocracy as the principle form of government, Congress has a duty to act to preserve the essential components of our tripartite system. To do that, it must first deal with *Chevron*.

III. THE ORIGINAL CONCEPTION AND EXPANDING ROLE OF *CHEVRON* IN THE ADMINISTRATIVE STATE.

While many point to the New Deal programs of Franklin Delano Roosevelt as the advent of the "age of regulation," the creation of large agencies does not in and of itself create an Administrative State characterized by agencies with active, ubiquitous, and

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before Congress. *See* Duty to Faithfully Execute Hearing, *supra* note 2, at 113–63; *see also* Jonathan Turley, *The President's Power Grab*, L.A. TIMES, Mar. 9, 2014, at A28.

[12] Jonathan Turley, *Another Federal Agency Goes Outside of Bounds Over Redskins Name*, WASH. POST (Sunday), June 22, 2014.

[13] Jonathan Turley, *Politics by Other Means,* USA TODAY, July 8, 2014.

largely independent governing authority. You can have large agencies that are still subordinate and controlled by the political branches. If the New Deal created the components for the Administrative State, it was the Supreme Court that gave those components the ability or license to govern with relative independence. *Chevron* has grown as a doctrine despite relative clarity of the obligation of courts to review agency decisions under federal law, which is conspicuously silent about any sweeping deference to be accorded to agencies. Section 706(2) of the Administrative Procedure Act (APA) states that court shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be –
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law . . . .

The statutory duty to decide whether an agency action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" reflects a traditional judicial review standard. There is no license for yielding a substantial part of that duty to agencies as presumptively correct interpreters of the law. In the APA, Congress specifically instructed courts to decide "all relevant questions of law."[14] When read in combination with the APA, *Chevron* reads as much a delegation of judicial function as legislative function.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[15] addressed the question of how the Environmental Protection Agency (EPA) could treat "non-attainment" states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. The Natural Resources Defense Council challenged the EPA regulation and prevailed in court. With three justices not participating in the decision, the court voted 6-0 to reverse and order deference to the EPA's interpretation.[16]

The *Chevron* decision proved to be something of a Trojan horse doctrine that arrived in a benign form but soon took on a more aggressive, if not menacing, character for those concerned about the separation of powers. The doctrine on its face is unremarkable and even commendable in the Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy. As noted by Chief Justice John Roberts, "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[17] *Chevron* put forward a simple test for courts in first looking at whether the

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[14] 5 U.S.C. § 706 (2016).

[15] *Chevron*, 467 U.S. 837 (1984).

[16] Chief Justice Rehnquist, Justice Thurgood Marshall, and Justice Sandra Day O'Connor recused themselves from the case.

[17] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

underlying statute clearly answers the question and, if not, whether the agency's decision is "permissible" or reasonable.[18] That highly permissive standard shifted the center of gravity of statutory interpretation from the courts to the agencies contrary to the language of the APA. With sweeping deferential language, the Court practically insulated agencies from meaningful review. In a system based on checks and balances, the Court helped create an internal system that would flourish under a protective layer of agency deference. To be sure, the Court has repeatedly recognized the right of Congress to check federal agencies. However, in practice, *Chevron* has proven a windfall for agencies in advancing their priorities and policies in the execution of federal laws. It is the administrative equivalent of *Marbury v. Madison*. Rather than declaring courts as the final arbiter of what the law means in *Marbury*, *Chevron* practically resulted in the same thing for agencies by giving them the effective final word over most administrative matters. Even though Congress can override agency decisions, it is unrealistic to expect millions of insular corrections to be ordered over agencies decisions.

While it seems that we have always lived under the dominance of the *Chevron* doctrine, it is important to note that it is only a little over 30 years old. Before *Chevron*, there was not a period of utter confusion and judicial tyranny in the review of agency decisions. Courts simply applied traditional interpretive approaches that looked at whether there was an ambiguity or gap in a statute as opposed to clarity on a given question. If so, it then reviewed the agency decision to determine whether it was legal and proper. This analysis was later developed further by the decision in *Skidmore v. Swift & Co.*, where the Court articulated factors to use to decide whether to overturn the particular agency's determinations.[19] Notably, without granting sweeping deference, the Court in *Skidmore* already recognized that agency determinations would carry weight, just not controlling weight:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. Justice Jackson referred to a historical treatment of agency interpretations with due "respect" and "considerable weight." *Id.* at 140. Thus, the courts did not have a hostile or counter-agency position in such cases, but a fairly accommodating standard. Courts in the United States also have a well-understood and respected tradition of avoiding political questions and limiting judicial discretion. *Chevron* could have resulted in the very same way under this prior case law, but the Court instead created a new deferential standard that proceeded to expand as soon as the Court gave it breath.

The late Justice Scalia once criticized *Chevron* as resting on a belief that Congress

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18 *Chevron*, 467 U.S. at 842-43.

19 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

knowingly passes vague or gap-filled laws with the intention that agencies should answer the lingering questions. Justice Scalia called that notion a "fiction" adopted by the Court to create the sweeping *Chevron* doctrine.[20] Yet, that fiction has become embedded in legisprudence and law students are often taught that agency interpretations are a part of the statutory process – as if Congress frames issues while agencies work out specific resolutions.[21] While Congress clearly at times leaves gaps due to poor legislative crafting or political impasses in statutes, it can hardly be said that those gaps are knowing invitations for agency lawmaking. Indeed, the notion that critical legislative decisions have been effectively delegated to the agencies runs against the grain of the Madisonian system and moves critical decision-making further from public review and influence.

After decades of neglect during which the Court remained relatively passive in the face of the rising dominance of agencies in our system, the Court began to seek incremental limitations on the authority of agencies. While Scalia called *Skidmore* "an anachronism"[22] the Court would rediscover the value of more serious judicial review in some cases. For example, in *Christensen v. Harris County*,[23] the Court suggested that the prior standard in *Skidmore* would apply to less formal agency decisions as opposed to those agency documents that carry "force of law." Justice Clarence Thomas drew a distinction of when an agency interprets a statute in a decision that has "the force of law" from more rudimentary decision. As noted by Harvard Professor (and my former professor at Northwestern) Thomas Merrill,[24] Thomas' proposal tracked a recommendation by the Administrative Conference of the United States.[25] Thomas described the former category including "formal adjudication or notice-and-comment rulemaking."[26] Thus, because this case involved a Department of Labor opinion letter that was merely advisory on the meaning of the Fair Labor Standards Act, there was no deference extended under *Chevron*. In applying the *Skidmore* standard, the Court rejected the interpretation. Adding to the confusion of current meaning of Chevron were differing minority opinions, including the dissenting opinion of Justice Breyer who insisted that Chevron did not create a new standard and that *Skidmore* remains the only standard for deference.[27] *Chevron* in his view only extended the basis for deference on the basis that "Congress had delegated to the agency the legal authority to make those

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[20] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[21] Notably, Scalia would later be highly critical of the Skidmore standard in favor of the *Chevron* deference standard in cases like *Mead*. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

[22] *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

[23] *Christensen*, 529 U.S. 576 (2000).

[24] *See generally* Thomas Merrill, Chevron *at 30: Looking Back and Looking Forward: Step Zero After* City of Arlington, 83 FORDHAM L. REV. 731 (2014).

[25] OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31-33 (1989).

[26] Merrill, *Chevron at 30*, *supra* note 24, at 587.

[27] *Id.* at 596 (Breyer, J., dissenting).

determinations."[28]

The evolving and conflicting view of *Chevron* was also captured in the decision of *United States v. Mead Corp.*[29] In that case of tariff classification rulings, the eight-justice majority opinion, recognized different deference tests under *Skidmore* and *Chevron*. Consistent with *Christensen*, the Court noted the application of *Chevron* for agency interpretations that have the "force of law."[30] The Court embraced the notion of delegated authority from Congress for "the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[31] However, the condition of what is an action with the force of law remained undefined. Yet, the ruling became the basis for the concept of "Chevron Step Zero," the court first inquires into whether Congress delegated the authority before applying *Chevron* deference. If not, the less favorable standard in cases like *Skidmore* would apply.

One of the more alarming applications of *Chevron* came in *City of Arlington v. FCC*.[32] The case concerned a 1996 amendment to the Federal Communications Act mandating that local land use agencies process applications for the construction or modification of wireless transmission towers "within a reasonable period of time."[33] The statute provided an avenue with a "court of competent jurisdiction" for relief to parties who did not receive action on requests. The case perfectly captured the fluid authority and utter flexibility of agencies in exercising their interpretive powers post-*Chevron*. The Federal Communications Commission (FCC) initially disclaimed the authority under the statute but then reversed itself and issued an order setting a 90-day limit for any tower expansion or 150-day limit for new construction under the rule. The jurisdictional authority of the FCC was challenged. For many years, it was generally thought that, no matter how expansively *Chevron* is read, the one area where an agency could not claim deference would be in the interpretation of its own jurisdictional powers. After all, as discussed above, the APA specifically leaves to the court to determine if an agency has acted "in excess of statutory jurisdiction." Nevertheless, the Fifth Circuit held that *Chevron* would apply in an agency defining its own jurisdiction. The Supreme Court agreed in a 5-4 decision with Justice Scalia joining the majority. Chief Justice Roberts (with Justices Kennedy and Alito) dissented. Five Justices found no way to distinguish jurisdictional and non-jurisdictional questions. Indeed, in his separate decision, Justice Scalia called such distinctions little more than a "mirage."[34]

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented, and expressed the view that such expanded authority raised transformative challenges for the

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28 *Id.*

29 *Mead*, 533 U.S. 218 (2001).

30 *Id.* at 226-27.

31 *Id.* at 27.

32 City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013).

33 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

34 Justice Scalia saw the distinction as another attack on *Chevron* that would exploited in future cases. *City of Arlington*, 133 S. Ct. at 1873 (Scalia, J., concurring) ("Make no mistake - the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case.")

federal system. Roberts decried the court evading its core responsibility in drawing lines of authority within that system: "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive . . . We do not leave it to the agency to decide when it is in charge."[35] In a chilling warning, Roberts further notes that "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the Administrative State cannot be dismissed."

City of Arlington fulfilled many of our worst fears of the trajectory of *Chevron*. Despite tailoring in cases like *Christensen* and *Mead*, *City of Arlington* gave agencies a critical and expansive power to define its own jurisdiction under the protection of heavy *Chevron* deference standard. For that reason, the avoidance of *Chevron* analysis in the recent decision in *King v. Burwell* only deepened the uncertainty over the scope and meaning of the doctrine. The case would seem ripe for *Chevron* analysis in the interpretation of an agency of the meaning of state and federal exchanges within the overall scheme of the Affordable Care Act (ACA). Writing for a six-justice majority, Chief Justice Roberts, wrote:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[36]

It is the type of fluid, undefined standard that has characterized not just the post-*Chevron* cases but many other areas of jurisprudence from the Court. The Court appears to believe that it will be self-evident when a court is dealing with a "question of deep economic and political significance."[37] Of course, many, if not most, federal agency decisions have significant impacts. While *King v. Burwell* may reflect a degree of belated buyer's remorse, it will hardly correct an ambiguous standard by grafting on an equally ambiguous limitation on that standard. Indeed, the Court appears convinced that adding layers of ambiguity will somehow produce clarity under *Chevron*.

IV. REFORMING *CHEVRON* AND REALIGNING GOVERNMENTAL AUTHORITY WITHIN THE SEPARATION OF POWERS.

The most obvious avenue for limiting or even eliminating the *Chevron* doctrine is through judicial action. After all, the doctrine is the creation of the Court and, while certainly reflecting constitutional values, is not imposed directly by any constitutional provision. Indeed, many have argued that the doctrine runs against the constitutional grain, particularly in the Vesting Clause of Article I. More importantly, as noted above,

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35 *Id.* at 1886 (Roberts, C.J., dissenting).

36 *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (citations omitted).

37 *Id.* at 2489.

the doctrine is based in large part on the perceived or assumed delegation of Congress. As the Supreme Court has made clear, "Agencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'"[38] Accordingly, this is an area where Congress can have a direct and pronounced impact. The question is not the authority but the desire of Congress to reassert its authority over agencies. Advocates of the Administrative State have been open in their skepticism that Congress would, or even could, exercise meaningful review over agency decisions and rulemaking. However, I fear that the growth of federal agencies is reaching a critical mass within our system – a point where rapid, exponential, and irreversible expansion will occur.

As noted above, post-*Chevron* cases have built limiting principles around the notion of implied delegation of interpretive questions to federal agencies. These cases flip the presumption of nondelegation that some of us view as inherent under the Vesting Clause or critical to the separation of powers.[39] This view is based on the text and purpose of Article I, Section: "All legislative Powers herein granted shall be vested in a Congress of the United States ˇ ˇ ˇ " Reinforcing this power is the Take Care Clause in Article II that states "[The President] shall take Care that the Laws be faithfully executed . . ."[40] Both provisions reinforce the role of Congress in the creation of laws that are to govern the nation. However, these clauses reflect a division of authority that is meant to do more than create a process for legislation. The separation of powers first and foremost protects individual liberty from the concentration of authority in the hands of any one agency or person. It also creates a transformative structure for resolving problems that divide us.

Even at the start of this Republic, the United States was one of the most pluralistic nations on Earth. Within that fabric were different groups and identifications and interests that represent the factions that were a preeminent concern for Madison and many of his contemporaries. The tripartite system, and particularly the bicameral system of Congress, works to convert disparate factional interests into majoritarian compromises. It is a system that not only works to perfect federal legislation but foster compromise and consensus. Factions are forced to deal with each other in the legislative process in order to achieve any shared goals. The result is a key stabilizing role for the country as a whole. The danger with the rise of the Fourth Branch is that key decisions are moving farther and farther away from this transformative and representative system. Accordingly, the presumed delegation of legislative functions raises fundamental dangers for a system based on the legislative process as a stabilizing and motivating component of our government.

What is fascinating to me is how the rise of the Administrative State has secured what the Framers sought to deny – a new type of "royal prerogative." The Framers

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[38] *City of Arlington, 133 S. Ct. at 1880 (quoting Louisiana Pub. Serv. Comm'n v. FCC*, 476 U. S. 355, 374 (1986)).

[39] See, e.g., Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237-41 (1994).

[40] U.S. CONST. art. II, § 3, cl. 4.

divided the powers of government against the backdrop of over 150 years of tension with the English monarchy.[41] They were specifically aware of the circumvention of the legislative and judicial branches by sovereigns like James I. The King insisted that the enactment of laws was merely the starting point of legislation and that the King – not just legislators or judges – plays a critical role in perfecting laws. He insisted that "I thought law was founded upon reason, and I and others have reason as well as the judges."[42] That was the view rejected by the Framers. Thomas Jefferson wrote in 1783 with regard to the Virginia Constitution that "[b]y Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government)."[43] Likewise, James Wilson defended the model of an American president by assuring his colleagues that "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature."[44] While the Framers opposed this role in crafting the first three articles of the Constitution, a type of "agency prerogative" has arisen within the system that is founded on the very same premise articulated by James I. As with the use of unilateral executive power, agency decisions now claim to further the legislative process though administrative reasoning. This prerogative is insulated from meaningful judicial review by the *Chevron* doctrine.

Efforts to regain control over agencies have met with limited success. The Congressional Review Act (CRA).[45] The CRA allowed Congress to block significant regulations. Yet, both houses had to pass resolutions of disapproval and the president had to sign the law. Not surprisingly, the law had little impact. The "Regulations from the Executive in Need of Scrutiny Act" or REINS, is a more muscular effort to regain congressional control over regulations.[46] REINS would require regulations to secure congressional approval in order to take effect. It would flip the dynamic of CRA from allowing congressional intervention to requiring congressional approval for major new rules. The law however has a default against new rule: if Congress does not act on a major rule within 70 days, it would be deemed "not approved" unless the president makes

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[41] *See* Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 CONST. COMMENT. 155, 164 (2002).

[42] 7 Sir Edward Coke, Reports 65, quoted in ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 61 (1921).

[43] This quote is from Jefferson's Draft of a Fundamental Constitution for Virginia. Adler, *supra* note 41, at 164 (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 177 (Harvard U. Press, 1947)).

[44] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 62-70 (Max Farrand, ed 1911); Adler, *supra* note 41, at 165.

[45] 5 U.S.C. . 801, et seq§

[46] *See* Regulations from the Executive in Need of Scrutiny ("REINS") Act of 2011, H.R. 10, 112th Cong.; *see also* Regulatory Accountability Act of 2011, S. 1606, 112th Cong. (requiring regulators to adopt the "least costly" rule and imposing formal rulemaking procedures); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (same).

a determination that failure to enact the rule would harm the health, safety, or national security or cause conflicts with criminal law or treaty obligations. While there are good-faith objections to REINS as possibly curtailing executive authority and running afoul of cases like *Chadha*, I believe that the premise of the law is sound and compelling in asserting legislative authority over the law-making functions of agencies. I believe that a congressional approval law would be constitutional.[47] There are aspects of REINS that should be reexamined but the categorical objection to such a law is fascinating. Indeed, the arguments from critics that the law would alter our constitutional structure only highlights how engrained the Administrative State has become in our assumptions about government. However, on the assumption that a REINS-like reform is not likely to pass, it may be more productive to look a reform that specifically target areas like the *Chevron* doctrine in seeking to rebalance this system.

A. Reinforcing Nondelegation As A Presumption In Judicial Review.

While perhaps out of vogue with academics, the notion of non-delegable powers runs deep in the constitutional tripartite design. After all, it makes little sense to create this careful balanced system if the powers can simply be delegated or waived. That is particularly the case with the legislative branch. Yet, while distinguishing "strictly and exclusively legislative powers", Chief Justice John Marshall, in *Wayman v. Southard*,[48] wrote for a unanimous Court in holding that Congress "may certainly delegate to others, powers which the legislature may rightfully execute itself." The issue remained one of line drawing for courts to isolate that point "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[49] This issue was in the forefront of the conflict between the Supreme Court and the White House during the 1930s, though admittedly the Court has routinely rejected nondelegation claims.[50] Yet, in 1928 in *J.W. Hampton, Jr. & Co. v. United States*, the Court upheld a statute that allowed the president to set tariffs because it contained an "intelligible principle" for implementing the statute.[51] Then, in 1935 in *A. L. A. Schechter Poultry Corp. v. United States*,[52] the Court

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[47] *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), dealt with the one-house legislative veto. Obviously REINS avoids the bicameralism problem of a one-house veto and there is no reason why such a law cannot be crafted to avoid Presentment Clause problems. Notably, both Justice Stephen Breyer and Professor Lawrence Tribe have previously indicated that they also believed that such a law could be crafted to pass constitutional muster. *See* Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785, 793-97 (1984); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 Harv. J. on Legis. 1, 19 (1984).

[48] 23 U.S. 1, 43 (1825).

[49] *Id.*

[50] Justice William Rehnquist invoked this doctrine in his opinion in *Industrial Union Department, AFL-CIO v. American Petroleum Institute (Benzene)*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). No other justice joined him in that position.

[51] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

struck down a provision of the National Industrial Recovery Act under the nondelegation doctrine for lacking such a principle. Likewise, *Panama Refining Co. v. Ryan*,[53] the Court held that no such principle was articulated when Congress gave the President authority to regulate the transportation of petroleum products.

In part the association with the anti-New Deal cases contributed to the demise of the doctrine.[54] However, there was also a growing view that Congress could never practically address the myriad of issues routinely addressed by agencies in the interpretation and enforcement of so many federal laws. The enactment in 1945 of Administrative Procedure Act reflected this view by creating a quasi-legislative process for notice and comment on new federal rules. The dismissive view of nondelegation was evident in the Court's decision in *Whitman v. American Trucking Ass'ns*,[55] when the Court noted "we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Of course, as with its *Chevron* standards, it is often hard to discern what the Court considers an "intelligible" from an "unintelligible" principle for the purposes of delegation. Justice Thomas made this point in his concurring opinion in *American Trucking* when he expressed obvious frustration on finding any meaning in the notion of "intelligible principles":

> Rather, it speaks in much simpler terms: "All legislative Powers herein granted shall be vested in a Congress." U.S. Const., Art. I, 1 (emphasis added). I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."[56]

Like the standard under the post-*Chevron* cases of determining those actions with "deep economic and political significance," the standard of "intelligible principles" is largely undefined. The result is ample room for agency actions while maintaining the pretense of judicial review. This is not to assign all of the blame to the courts. Clearly this history shows not just judicial abrogation of the duty to maintain lines of separation but also the willing role of Congress as an enabler of agency expansion. There have been times when Congress has turned a blind eye to the usurpation of its authority by a popular president. Indeed, Congress has at times even facilitated the circumvention of its own

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52 A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

53 *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

54 JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980).

55 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

56 *Whitman v. Am. Trucking Ass'ns, 531 U.S.* at 487 (2001) (Thomas, J., concurring).

authority. This can occur for a number of obvious reasons. A president may be enormously popular and members fear a public backlash from any action about could be seen as disloyalty. Likewise, the political environment may be viewed as too risky for members to stand on constitutional principle as with periods of national security or economic crisis. The Framers well understood the wavering principles that can characterize politics. While Madison hoped in *Federalist No. 51* that "ambition must . . . counteract ambition," personal ambition can prevail over institutional interests in modern politics as members become agents of their own obsolescence.

These cases reaffirm that there is no inherent authority of agencies to carry out such actions and, as my colleague Dick Pierce noted, "an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so."[57] Thus, even in carrying out the takeover of the steel mills during wartime, Justice Hugo Black demanded evidence of such congressional intent. Thus in *Youngstown Sheet & Tube Co. v. Sawyer*, he wrote:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.[58]

Professor Merrill has tried to thread this jurisprudential needle by moving beyond a nondelegation doctrine toward an "exclusive delegation doctrine" that states that "the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power."

Whatever perspective is applied, the legislative functions of agencies are based either loosely or directly on a delegation theory. As a result, Congress could alter Section 706 of the APA[59] to expressly reject any presumption of delegation for such interpretations, particularly with regard to the jurisdiction of a federal office or agency. The section currently authorizes judicial review of agency actions to determine if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[60] The APA could be altered to expressly reject any claimed presumption of delegation and to reject the application of the *Chevron* standard absent an express standard of deference given to an agency. Section 701 already limits judicial review "(1) if a statute expressly precludes review or provides another form of review under the APA, that statute governs; or (2) the 'agency action is committed to agency discretion by law.'"

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[57] 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 234 (3d ed. 1994)); *See also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

[58] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[59] 5 U.S.C. § 706 (2012).

[60] § 706.

Id. § 701(a). Congress can change the APA to address the standard for review. Clearly if Congress can deny review, it can structure review under the belief that the lesser is contained in the greater in such use of congressional authority.

Putting aside the APA, Congress could also use a standard provision to add to statutes that expressly denies any delegation of authority to agencies to determine their jurisdiction. Such provisions could also deny any intended delegation over force of law interpretations while recognizing that provisions can be subject to a *Skidmore*-like standard of interpretation. Such standard clauses are already used for such legal issues as severability issues for judicial review. Courts could still evade such provisions but they will have to dispense with the pretense that the sweeping deference under *Chevron* is Congress' doing or delegated intent.

B. Reasserting Citizen and Congressional Power Over Agency Action.

While statutory changes would attack *Chevron's* underlying presumption directly, the decades of expansion of administrative agencies left created a myriad of problematic elements that would remain. Indeed, the statutory changes would address some of the overreach of agencies into legislative areas but it would not address other problems related to the judicial review. As noted earlier, citizens are now over ten times more likely to have their disputes adjudicated in an administrative court than a conventional court. There are roughly 870 Article III judgeships in comparison to almost 1,600 Administrative judges.[61] What citizens find in agency hearings is generally a judge who conducts abbreviated and agency-dominated proceedings. Citizens are rightfully irate over their treatment by these administrative courts.

1. Administrative Judges. We have effectively created an alternative – and now larger – shadow court system. Yet, the court system lacks due process guarantees and truly independent judges. I want to emphasize that I respect (and indeed I have represented and counseled) administrative judges. Under the APA, Congress has taken important steps to try to preserve the independence of Administrative Law Judges (ALJs) who are separated from agency staff,[62] removed in terms of compensation from agency heads,[63] and exempted from performance appraisals in agencies.[64] However, these judges remain "inferior officers" under Article I and are subject to removal by the Executive branch. While the Office of Personnel Management (OPM) sets the standards for ALJ selection (including seven years experience and test results), they are dependent on agencies that are empowered to hire as many ALJs as necessary[65] and are subject to

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[61] Kent Barnett, *Resolving the ALJ Quandary*, 33 J. NAT'L ASS'N L. JUD. 644, 647 n.5 (2013).

[62] 5 U.S.C. § 554(d) (2012).

[63] § 3105.

[64] § 5372.

[65] 5 U.S.C. § 3105 (2006). The agencies choose among the top three candidates for a given ALJ position. Robin J. Arzt et al., *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUD. 93, 101 (2009).

removal by the Executive Branch (though only for "good cause").[66] ALJs have objected to this process, particularly the role of the OMB, as undermining their independence.[67] Moreover, agency heads can still reverse ALJ decisions.[68]

Adding to this concern is a system that does not always allow for a full and fair proceeding. Indeed, some administrative proceedings resemble a factory-system of adjudication. Consider the ALJs assigned to the Social Security Administration (SSA). The agency expects these judges to assign roughly 2 hours on each case while hearing office staff attorneys are allotted 8 hours to prepare a draft denial decision for the judge's review. These judges labor under a load of 700,000 to 800,000 cases each year.[69] Congress should examine the degree of influence of agencies in the selection of ALJs and the degree to which ALJs are given little time to seriously consider cases. First and foremost, agencies should have no role in the selection, even among the top candidates, to fill these positions. There needs to be greater separation of agencies from the ALJs and their decisions.

2. *Administrative Proceedings.* The most troubling aspect of the rise of ALJ proceedings as a massive shadow court system is that these proceedings lack basic guarantees of due process and access to information. Under Section 554, the APA provides that "every case of adjudication required by statute to be determined on the record" and further states under Section 556(d) that:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

However, the rights afforded under these provisions are limited by an agency's governing statute, which results in a varying procedures and access to review. Citizens complain about the lack of access to information or the ability to present evidence. The rules of evidence do not apply in the same fashion as in the federal courts, including *Brady*-like mandatory disclosures. Standard depositions or discovery forcing motions are generally denied.

If the trend is to continue with administrative courts becoming the dominant adjudicatory system in the country, citizens should be afforded the same evidentiary and discovery protections that they would have in federal courts. Congress should amend the APA to limit the variation among agencies and specifically guarantee access to evidence

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[66] 5 U.S.C. § 7521(a).

[67] Barnett, *supra* note 61, at 653-54.

[68] 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

[69] *See generally* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1993).

with guarantees that citizens will be given such evidence with ample time before the start of proceedings. Furthermore, Congress should address the relatively light standard of review of agency decisions by federal courts as well as the use of such privileges as the deliberative process privilege to deny access to key agency material. Section 706 specifically instructs that a reviewing court should consider the "full record" in an administrative decision. Yet, the agencies routinely claim privilege over such material, particularly the deliberative process privilege. The mere use of material in the decision-making process should not automatically result in the withholding of such important evidence in a case.

Finally, the APA allows a federal court to set aside agency action.[70] However, with the more limited evidentiary rules, federal courts tend to give such rulings a relatively light look, rather than the hard look, that litigants seek after making it through this mandatory process. Thus, if you are litigant in the EPA system,[71] before an ALJ and then you must go to the Environmental Appeals Board (EAB). Once the EAB rules, you have a final agency action to appeal to federal court. However, the court reviews the record created under the agency rules under Section 706 (2)(A) to determine if the agency acted in an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This often amounts to a largely procedural review of whether the agency followed its own rules and whether the decision is so disconnected to the evidence to be arbitrary or capricious. Citizens get hit twice in this system: first by a process that offers fewer rights than federal court and then a review in the federal court where that record is largely outcome-determinative.

3. Reinforce Citizens In Challenging Agency Actions. There is little question that Congress lacks the personnel and the time to directly monitor all of the decisions made in all of the federal agencies. While I strongly believe that congressional committees (and staff) should be significantly expanded to allow for greater monitoring of agency decisions, our federal government is simply too large for Congress to act with regard to more than a relatively small fraction of agency actions. When Congress has faced areas with such limited ability to monitor or identify governmental abuse, it has used private attorneys general or citizen lawsuits. Congress should continue to ally itself with the public in monitoring agencies by creating such provisions to allow citizens to more easily pursue nondisclosures and noncompliance in court. It can further reinforce this system by examining new limitations placed on what constitutes a "prevailing party" for the purposes of recovery of fees and costs in such actions. It should also pursue amendments of laws that are information forcing, like the Freedom of Information Act, by addressing the long delays and expansive privileges imposed by agencies. In so doing, the public can help monitor and deter agency abuse.

V. CONCLUSION

For many supporters of the Administrative State, the shift in gravity toward the Executive Branch and federal agencies is both inevitable and logical. Those arguments raise a myriad of interesting questions that fascinate academics, including myself. They

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[70] 5 U.S.C. §706.

[71] 40 C.F.R. §§ 22.1-.52.

are not, however, questions that have been asked of citizens who continue to labor under the assumptions of the tripartite system taught in our schools and expressed in the Constitution. This massive shift in authority has occurred without a national debate and certainly not a national vote. *Chevron* is illustrative of that troubling trend. The doctrine was the creation of the Supreme Court in declaring sweeping deference to agencies – deference that ultimately would extend not only to policy choices but even the interpretation of the agency's jurisdiction. While *Chevron* was not the cause of the expansion of federal agencies, it has been a critical component in the Administrative State, which combines both sweeping authority and sweeping deference in carrying out changes in the country.

Because the doctrine is based on assumption of delegated authority, Congress can aggressively move to limit such deference while also examining the implications of the expanding scope of agency authority. Clearly this country will continue to have a large and active federal bureaucracy. However, Congress can exercise greater control over agencies and empower citizens to challenge agency decisions. While many will argue that it is too late and the Administrative State is now a fait accompli, we need not accept such a fatalistic view. Congress has not become a passive player in government and still retains the ability to actively impose limiting principles on agency action. More importantly, the public is more than the subject of government power – it is the ultimate source of government power. Citizens have not signed on to the concept of a fourth branch of government containing legislative, executive, and judicial components but relatively little direct public influence. Indeed, it is fascinating to see how agencies increasingly work to assume the legitimacy of a legislative process by incorporating "town hall" events and other devices for citizen input.[72] Yet, those with the greatest voice on the administrative-level remain organized interests represented by lobbyists and large organizations.[73] Such town hall events add the patina of an alternative legislative process, but they occur outside of the structure so carefully designed by the Framers.

To return to the offer of Woody Allen, there is the possibility of two negatives making a positive here – though not in the same way as Administrative State advocates suggest (as discussed above). While it is true that the Court has allowed the expansion of agency authority and Congress has largely acquiesced to that expansion, it is also true

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[72] *See* Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 297. These new approaches include the "*AmericaSpeaks* 21st Century Town Meeting" model where agencies hold events that have the same appearance as the town halls used by presidents and members of Congress. *See* AMERICA SPEAKS: ENGAGING CITIZENS IN GOVERNANCE, http://www.americaspeaks.org (last visited Sept. 23, 2012). Yet, these events only involved a few thousand citizens and do not represent a significant level of participatory process. Professor Bingham notes "they report that counsel advised this method is inappropriate for rulemaking because it is impossible to capture all the simultaneous dialogue comments of thousands of people in the rulemaking record." Bingham, *supra*, at 316.

[73] The awareness of the shift in political dialogue and citizen participation is reflected in the fact "public participation" is mentioned over 1000 times in the federal code. Bingham, *supra* note 72, at 322 (citing regulations).

that the resulting *Chevron* doctrine is based on a theory of delegated authority that could be used to dramatically limit its application. Congress can also pursue a variety of avenues for exercising greater control over agencies and guaranteeing greater rights for citizens subject to agency proceedings. The result is not the rejection of administrative agencies but of the Administrative State. The first step however in addressing the independence of federal agencies is to reduce their insulation from review. That is why this hearing is so important.

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Mr. MARINO. Thank you. Professor Duffy.

TESTIMONY OF JOHN F. DUFFY, SAMUEL H. McCOY II PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. DUFFY. Thank you, Chairman Marino, Ranking Member Johnson, and distinguished Members of the Subcommittee. Thank you for inviting me to testify before you today. At the outset, I'd like to compliment the Subcommittee for devoting time and attention to the *Chevron* doctrine. This single doctrine has enormous practical and theoretical importance in the courts. And yet, it remains deeply controversial and confusing.

I believe that the Congress could write and enact clarifying legislation to supplant *Chevron* with more theoretically sound, and more easily understood principles.

I want to begin with two significant missteps, made in the *Chevron* opinion itself. First, and most importantly, the Supreme Court decided for itself, based on its own assessments of good policy and institutional competence where the Court should defer to agency statutory interpretations. The Court assumed, at least implicitly that Congress did not have an opinion on the matter. That implicit assumption was wrong. If the Court considered statutory law, it would have found that the first sentence of 706 of the APA requires the reviewing court to decide all relevant questions of law. And it would have found that the text structure, legislative history and a consistent line of judicial precedence all supported reading that sentence as requiring de novo review of agency interpretations.

Second, the *Chevron* court muddled the distinction between giving some weight to an agency's view as a part of the process of interpreting the statute, and recognizing the scope of an agency's delegated rulemaking or lawmaking powers.

Traditionally, courts engaged in statutory interpretations would not afford an agency's view significant weight if the agency had flip-flopped on its interpretation. The intuition here is easy to understand, where an agency has held inconsistent views, the varying agency positions are simply unhelpful in determining a statute's meanings.

By contrast, where an agency is wielding a delegated lawmaking power, courts fully expect administrative change. Indeed, the ability of an agency to change is part and parcel of a rulemaking power, which, as defined by the APA, encompasses not just the power to formulate rules, but also the power to amend and to repeal prior rules.

Chevron blended these two concepts together. It treated the issue in the case as involving deference, but borrowed from the delegation theories the crucial point that agencies can change their positions with no penalty whatsoever. As shown in my written testimony, *Chevron* itself is an excellent demonstration of how agencies exercise their delegated rulemaking powers, and the government itself presented the case to the Supreme Court on a delegation theory. The courts articulation of the new theory of statutory interpretation was as unnecessary as it was unwarranted.

Post *Chevron* cases, especially *United States v. Mead* and *King v. Burwell*, have begun to reinterpret *Chevron* as the doctrine about delegation rather than deference. Nevertheless, corrective

legislation would still be desirable because the case law remains deeply confusing.

I believe legislation should be drafted around four principles: First and foremost, that Congress should reassert, in the clearest possible terms, that reviewing courts are to decide all questions of law and decide those questions de novo, without any deference to the administrative agency's positions.

Second, the legislation should recognize that where Congress has delegated lawmaking powers to an agency, reviewing courts should give proper scope to those powers, and allow the agency to write rules that are not arbitrary, capricious or contrary to law. This principle would count for the actual result in the *Chevron* case, but would make clear that the agency's power is grounded in the congressional delegation and not in deference.

Third, the Congress might also consider recognizing the traditional view that some administrative issues are mixed questions of law, in fact, and the courts might properly give some deference to the agency's application of law to the facts of a particular case.

Fourth and finally, Congress might also recognize the principle articulated by the Supreme Court in *Skidmore v. Swift* that in interpreting a statute de novo, courts may consider an agency's position as some evidence of a statute's meaning. Importantly, the agency would not have the power to control, but merely the power to persuade, a respect similar in kind to what might be afforded a prominent treatise, or nice law review article. Together, these principles reaffirm what Congress previously codified in section 706 of the APA, and restore the court's traditional role as articulated in *Marbury v. Madison*, to say with the law is.

Thank you for your time and attention to these issues, and thank you, again, Mr. Chairman, for the invitation to speak.

[The prepared statement of Mr. Duffy follows:]

Testimony of

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Samuel H. McCoy II Professor of Law

University of Virginia School of Law

On

"The *Chevron* Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies"

Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

of

The Judiciary Committee of the House of Representatives of the Congress of the United States

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Introduction

Chairman Marino, Ranking Member Johnson, and distinguished members of the Subcommittee, thank you for inviting me to appear before you today to testify and giving me the opportunity to share my views concerning "The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies."

At the outset, I would like to compliment the Subcommittee for devoting time and attention to the *Chevron* doctrine. This single doctrine has enormous practical and theoretical importance in the federal courts, and yet it remains deeply controversial. In recent years, Supreme Court case law has indicated a fundamental shift in the theory underlying the doctrine. While that change is a welcome reform, the doctrine remains both tremendously confusing and deeply troubling from a theoretical standpoint. I believe that the Congress could write and enact clarifying legislation to supplant *Chevron* with more theoretically sound and more easily understood principles.

My testimony will be divided into four parts. Part I will summarize very briefly the *Chevron* case and the two major missteps in the Court's decision. Part II will elaborate in more detail on those two major mistakes. Part III will discuss the Supreme Court's subsequent case law, which has slowly been correcting at least one of the two mistakes in the original *Chevron* opinion. Finally, Part IV will make some concrete suggestions for corrective legislation.

I. The *Chevron* Decision and Its Two Mistakes.

The familiar facts of *Chevron v. Natural Resources Defense Council*[1] need not be set forth in much detail. Suffice to say that the case presented a challenge to a Reagan-era rule of the Environmental Protection Agency that defined the term "stationary source" in the Clean Air Act to include all polluting activities within an entire industrial facility. The EPA's rule became known as the "bubble" concept because it allowed firms to comply with the Clean Air Act by obtaining a single permit for a whole facility (a whole "bubble"), rather than multiple, individual permits for each smokestack in the facility.

The D.C. Circuit invalidated the EPA's rule, but the Supreme Court reversed and announced the now familiar two-part inquiry applicable (so the Court then claimed) whenever "a court reviews an agency's construction of the statute which it administers."[2] The first part of the inquiry requires the court to determine whether the statute is unambiguous or "clear" on the precise question at issue. If so, "that is the end of the matter."[3] That conclusion is unsurprising, because clear statutory language always constrains agencies. *Chevron*'s innovation comes in the second part of the inquiry: "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction

[1] 467 U.S. 837 (1984).
[2] Id. at 842.
[3] Id.

of the statute."[4] That limitation on the judicial role, the Court believed, meant that the reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[5]

In producing such a new test for reviewing agency constructions of statutes, the *Chevron* Court made two mistakes. First, and most importantly, the Court decided for itself whether, and to what extent, federal courts should grant deference to an administrative agency's statutory interpretations. In making that decision, the Court relied explicitly on its own policy views—justifying judicial deference to administrative interpretations of statutes because judges are neither "experts in the field" nor "within a political branch of the Government."[6]

The *Chevron* Court seemed to assume, at least implicitly, that Congress did not have an opinion on the matter. That implicit assumption was wrong. In 1946, Congress enacted legislation governing how courts should review administrative action, and that legislation—the Administrative Procedure Act or APA—regulates the standards that courts are to apply in reviewing administrative action. Rather than using its own policy justifications to justify judicial deference, the Court should have looked to the APA and then determined whether and to what extent *Congress* wanted the federal courts to defer to the judgments of administrative agencies.

Second, the *Chevron* Court muddled the distinction between (i) giving some weight to an agency's views as part of a process of interpreting the statute, and (ii) recognizing the scope of an agency's delegated lawmaking powers.

The key to understanding this distinction is to focus on the effect of changes in the agency's positions. Traditionally, courts engaging in statutory interpretation would not afford an agency's views significant weight if the agency had changed its interpretation of the statute. The intuition behind that rule is easy to understand. Courts seeking to interpret a statute are trying to find *the* correct meaning of the statute. Thus, if an agency had held inconsistent views about the correct meaning, the court had no reason to prefer one view over the other and so the varying agency positions were simply not helpful.

By contrast, where an agency is wielding a delegated lawmaking power, courts fully expect the agency to have power to change its position. Indeed, the ability of an agency to change positions is typically part and parcel of an administrative rulemaking power which, as defined by the APA, encompasses not only the power of "formulating" a rule, but also the powers of "amending" or "repealing" prior rules.[7] Courts reviewing an agency's exercise of its lawmaking powers would expect that the agency can change its positions, but—and this point is crucial—the court would not traditionally have thought that the agency's exercise of its rulemaking power was an exercise in statutory interpretation.

The *Chevron* decision blended together these two quite different concepts. It treated the issue in the case as involving deference to an agency's statutory interpretation, but it borrowed

[4] Id. at 843.
[5] Id.
[6] Id. at 845.
[7] 5 U.S.C. § 551(5) (defining rule making).

from delegation theory the crucial concept that agencies engaged in rulemaking can be expected to change their positions:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.[8]

The novelty in that passage is not the Court's recognition that an agency engaged in rulemaking can change its views on "policy," but the assertion that an agency can also change its view about statutory meaning without losing judicial deference.

II. The Relevance of the APA and Delegated Lawmaking Powers to *Chevron*.

As discussed in Part I, the *Chevron* Court did not try to reconcile its reasoning with the APA, and it also conflated delegated lawmaking powers with deference in statutory interpretation. Here, I describe those errors in more detail.

A. The APA's Command for Courts to Decide All Relevant Questions of Law.

The *Chevron* case was fully subject to the APA, so a natural starting place for the analysis in the case would have been the judicial review provisions of the APA which, as the Supreme Court has noted in other cases, were supposed to provide a "uniform approach to judicial review of administrative action."[9]

The first sentence of § 706 of the APA requires a reviewing court to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions."[10] The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision "requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions."[11]

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[8] 467 U.S. at 863-64.
[9] Dickinson v. Zurko, 527 U.S. 150, 154 (1999).
[10] 5 U.S.C. § 706.
[11] 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in Staff of Senate Comm. on the Judiciary, Legislative History of the Administrative Procedure Act, S. Doc. No. 79-248, at 370 (1946) [hereinafter, APA Legislative History]. Both the House and the Senate Reports also state that "questions of law are for courts rather than agencies to decide in the last analysis." H.R. Rep. No. 79-1980, at 44 (1946), reprinted in APA Legislative History at 233, 278; S. Rep. No. 79-752, at 28 (1945), reprinted in APA Legislative History at 185, 214. The legislative history also indicates that Congress excepted "interpretative" rules from the APA's notice and comment rulemaking procedures because it believed that ""interpretative' rules - as merely interpretations of statutory

The text and structure of the statute confirm that Representative Walter's interpretation of the first sentence in § 706 is correct. The plain language alone suggests de novo review of statutory issues, as courts routinely conclude when they focus on the APA rather than on the Supreme Court's administrative common law.[12] Furthermore, the APA places the court's duty to interpret statutes on an equal footing with its duty to interpret the Constitution, and courts never defer to agencies in reading the Constitution. The overall structure of Section 706 provides even more support. Section 706 concerns the scope of review, and it does include deferential standards of review - just none that apply to review of legal questions. For all these reasons, commentators in administrative law have "generally acknowledged" that § 706 seems to require de novo review on questions of law.[13]

Chevron also cannot be justified as a canon of statutory construction. Traditional canons of construction help courts to determine a fixed meaning for a statute. That is not how *Chevron* works. Under *Chevron*, a court must allow an agency to change its interpretation of a statute. Thus, a court sustaining an agency interpretation under *Chevron* does not itself decide the meaning of the statute; it determines only that the statute is ambiguous and then allows the agency to determine its meaning. This feature of *Chevron* is at the heart of the doctrine. But the feature also makes it impossible to consider *Chevron* a traditional canon of statutory construction, because the doctrine is not a rule to help the court determine a meaning.

There is one argument that does avoid a conflict between *Chevron* and § 706. Under this view, *Chevron* is a presumption that any statutory ambiguity should be interpreted as implicitly delegating, to the administrative agency with jurisdiction over the statute, the lawmaking authority necessary to resolve the issue. The theory avoids the problem with § 706 because the court *does* interpret the statute de novo; the court just finds that the statute (or rather the ambiguity in the statute) gives the agency the power to make the rule of decision. The problem with the "implicit delegation" view of *Chevron* is that it violates another provision of the APA.

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provisions - are subject to plenary judicial review." Staff of the Senate Comm. on the Judiciary, 79th Cong., Report on the Administrative Procedure Act (Comm. Print 1945), reprinted in APA Legislative History at 11, 18.

[12] See Velasquez-Tabir v. INS, 127 F.3d 456, 459 n.9 (5th Cir. 1997); DuBois v. USDA, 102 F.3d 1273, 1284 (1st Cir. 1996); Smith v. Office of Civilian Health & Med. Program of the Uniformed Servs., 97 F.3d 950, 955 (7th Cir. 1996); and Stupak-Thrall v. United States, 70 F.3d 881, 887 (6th Cir. 1995), Molina v. Sewell, 983 F.2d 676, 679 n.3 (5th Cir. 1993) (all citing § 706 as requiring de novo review on issues of law). Pre-Chevron courts also read 706 this way. See, e.g., Rice v. Wilcox, 630 F.2d 586, 589 (8th Cir. 1980); Hanly v. Kleindienst, 471 F.2d 823, 828 (2d Cir. 1972); SEC v. Cogan, 201 F.2d 78, 86-87 (9th Cir. 1952) ("In enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide, - it so enacted with explicit phraseology.").

[13] Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 473 n.85 (1989); see also Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 Chi.-Kent L. Rev. 1039, 1085-86 (1997) (noting the "embarrassing" point that the "APA appears to compel the conclusion" that "courts should decide all questions of law de novo," and finding it "puzzling" that there has been no ""rediscovery' of the language of the APA"); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 995 (1992) (arguing that 706 "suggests that Congress contemplated courts would always apply independent judgment on questions of law").

Often overlooked, Section 558(b) of the APA forbids agencies from issuing "substantive rules … except [(1)] within jurisdiction delegated to the agency and [(2)] as authorized by law."[14] The implicit delegation view of *Chevron* violates this provision because it allows an agency to assert a "de facto rule-making power"[15] so long as only the first condition is satisfied—the agency has a jurisdiction over the statute.

B. *Chevron* and Delegation.

One of the most puzzling aspects of the *Chevron* decision is that, while the Court's opinion articulated a radically new theory of judicial deference to changed administrative interpretations of statutes, no such new theory was needed to decide the case. In fact, the Solicitor General of the United States urged the Court to sustain the legality of EPA's rules on the fairly conventional ground that the agency had a sufficiently broad rulemaking power to formulate the challenged definition of "stationary source."

The *Chevron* Court seemed to appreciate that its new approach to statutory interpretation effectively provided a new source of delegated power to administrative agencies. The Court cited no particular statutory basis for this effective power, but instead reasoned that "sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[16] The Court need not and should not have relied on any sort of "implicit" delegation theory.

The EPA had an explicit delegation under § 301 of the Clean Air Act "to prescribe such regulations as are necessary to carry out [its] functions under this Act."[17] That statute confers the "authorization by law" demanded by § 558(b) for an agency to issue "substantive rules" and eliminates the need for an implicit delegation theory, with all its weaknesses. The importance of this rulemaking power was well appreciated by the Solicitor General, who began the EPA's argument for deference by quoting the EPA's § 301 rulemaking power in full, in the text of the brief.[18] Such rulemaking power reconciles the *result* reached in *Chevron* with the APA, even if it does not support the Court's reasoning.

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[14] 5 U.S.C. § 558(b) ("A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."). The legislative history shows that this provision was "framed on the necessary assumption that the detailed specification of powers must be left to other legislation relating to specific agencies. Its effect is to confine agencies to the jurisdiction and powers so conferred." 92 Cong. Rec. 5654 (1946) (statement of Rep. Walter), reprinted in APA Legislative History at 367-68.

[15] Louis L. Jaffe, Judicial Control of Administrative Action 564 (1965) (as Jaffe summarized it, his "argument … is that even in the absence of a formal rule-making power, formally exercised, a de facto rule-making power is recognized when a court approves (as it often does) a policy or interpretation but stops short of adopting it as *the* interpretation"). See also Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 26 (1983) (recognizing that "if interpretive rule making is coupled with a [judicial] deference principle, it is, from a legal perspective at least, the functional equivalent of substantive rule-making authority").

[16] *Chevron*, 467 U.S. at 844.

[17] Clean Air Act § 301(a)(1), 42 U.S.C. § 7601(a)(1). Although the Chevron court did not cite this provision, it did describe the EPA as "an agency to which Congress has delegated policymaking responsibilities," *Chevron*, 467 U.S. at 865, and "policymaking responsibilities" often refers to rulemaking powers in administrative law.

[18] See Brief for the Administrator of the Environmental Protection Agency at 21, in *Chevron v. Natural Resources Defense Council* (No. 82-1005).

To understand this point, it is highly useful to appreciate the precise legal issue that was before the Supreme Court. In 1980, under the Carter Administration, the EPA promulgated a definition of stationary source that read:

> 1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
>
> 2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).
>
> **3. "Installation" means an identifiable piece of process equipment.**[19]

The bolded part of that definition—i.e., paragraph 3—would be omitted in the challenged definition of source promulgated under the Reagan Administration one year later, and the concept of "installation" was folded into paragraph 2:

> 1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
>
> 2. "Building, structure, or facility, **or installation**" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).[20]

Even by just skimming over these definitions of "source," a reader can easily appreciate that, in both the Carter and Reagan Administrations, the EPA was engaged not so much in interpreting the statute as in exercising its delegated power to make binding rules. After all, the statutory language in the Clean Air Act included the phrase "stationary source" but did not define it. Given that statutory silence, how could either the Carter or Reagan Administrations extract from the statute a meaning that, among other concepts, included industrial groups in the

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[19] Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980) (emphasis added).

[20] See 40 C.F.R. 52.24(f) (1982) (emphasis added); see also, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981).

"Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively)"? Certainly, no known form of statutory interpretation could wring such precise meaning from the undefined phrase "stationary source."

The *Chevron* case itself is thus an excellent demonstration of how agencies exercise their delegated rulemaking powers, and that is precisely how the government presented the case at the Supreme Court. The *Chevron* decision's articulation of a new theory of statutory interpretation was as unnecessary as it was unwarranted.

III. Subsequent Supreme Court Case Law.

Though the *Chevron* decision itself appeared to announce a generally applicable approach to reviewing statutory interpretations of administrative agencies, subsequent Supreme Court cases have limited *Chevron* significantly. Most importantly, in *United States v. Mead*, the Court limited the *Chevron* doctrine to situations in which Congress has conferred upon the administrative agency the power "to be able to speak with the force of law."[21] Where an agency does not have such delegated power, *Mead* held that *Chevron* deference is not appropriate.

Mead is an extraordinarily important case because it reinterprets *Chevron* as being a case about the proper reach of agency lawmaking powers—i.e., as a case about delegation rather than deference. That approach holds the promise of ultimately reconciling the *Chevron* doctrine with the APA's rule that reviewing courts are supposed to decide all issues of law. Under the theory articulated in *Mead*, a reviewing court should approach an administration statute initially with the assumption that it—the review court—will decide all questions of law (as required by § 706). But in the process of reviewing the administrative statute, the court may find (and indeed often will find) that the statute confers on the agency an explicit lawmaking power. Such powers are, of course, common in administrative statutes, and in fact the APA itself expressly recognizes that agency rulemaking powers include the power to "prescribe law."[22]

Other subsequent case also tend to confirm that *Chevron* is not really about judicial deference to agency statutory interpretations, but instead about judicial acceptance of delegated lawmaking powers. Thus, for example, in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, the Court held that an administrative agency can rely on *Chevron* deference to change a prior statutory interpretation *even where that prior statutory interpretation was made by a federal court*.[23] If the *Chevron* doctrine were truly about statutory interpretation, the Court's conclusion in *Brand X* would be truly stunning, for it would allow an administrative agency effectively to "overrule" statutory precedents of any federal court, even those of the Supreme Court itself. Because, however, *Mead*'s reinterpretation of *Chevron* grounds the doctrine in the exercise of an agency's delegated lawmaking powers, the result in *Brand X* makes sense. A new exercise of an agency's rulemaking powers changes law, and when the law changes, prior precedents are no longer necessarily valid.

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[21] 533 U.S. 218, 229 (2001).
[22] 5 U.S.C. § 551(4).
[23] 545 U.S. 967 (2005).

A third Supreme Court case limiting *Chevron*—the recent decision in *King v. Burwell*[24]—also makes sense under *Mead*'s reinterpretation of the doctrine. *King* held that *Chevron* deference is inapplicable to any issue of "deep 'economic and political significance' that is central to [a] statutory scheme."[25] *King*'s exception to *Chevron*, which might termed the "too big to defer" exception, makes sense under a delegation theory, for Congress is not likely to grant an administrative agency power to make the fundamental policy choices about the law. Indeed, if a statute were to grant an agency such power with little or no guidance as to the constraints on the exercise of that power, the statute would raise a serious issue under the constitutional nondelegation doctrine.

Each of these Supreme Court cases reformulates *Chevron* to be more of a doctrine about delegated lawmaking power rather about deference to administrative interpretations of statutes. Unfortunately, the doctrine's original formulation as a deference principle survives and is commonly repeated in the case law. The mixture of the two theories is both unhelpful and confusing.

IV. The Desirability of Corrective Legislation.

Even though Supreme Court case law has taken some steps toward reinterpreting *Chevron* as a doctrine about delegation rather than deference, corrective legislation would still be desirable. Here, I outline some possibilities for such legislation.

As an initial matter, however, I would suggest that, in any potential bill, the sponsors of the legislation should make it perfectly clear in the legislative record that they are not seeking to foreclose further judicial reexamination of the *Chevron* decision. The introduction of legislation designed to correct a particular judicial decision is sometimes used strategically in litigation as a congressional recognition that corrective legislation is necessary—i.e., that the targeted judicial decision is currently good law and can be changed only through legislation. While such strategic uses of proposed corrective legislation has waned in recent years as the courts increasingly refuse to rely on unenacted legislation in interpreting prior statutes, some risk of that misuse of proposed legislation remains. To minimize that risk, the congressional sponsors of any bill on this matter would be well advised to state clearly the views (i) that the proposed corrective legislation should not be viewed as confirming the continuing vitality of the *Chervon* decision and (ii) that it should not prevent the ongoing process by which the courts are continuing to reexamine and to dismantle the *Chevron* doctrine.

For the legislation itself, I believe that it should be drafted around four principles. First and foremost, the Congress should reassert, in the clearest possible terms, that reviewing courts are to decide all questions of law *de novo*, without any deference to administrative agency positions.

[24] 135 S.Ct. 2480 (2015).
[25] Id. at 2489.

Second, the legislation should recognize that, where Congress has delegated lawmaking power to an agency, reviewing courts should give proper scope to that lawmaking power by permitting the agency to fill in the details of the statutory scheme in a reasonable manner—i.e., in a manner that is not arbitrary, capricious or otherwise contrary to law. This principle would account for the actual result in the *Chevron* case but would make clear that the agency's authority should be grounded on the existence of delegated rulemaking powers, not on the agency's supposed superior abilities at statutory interpretation.

Third, Congress might also consider recognizing the traditional view that, in formal agency adjudicatory proceedings, some issues decided by the agency are not pure issues of statutory interpretation but are instead mixed questions of law and fact. For such questions, a reviewing court might provide deference to the agency not because of the agency's abilities at statutory interpretation, but because of the agency's superior ability to apply a statutory concept to the specific factual context in that adjudication. This theory of deference was articulated by the Supreme Court in *NLRB v. Hearst Publications, Inc.*,[26] and it provides another proper basis for granting deference to an administrative agency that does not deny to the federal courts their traditional role in deciding issues of law *de novo*.

Fourth and finally, the Congress might also recognize that, in interpreting any statute *de novo*, the federal courts may consider an agency's position as some evidence of the statute's meaning. This principle would codify the approach endorsed by the Supreme Court in *Skidmore v. Swift*, which stated that an administrative agency's "rulings, interpretations and opinions …, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[27] Importantly, however, such use of agency positions does not constitute deference. Rather, the court affords the agency's view the degree of "weight" merited by "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[28] Such weight is similar in kind, if perhaps different in degree, to the weight that might be afforded to a prominent treatise or thorough law review article written by a professor who also has "power to persuade" but no "power to control."

Together these four principles would reaffirm the law already codified in § 706 of the APA and restore the traditional role of federal courts "to say what the law is."[29]

Thank you all for your time and attention to these issues, and thank you again Mr. Chairman for the invitation to speak to the Subcommittee.

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[26] 322 US 111, 130-131 (1944)
[27] 323 US 134, 140 (1944).
[28] Id.
[29] Marbury v. Madison, 5 U.S. 137, 177 (1803).

Mr. MARINO. Thank you.

Dr. Shepherd, please accept my apology for not referring to you as Dr. Shepherd when I started reading your bio.

TESTIMONY OF GEORGE SHEPHERD, PROFESSOR OF LAW, EMORY UNIVERSITY SCHOOL OF LAW

Mr. SHEPHERD. Thank you, Chairman Marino, Ranking Member Johnson, Ranking Committee Member Conyers, and distinguished Members of the Subcommittee, for the opportunity to testify today. Let me summarize my main point, and then explain it in detail.

In the *Chevron* decision and cases following it, the courts have often given deference to legal interpretations. However, as Professor Duffy has noted, the Administrative Procedure Act said and still says the opposite. The APA explicitly says that there should be no deference on pure issues of law. And the APA's legislative history backs that up.

Let me now discuss this in a bit more detail. The APA was a compromise between liberal New Dealers, including President Roosevelt, and conservative opponents of the New Deal. It is the bill of rights for the administrative state. It has remained in force with little change for 70 years.

What does this founding document say about judicial review? The APA says that there should be no deference on issues of law. So here is the provision, the scope of review: The reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions.

The provisions of the APA don't say anything about giving any deference on questions of law. If the drafters had wanted to, they knew how to create deference. Indeed, other nearby parts of the APA said that there should be deference on issues of fact. And the provision of the APA really means what is it says. To see this, let's look at the legislative history.

By the early 1940's, the Court had developed the following system: The Court said that there would be deference for agency decisions of fact, and for agency decisions of mixed fact and law. But there would be deference for decisions of law. At the time of the APA, everyone understood that the APA would codify and restate the Court's existing approach. This was shown by the understanding of three groups: first, participants in the legislative process; second, contemporary commentators; and finally, the courts.

First, the participants in the legislative process said this. As the bill that became the APA worked its way through Committees, all the reports said just that. For example, the Senate Judiciary Committee said, ["The provision on Judicial Review] seeks merely to restate the several categories of questions of law for judicial review."

Likewise, in testimony in the House Judiciary Committee, the Attorney General said: "This declares the existing law concerning the scope of judicial review."

The Senate and House reports indicated the following: "This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis."

The second group that said that the APA confirmed existing law was contemporary commentators. They said this in publications that appeared shortly after the APA became law in 1946.

For example, one commentator wrote in 1948 that "[the provisions] 'would appear to be quite simply a restatement of the present powers which reviewing courts possess, and frequently exercise, of reviewing relevant questions of constitutional and statutory law . . .'"

The third group that understood the APA to merely restate existing law was the courts.

Mr. MARINO. Doctor, could you please pull that microphone closer to you?

Mr. SHEPHERD. Was the courts.

Mr. MARINO. It is still not working. Excuse me, a moment. I don't mean to interrupt.

Mr. SHEPHERD. The button was not pushed.

[Sound issue resolved.]

Mr. MARINO. All right. I hope I don't have to repeat my entire testimony.

The third group that understood the APA to restate existing law was the courts. After the APA was adopted, the courts did just the same thing that they did before the APA. They gave deference on fact questions and mixed questions; but they gave no deference on issues of law. If the Supreme Court had understood the APA to change the scope of judicial review, then the APA's adoption would have caused the court to change its approach, but that did not happen.

To sum up, the APA's provisions on judicial review are inconsistent with the *Chevron* doctrine. The *Chevron* doctrine requires courts to give deference to many agency decisions of law; the APA says the opposite. It explicitly requires courts to give no deference to agency's decisions of law. And the APA's legislative history confirms this.

Suppose the people who were involved in the passage of the APA took a time machine to today. They would be shocked at the *Chevron* doctrine. Indeed, it is easy to understand why the *Chevron* doctrine appeared only 38 years after the APA's adoption and not sooner. For many years, memories of the APA's true meaning were fresh. Only when memories started to fade, or to die out, could the courts adopt an approach that ignored administrative law's fundamental statute.

Thank you very much.

[The prepared statement of Mr. Shepherd follows:]

The Administrative Procedure Act, Its Legislative History, and Courts' Deference to Agencies' Legal Interpretations

Written Testimony for a Hearing of the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, entitled "The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies," 1:30 p.m., March 15, 2016

George Shepherd
Emory University School of Law

INTRODUCTION

In the *Chevron*[1] decision and cases following it, the U.S. Supreme Court and courts of appeal held that reviewing courts must give great deference to an agency's interpretation of the statute that it administers, even on issues of pure law. However, in *Chevron* and subsequent cases, courts have ignored the fact that the Administrative Procedure Act (APA), the fundamental bill of rights for the administrative state,[2] includes provisions that specify how judicial review should occur, including specifically the scope of review.[3] Since being signed into law by President Truman in 1946, the provisions have remained in force without substantive amendment.

The provisions' clear language, their legislative history, and court decisions following 1946 make clear that the provisions were intended to codify the existing common law concerning judicial review of agency decisions as it existed in 1946. That law required courts to give some deference to agency decisions of fact or mixed questions of law and fact. However, it instructed courts to give no deference to agency decisions of law.

Accordingly, *Chevron* and the later decisions that interpreted it broadly are wrongly decided, in the following sense: the system of deference that the decisions establish even for agency's decisions of pure law conflicts with the commands of the APA.

I proceed as follows. In Part I, I discuss the language of the APA's provisions on judicial review, especially its clear language that courts should give agencies' decisions of law no deference. Part II then describes the history of judicial review of agency decisions leading up to the APA.

In Part III, I address the APA's history. I show that the APA was a compromise between supporters of the New Deal and the administrative state that administered it, on one hand, and opponents of the New Deal, on the other. Likewise, the common-law rules for judicial review of agency decisions that had developed by the early 1940s reflected this compromise. Courts in earlier decades had given little deference to agency decisions, tightly controlling and constraining agencies, especially during the first years of the New Deal. In the early 1940s, as Roosevelt appointed more judges, the courts began to give agencies some deference on questions of fact and mixed questions, but not on questions of pure law.

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[1] Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[2] George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NORTHWESTERN LAW REVIEW 1557, 1558 (1996).
[3] 5 U.S.C. 706.

In Part IV, I describe how most participants in the legislative process that led to the APA, as well as contemporary commentators and the courts, believed that the APA simply declared existing law on judicial review. Specifically, they indicated that the APA incorporated courts' existing system of deference to agencies' decisions on questions of fact and mixed questions, but no deference on questions of law.

Part V concludes that both the APA's clear language and its legislative history demonstrate that the *Chevron* system of deference to agency decisions on issues of law is inconsistent with a proper understanding of the APA.

In this paper, I do not address whether the *Chevron* system is good policy. Instead, I only examine the APA's provisions on judicial review and their legislative history. I am in a position to do this because I have published one of the leading studies on the APA's history.[4] Instead of addressing whether *Chevron* is good policy, I show here only that it was inappropriate for the courts, beginning in 1984, to ignore the APA, and to change the law that the APA established. If the *Chevron* system is a better approach than the approach under the APA, then the new system should have been established not by the courts, but by legislation. That is, the system should have been changed, not by a court's decision, but only after hearings and other legislative proceedings such as the present one.

I. THE APA'S CLEAR LANGUAGE SUGGESTS NO DEFERENCE ON QUESTIONS OF LAW

The Supreme Court's *Chevron* decision, which is the foundation of the court's current system of deferring to an agency's interpretations of its governing statute, does not refer to the APA. It should have. The APA includes extensive provisions that govern judicial review of agencies' legal interpretations. The APA currently provides:

> Scope of Review. [T]he reviewing court *shall decide all relevant questions of law, interpret constitutional and statutory provisions* and determine the meaning or applicability of the terms of an agency action. The reviewing court *shall ... hold unlawful and set aside agency action*, findings, and conclusions found to be—(A) *not in accordance with law*; (B) *contrary to constitutional right, power, privilege, or immunity*; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ...[5]

These provisions have not changed since 1946. They are, except for a renumbering, identical to the provisions of Section 10(e) of the APA as the provisions existed when the APA became law in 1946.[6]

A normal reading of the provisions would suggest that they command courts to decide questions of law themselves, giving no deference to agencies' interpretations. The provisions require that reviewing court "shall decide all relevant questions of law, interpret constitutional

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[4] *See, supra,* Shepherd at note 2.

[5] 5. U.S.C. 706.

[6] Sec. 10 (e). Scope of Review. ... [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... (1) ... not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ..."

provisions…" The provisions say nothing about giving deference to the agencies' interpretations. The courts are simply required to "decide all relevant questions of law."

If the APA's drafters had desired to require deference, they knew how to express this desire. Where the drafters desired courts to defer to agencies' findings, they expressed that clearly. For example, the provisions on review of agencies' conclusions of fact indicate clearly that, in a proceeding involving a hearing, courts are to defer to the the agencies' factual conclusions, if the conclusions are supported by substantial evidence. The original and current versions of the APA provide: "[The court] shall … hold unlawful and set aside agency action, findings, and conclusions found to be … unsupported by substantial evidence in any case [requiring a formal hearing] or otherwise reviewed on the record of an agency hearing provided by statute."[7]

That is, the provisions on judicial review of agencies' decisions of fact specifically require deference. The provisions on agencies' decisions of law include no such requirement. The APA could hardly be clearer that no deference is required to agencies' decisions of law.

After *Chevron*, some commentators have noted the APA's conflict with *Chevron*. For example, Thomas Merrill notes:

> "The one general statute on point, the Administrative Procedure Act, directs reviewing courts to 'decide *all* relevant questions of law.' If anything, this suggests that Congress contemplated courts would always apply independent judgment on questions of law, reserving deference for administrative findings of fact or determinations of policy."[8]

To understand why the APA would establish this system of deference on questions of fact, but no deference on questions of law, we turn first to the history of how courts reviewed agency decisions before the APA.

II. THE LAW ON JUDICIAL REVIEW OF AGENCY DECISIONS BEFORE THE APA

Before the New Deal and in its early years, the courts were a major weapon that conservative business interests used to defend against actions by agencies. Sometimes, conservative courts, staffed by conservative judges from previous conservative administrations, would strike down whole New-Deal administrative systems.[9]

However, more frequently, conservative courts would constrain New Deal agencies' exercise of their regulatory powers not by challenging the agencies' existence, but by imposing close judicial review on the agencies' individual decisions. As a leading text on administrative law notes,

> "[J]udges used review of agency factfinding and legal determinations in order to exercise close and often exacting control over the agency's regulatory powers. … [T]he basic impact of hearing procedures and judicial review was to constrain the

[7] APA Section 10 (e)(B)(5); 7 U.S.C. 706 (2) (E).
[8] Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).
[9] *See* A.L.A. Schechter Poultry Corp. v. United States. 295. U.S. 495 (1935) (National Industrial Recovery Act); United States v. Butler, 297 U.S. 1 (1936) (Agricultural Adjustment Act). *See also* Shepherd, *supra* note 2, at 1562-63.

> effective power of the new regulatory bodies to control private business conduct. … The courts rarely struck down the legislatures' creation of new administrative bodies on constitutional grounds; instead they exercised close review over particular agency decisions and procedures to hedge the exercise of administrative power."[10]

As Roosevelt continued to appoint liberal judges to the Supreme Court and lower courts, the judicial tide then turned. In contrast to the earlier conservative courts' hostility to New Deal programs, the newly liberal courts began to support the agencies.[11] An important way that the courts did this was to give agencies' decisions greater deference.

> In a relatively short time, the Supreme Court (and with it, much of the lower federal judiciary) swung from almost undisguised hostility toward the new programs of administration to conspicuous deference. The availability of judicial review of administrative action was curtailed, and particular agency decisions were frequently sustained with judicial obeisance to the mysteries of administrative expertise. The defenders of the administrative process appeared to have substantially succeeded in insulating agency decisions from judicial check.[12]

In the early 1940s, a liberal Supreme Court issued several important decisions that established a new deferential approach for judicial review of agency decisions. Under the new approach, established in decisions such as *Dobson v. Commissioner*,[13] *Gray v. Powell*,[14] and *NLRB v. Hearst*,[15] courts would as before give agency decisions of purely legal questions no deference. However, agency's decisions of both issue of fact and mixed issues of law and fact would receive deference.

In effect, the courts' approach was a compromise. It allowed New-Deal programs to breathe, while also giving business interests some recourse to the courts if agencies misinterpreted the law or if their fact-finding was egregiously faulty.

I now turn to a similar compromise: the provisions for judicial review in the APA.

III. THE LEGISLATIVE HISTORY OF THE APA'S PROVISIONS ON JUDICIAL REVIEW

The APA's provisions on judicial review, like the entire APA, were a compromise. To understand the history of the APA's provisions on judicial review, it is necessary first to understand the history of the APA as a whole.

A. A SUMMARY OF THE APA'S HISTORY

The APA was a compromise between liberal New Dealers, including President Roosevelt, and conservative opponents of the New Deal.[16] The balance that the APA struck

[10] Richard Stewart *et al.*, ADMINISTRATIVE LAW AND REGULATORY POLICY 19-20 (2nd ed. 1992).
[11] *See* Shepherd, *supra* note 2, at 1562-63.
[12] Richard Stewart *et al*, *supra* note 10, at 21.
[13] 320 U.S. 489 (1943)
[14] 314 U.S. 402 (1941)
[15] 322 U.S. 111 (1944)
[16] For a thorough exploration of the APA's history, *see* Shepherd, *supra* note 2.

between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.[17] The APA's impact has been large. It has provided agencies with broad freedom, limited only by relatively weak procedural requirements and modest judicial review, to create and implement policies in the many areas that agencies touch: from aviation to the environment, from labor relations to the securities markets. The APA permitted the growth of the modern regulatory state.

The APA and its history are central to the United States' economic and political development. In the 1930s and 1940s when the APA was debated, much in the United States was uncertain. Many believed that communism was a real possibility, as were fascism and dictatorship. Many supporters of the New Deal favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and businesses that felt the impacts of the bureaucrats' commands. To New Dealers, this was efficiency. To the New Deal's opponents, this was dictatorial central planning. The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning. The decision has shaped the nation for seventy years.

However, the APA's development was not primarily a search for administrative truth and efficiency. Nor was it a theoretically centered debate on appropriate roles for government and governed. Instead, the fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. Republicans and Southern Democrats sought to crush New Deal programs by means of administrative and judicial controls on agencies. Every legislator, both Roosevelt Democrats and conservatives, recognized that a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and Securities and Exchange Commission. They understood, and stated repeatedly, that the shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement.

Some of the most important events leading up to the APA's becoming law were as follows. After more than a decade of halting attempts to pass legislation to govern administrative agencies, the U.S. House and Senate in 1940 passed the conservative Walter-Logan Bill, which would have constrained administrative agencies strictly.[18] President Roosevelt then vetoed the bill, and the House failed to override the veto.[19] The veto preserved New-Deal agencies' ability to function freely.

In early 1941, the Attorney General's Committee on Administrative Procedure (the Attorney General's Committee) issued its report.[20] The Roosevelt administration had established the committee to investigate administrative agencies and propose legislation. The committee's report contained two reports and two proposed bills, the first from the committee's liberal

[17] *See* William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235-52 (1986).
[18] Shepherd, *supra*, note 2, at 1598-1625.
[19] *Id.* at 1625-1632.
[20] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (ATTORNEY GENERAL'S COMMITTEE'S REPORT) (1941).

majority and the other from its conservative minority. As might be expected, the majority bill placed few limits on agencies. In contrast, the minority bill imposed many restrictions.[21]

When World War II began, efforts on administrative-law reform did not cease. Instead, the efforts receded behind the scenes, to a continuing process of quiet negotiations. The process concluded with enactment of the APA.

Central to the process's success was the appointment in 1941 of Carl McFarland as chairman of the American Bar Association's Special Committee on Administrative Law. McFarland was trusted by both the Roosevelt administration and by conservatives; although the Roosevelt administration respected him, he had been a part of the conservative minority in the Attorney General's Committee.[22] McFarland then led the process of negation, proposal, and counter-proposal that led to the APA.[23]

The APA that finally emerged in 1946--after more than a decade of legislative activity that saw scores of bills, many days of hearings, many committee reports, and a presidential veto--did not represent a unanimous social consensus about the proper balance between individual rights and agency powers. The APA was a hard-fought compromise that left many legislators and interest groups far from completely satisfied. Compared to the status quo, liberals gained much. But conservatives also gained—especially on judicial review, as we will see below. Congressional support for the bill was unanimous only because many legislators recognized that, although the bill was imperfect, it was better than no bill. The APA passed only with much grumbling. The APA was a cease-fire armistice agreement that ended the New Deal war on terms that favored New Deal proponents.[24]

B. THE SPECIFIC HISTORY OF THE APA'S JUDICIAL-REVIEW PROVISIONS.

Like the APA itself, the APA's section 10 on judicial review was also a compromise. The path to the compromise was as follows.

The Walter-Logan bill, which the House and Senate passed in 1940, including broad standing for judicial review of most any agency decision.[25] Critics of the bill argued that this would paralyze agencies. "This would simply mean that United States judges would substitute their views for those of the administrative officer. ... This would involve endless litigation. Anyone aggrieved could bring an action and tie into knots the activities of the agency for months and months."[26] For this and other reasons, President Roosevelt vetoed the bill.

The majority and minority reports of the the Attorney General's Committee, mentioned above, discussed in detail the scope of judicial review of agency actions. The majority report, as might be expected of a group that supported the New Deal and its agencies, urged that judicial review should balance protecting private interests from unjust agency action with protecting agencies' freedom to conduct their business:

> [W]e expect judicial review to *check*—not to *supplant*—administrative action. Review must not be so extensive as to destroy the values—expertness,

[21] Shepherd, *supra*, note 2, at 1632-1636.
[22] *Id.* at 1645-1647.
[23] *Id.*
[24] *Id.* at 1675-1678.
[25] *Id.* at 1600.
[26] Representative Emanuel Celler, H.R. Rep. No. 1149, 76th Cong., 3d Sess. (1940). *See also* Shepherd, *supra* note 2, at 1605.

> specialization, and the like—which, as we have seen, were sought in the establishment of administrative agencies.[27] (emphasis original)

The majority report then indicated that the current common law provided for no judicial deference for issues of law, but for deference for issues of fact:

> "In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, is is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence."[28]

However, it was hard to predict when courts would decide that an issue was of law or of fact: "In numerous decisions courts have held that the specific issues involved were questions of fact or questions of law. But definite criteria for ascertaining confidently which is which prior to court decision have not yet developed."[29] This was the issue that the Supreme Court would attempt to resolve in the next few years by establishing the distinction between issues of law and issues of fact or mixed issues of law and fact.[30]

The majority report then proposed that courts should consider altering existing law to adopt the equivalent of the *Chevron* doctrine, with courts giving deference even to agencies' decisions of law:

> We may expect judicial review, in the performance of this function of control, to speak the final word on interpretation of law, both constitutional and statutory. This is not to say that the courts must always substitute their own interpretations for those of the administrative agencies. Their review may, in some instances at least, be limited to the inquiry whether the administrative construction is a permissible one.[31]

Likewise, the majority report hoped that:

> Even on questions of law judgment seems not to be compelled. The question of statutory interpretation might be approached by the court de novo and given the answer which the court thinks to be the "right interpretation." Or the court might approach it, somewhat as a question of fact, to ascertain, not the "right interpretation," but only whether the administrative interpretation has substantial support.[32]

If adopted, such an approach would have furthered the Roosevelt administration's goal of further insulating New Deal agencies from judicial disruption. The majority report could, of course, cite

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[27] ATTORNEY GENERAL'S COMMITTEE'S REPORT, *supra* note 20, at 77.
[28] *Id.* at 88.
[29] *Id.*
[30] *See* cases cited *supra* at notes 13-15.
[31] ATTORNEY GENERAL'S COMMITTEE'S REPORT, *supra* note 20, at 78.
[32] *Id.* at 90.

no Supreme Court decision to support its proposal; the majority report had already confirmed that existing Supreme Court precedent required courts to grant no deference to agency decisions of law. However, the majority report cited one lower-court decision from three years earlier that endorsed this novel approach.[33]

The majority's proposed bill contained no provision that specified the scope of review.[34] The report suggested that, instead of imposing comprehensive rules for judicial review for all agencies, Congress should address specific legislation to specific agencies as problems arose in them:

> When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situation, and not by general legislation for all agencies and all types of determination alike, can Congress make effective and desirable change.[35]

Of course, an additional unexpressed reason may have been that the absence of a statutory specification of the scope of judicial review would permit a liberal Supreme Court to continue to provide ever greater deference to agency decisions. Indeed, in the absence of statutory standards, the Supreme Court might even adopt the majority report's proposal of providing deference to agencies even on issues of law.

The minority report, offered by the committee's more-conservative members, including Carl McFarland, was different. It proposed a bill that included a section that imposed specific standards for judicial review.[36] The section was the forerunner to the provisions that eventually appeared in the APA.

The minority explained that the legislation would prevent courts from further changing standards of review: "We believe, however, that Congress should prescribe the scope of judicial review rather than leave it to the courts to venture into this controversial field upon their own initiative and without needed statutory direction."[37] Implicit is the minority's recognition that specific standards would prevent the liberal Supreme Court from accepting the majority report's suggestion of providing deference even on agencies' decisions of law.

As the war intervened, negotiations over the APA proceeded behind the scenes, moderated by Carl McFarland.[38] The bill that emerged from the process in 1945 and became the APA was a compromise. It offered much to liberals.[39] But it also offered important concessions to conservatives. One of the important concessions to conservatives was the APA's Section 10 on judicial review.

Section 10 of the APA includes specific standards for judicial review. This approach accepts the recommendation of the conservative minority report from the Attorney General's Committee, and rejects the recommendation of the liberal majority's report. This is not entirely surprising because McFarland was a member of the Attorney General's Committee's minority.

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[33] S.E.C. v. Associated Gas & Election, 99 F. 2d 795, 798 (C.C.A. 2d 1938).
[34] *Id.* at 191-202
[35] *Id.* at 92.
[36] *A Code of Standards of Fair Administrative Procedure, Section 211, Judicial Review*, *in id.* at 230.
[37] *Id.* at 209.
[38] *See supra* text at notes 22-23.
[39] Shepherd, *supra* note 2, at 1765-1678.

Moreover, the standards reject the proposal from the majority report that courts provide *Chevron*-like deference to agencies' decisions of law: I have already discussed how the provisions' clear language requires deference for agencies' decisions of fact, but indicates no deference for decisions of law.[40]

IV. CONTEMPORARY UNDERSTANDING OF APA SECTION 10'S MEANING

At the time of the APA's adoption, no legislative participants, commentators, or judges understood the APA's provisions on judicial review to require deference to agencies' decisions on issues of law. That is, none understood the APA to endorse *Chevron*-style deference.

Instead, most understood the APA to confirm the Supreme Court's contemporary standards for judicial review. Recall that the contemporary standards were no deference on agencies' decisions of law, but deference on questions of fact and mixed questions of law and fact.[41]

A small minority indicated that the APA required *less* deference than under contemporary common law, the opposite of *Chevron*-style deference.

A. UNDERSTANDING OF LEGISLATIVE PARTICIPANTS

People and committees that were most central to the APA's creation and adoption understood its provisions on judicial review to codify existing Supreme Court doctrine.

In a document that accompanied the bill, the Senate Judiciary Committee, which had been responsible for the bill, noted:

> A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. ... Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. ... The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government.[42] (citations omitted)

The separate report of the Senate Judiciary Committee notes about section 10 (e), "This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law."[43] The House Committee report says exactly the same thing.[44]

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[40] *See supra* text at note 5-8.

[41] *See supra* text at notes 13-15.

[42] SENATE JUDICIARY COMMITTEE PRINT (June 1945), *in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944-46 [LEGISLATIVE HISTORY] 39(1946).

[43] SENATE, REPORT ON THE COMMITTEE ON THE JUDICIARY ON S.7 (November 19, 1945), in LEGISLATIVE HISTORY, *supra* note 42, at 185, 214.

[44] REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES ON S.7. (May 3, 1946), *in* LEGISLATIVE HISTORY, *supra* note 42, at 278.

Likewise, in written testimony to the House Judiciary Committee in 1945, Tom Clark, the attorney general noted of section 10 generally, "This section, in general, declares the existing law concerning judicial review."[45] Specifically, as to the provisions on judicial review, Clark noted, "Section 10 (e): This declares the existing law concerning the scope of judicial review."[46]

Individual representatives also confirmed this interpretation during debate in the House.[47]

In addition, Carl McFarland, who led the APA's creation, indicated repeatedly that the APA confirmed existing rules for the scope of review. For example, in hearings on the APA before the House Judiciary Committee in 1945, McFarland noted:

> [W]e do not believe the principle of review or the extent of review can or should be greatly altered. ... We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.[48]

Rep. Walter's follow-up question makes clear that "as it now is" refers to the Supreme Court's existing approach.[49]

Similarly, at a panel in 1947, McFarland was asked whether the APA changed the *Dobson* rule. *Dobson* was one of the Supreme Court's decisions that provided for deference on fact questions and mixed question, but no deference on questions of law.[50]

> Question: I wonder if Mr. McFarland would care to comment on the effect of the use of the word "substantial" in the statute in connection with the evidence upon which judicial review is based—as to whether he thinks the Dobson rule is affected by the state?
>
> Mr. McFarland: I can answer your question very simply by saying no.[51]

Likewise, shortly after the APA became law, the attorney general produced a manual for understanding the statute. It notes, "The provisions of section 10 constitute a general restatement

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[45] *Appendix to Statement by Attorney General Tom Clark*, *in Id.* at 229

[46] *Id.* at 230.

[47] Rep. Walters: "Subsection (e) of section 10 requires courts to **determine independently** all relevant questions of law, including the interpretation of constitutional or statutory provisions ..." (emphasis added). LEGISLATIVE HISTORY, supra note 42, at 370. Rep. Springer: "In those cases where these decisions are found to be ... not in accordance with the law, the decision can be set aside." *Id.* at 377. Rep. Doliver: "Not only does it promote uniformity but it codifies the procedures in a court review." *Id.* at 380.

[48] ADMINISTRATIVE PROCEDURE, HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 79TH CONGRESS, 1ST SESSION, JUNE 21, 25, 26, 1945, *in* LEGISLATIVE HISTORY, *supra* note 42, at 84.

[49] "Mr. Walter. You say 'as it now is.' Frankly, I do not know what it now is; and I do not know whether the rule as laid down in the Consolidated Edison case is the law, or what the law is. I am not saying that because the Supreme Court apparently changes its mind daily, but what is the rule?" LEGISLATIVE HISTORY, *supra* note 42, at 84.

[50] *See* text at notes 13-15.

[51] Carl McFarland, *Response to Mr. Blachly's Critique, Discussion*, *in* THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 69 (1947).

of the principles of judicial review embodied in many statutes and judicial decisions."[52] Specifically, discussing section 10(e), the section on judicial review's scope, the manual indicated, "This restates the present law as to the scope of judicial review."[53]

The manual also discusses section 10(e)(B), which includes provisions that require the agency to "hold unlawful and set aside agency action, findings, and conclusions found to be (1) … otherwise not in accordance with law … (2) contrary to constitutional right … (3) in excess of statutory jurisdiction … or short of statutory right." The manual concludes, "The numbered clauses of section 10(e)(B) restate the scope of the judicial function in reviewing final agency action.[54]

B. UNDERSTANDING OF CONTEMPORARY COMMENTATORS

Most contemporary commentators indicated that the APA codified existing Supreme-Court precedent on judicial review. For example, Alfred Scanlon wrote in 1948 that "the Administrative Procedure Act was not intended to upset the existing rules or principles of judicial review of administrative action [because] congress was aware of the existing principles of judicial review when it passed the Act, and … congress merely restated them.[55]

Specifically, Scanlon addressed the first sentence of section 10(e), the section that directs courts to "decide all relevant questions of law, interpret constitutional and statutory provisions…". He noted: "The first sentence [of section 10(e)] would appear to be quite simply a restatement of the present powers which reviewing courts possess, and frequently exercise, of reviewing relevant questions of constitutional and statutory law …"[56]

Likewise, Reginald Parker wrote in 1951: "The new law does no more than restate the wide and vague grounds upon which judicial review may be sought."[57] In addition, Parker noted specifically that "there is no change in law of judicial review even in the hotly contested field of 'mixed' questions."[58]

Another commentator noted, in an article entered into the Congressional Record during debate on the bill:

> Subsection (a) provides that any party adversely affect by any administrative action, rule, or order within the purview of the act or otherwise presenting any

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[52] Tom Clark, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 93 (1947)
[53] *Id.* at 108.
[54] *Id.*
[55] Alfred Scanlon, *Judicial Review Under the Administrative Procedure Act—In which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME LAWYER 501, 502 (1948). "This writer's personal view is that no fundamental change was intended as to the scope of judicial review." *Id.* at 528. Likewise,

> At the risk of repetition, it can be concluded that the legislative intent behind the provisions of Section 10, taken individually or collectively, was to restate the existing principles governing judicial review of administrative actions. … Congress has merely restated the home-made principles which the judicial process already had fashioned.

Id. at 544-545.
[56] *Id.* at 529.
[57] Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE LAW JOURNAL 581, 590 (1951)
[58] *Id.* at 590, n. 85.

> issue of law shall be entitled to judicial review thereof in accordance with this section, and reviewing courts are given plenary power with respect thereto. I shall not attempt here to make crystal clear what "an issue of law" is as distinguished from "an issue of fact" or a "mixed issue of law and fact." I suspect the courts will wrestle with that problem a long, long time.[59]

Some modern commentators have confirmed that the APA codifies pre-existing common-law rules. For example, Richard Stewart notes that the APA's provisions on judicial review "essentially codify preexisting judge-made principles of administrative law."[60]

A small minority of commentators suggested that the APA changed existing rules to require court to give agencies *less* deference than before.[61] None suggested that the APA did the opposite, and required *Chevron*-style deference.

C. Understanding of Contemporary Courts

The courts also understood that the APA confirmed existing law on deference to agencies' decisions of law. The approach that the Supreme court took before the APA (deference on fact questions and mixed questions but no deference on issues of law) was the same approach that the court used directly after the APA became law, and then for many years.[62] If the Court had understood the APA to change the scope of judicial review, then the APA's adoption would have caused the court to change its approach. Contemporary commentators made this same point.[63]

V. The APA is Inconsistent with *Chevron*

The APA's provisions on judicial review are inconsistent with the *Chevron* doctrine. The *Chevron* doctrine requires courts to give deference to an agency's interpretation of its governing statute. The APA's provisions on judicial review, which have remained unchanged since 1945, clearly require courts to give no deference to agencies' decisions of law. The APA's legislative history confirms this.

Instead, the legislative history reveals that the APA codifies the system for judicial review that the Supreme Court had created in the early 1940s. Reviewing courts would give no deference on issues of law, but would offer some deference on issues of fact and mixed issues of law and fact.

This analysis provides a possible explanation for why the *Chevron* doctrine appeared 38 years after the APA's adoption, and not sooner. For many years, memories of the APA's true meaning were fresh. Only when memories started to fade, or to die out, did it become possible for the courts to adopt an approach that ignored administrative law's fundamental statute.

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[59] Allen Moore, *The Proposed Administrative Procedure Act*, DICTA (1945), including in Congressional Record in LEGISLATIVE HISTORY, *supra* note 42, at 327.

[60] Stewart, *supra* note 10, at 25.

[61] *See, e.g.*, John Dickinson, *The Judicial Review Provisions of the Federal Administrative Act (Section 10) Background and Effect*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 546 (1947);

[62] *See, e.g.*, O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951).

[63] *See* Scanlon, *supra* note 55, at 532-33. *Cf.* Moore, *supra* note 57, at 334-335 (section 10 (e) may be misinterpreted to require less deference than before).

Mr. MARINO. Thank you, Professor Pierce.

TESTIMONY OF RICHARD J. PIERCE, JR., LYLE T. ALVERSON PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. PIERCE. Thank you, Chairman Marino, Ranking Member Johnson and distinguished Members of the Subcommittee, for providing me the opportunity to testify today. I just want to go through a couple of basics to start with. First, courts always have and always will, confer to some degree of deference on agencies when they act because of comparative institutional expertise. The agencies know more than the courts about the subject matter that they are addressing, and that's why, presumably, Congress gave them the power, and not the courts, the power to implement the statutes at issue.

Second, courts always reject any agency action that is inconsistent with the statute, or if it is arbitrary and capricious. That's, again, something that's been around for a very long time and hasn't changed, didn't change with *Chevron*, hasn't changed today.

And then, courts uphold agency actions in about two-thirds of the cases that come before them, no matter what doctrine they apply. There has been study after study of all of these doctrines, and what they show is, like, a 2 percent difference in rate of upholding. The doctrines are not very important. Now, when *Chevron* was first decided in 1984, I set forth, in a number of articles and books, my reasons why I thought it was sensible and consistent with both the administrative procedures and the Constitution.

I also predicted that it would have a big effect. Well, I was totally wrong in my prediction, time has proven me wrong. Between 1984 and 2001, it had a fair amount of support in the circuit courts. Circuit courts rates of upholding agency action went up during that period of time. Since 2001, there's very little evidence that it's had any effect in the circuit courts. And there's never been any evidence that it has had any effect on the actual decisions of the Supreme Court, as opposed to the way that they phrased their decisions.

Just to give you an example of the difference between the two. Justice Scalia was the strongest proponent of *Chevron*. He expressed that view in opinion after opinion, and in a famous law review article he wrote in Duke Law Journal. He also is the Justice who votes least frequently to uphold agency actions. By contrast, Justice Breyer has always been a strong critic of *Chevron*, and he's the Justice who votes most frequently to uphold agency actions.

So, there really is no evidence today that *Chevron* is having any of the effects that some people attribute to it, and very little evidence that it ever had those effects in terms of actual Supreme Court opinions. The Supreme Court has the power to change its doctrine; it changes its doctrine all the time. It also has the discretion to apply its doctrines in different ways in different cases and to tailor the doctrines to the facts of the cases. And that's what they are doing. And the evidence is, as I indicated in an article that I included as an appendix to my testimony, that the degree of deference is going down. It has gone down over the last several years.

So there's really no reason for concern at all. I can see absolutely no reason why you'd want to take legislative action in this area.

Thank you.

[The prepared statement of Mr. Pierce follows:]*

*__Note:__ Supplemental material submitted with this statement is not printed in this hearing record but is on file with the Subcommittee, and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104665

HOUSE DEFERENCE HEARING

TESTIMONY OF RICHARD J. PIERCE, JR.

LYLE T. ALVERSON PROFESSOR OF LAW

GEORGE WASHNGTON UNIVERSITY

IN A HEARING ON JUDICIAL DEFERENCE TO AGENCY DECISIONS

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM COMMERCIAL AND ANTITRUST LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

MARCH 15, 2016

Thank you, Chairman Marino, Ranking Member Farenthold, and distinguished members of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, for the opportunity to testify today about the practice of the federal courts of conferring some degree of deference on agency interpretations of the statutes they administer and the rules they issue.

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at the George Washington University School of Law and a member of the Administrative Conference of the United States. For 38 years my teaching, researching and scholarly writing has focused on administrative law and government regulation. I have written 125 articles and 20 books on those subjects. My books and

articles have been cited in scores of judicial decisions, including over a dozen opinions of the United States Supreme Court.

Before I discuss the deference doctrines, I will place them in the context of the types of actions in which agencies announce interpretations of the statutes they implement and the rules they issue. Most agencies have the power to announce interpretations of statutes and rules either in rules or in adjudications. Agencies usually announce the most important ways in which they will interpret and implement a statute in rules.

The Administrative Procedure Act (APA) divides rules into several categories. The most important type of rule is often called a legislative rule because, if it is valid, it has the same legally binding effect as a statute. Subject to some exceptions, an agency cannot issue a legislative rule without first conducting a notice and comment proceeding. If the proposed rule is controversial and its imposition will require regulated firms to incur substantial costs, the notice and comment process can require an agency to devote substantial scarce resources to the rulemaking process for many years.

The lengthy and costly notice and comment procedure gives rise to a phenomenon that is often referred to as "ossification" of the rulemaking process. Thus, for instance, agencies were unable to comply with 1400 statutory mandates to issue rules by a statutorily-prescribed date during the period 1995 to 2014 because the rulemaking process is so lengthy and costly. Ossification also produces a situation in which many agencies have rules that have long been obsolete because they do not have the time or resources required to use the expensive and time-consuming notice and comment process to amend or rescind a rule.

Several categories of rules are exempt from the notice and comment process. The most important types of exempt rules are interpretative rules and general statements of policy. Courts differ with respect to the ways in which they distinguish between legislative rules that are subject to the

notice and comment process and interpretative rules or general policy statements that are exempt from that process. I describe the types of rules and the rulemaking process in detail in chapters six and seven of my treatise. I Richard J. Pierce, Jr., Administrative Law Treatise chapters 6 and 7 (5th ed. 2010), and 2015 Cumulative Supplement to Administrative Law Treatise.

Agencies typically issue legislative rules that are relatively broadly worded and then use interpretative rules (or decisions in adjudications) to announce the more particularized interpretations, scope, and effect the agency plans to give the legislative rules. The process the Department of Labor (DOL) has long used to implement the Fair Labor Standards Act (FLSA) illustrates this common agency approach. FLSA requires employers to pay an employee overtime for every hour an employee works in excess of forty hours per week. FLSA exempts "administrative" employees from that requirement, however. In 2004, DOL used the notice and comment rulemaking process to issue a legislative rule in which it adopted a new definition of the "administrative" employees who are exempted from the overtime requirement in FLSA. The new rule included a section in which it stated that the "administrative" exemption applies to "employees in the financial services industry" whose day-to-day work "generally meet the requirements for the administrative exception" except that it does not apply to "an employee whose primary duty is selling financial products."

In 2010, DOL issued an interpretative rule in which it interpreted its 2004 legislative rule not to exempt mortgage loan officers from the overtime pay requirement in FLSA because their "primary duty" is to make sales. The U.S. Court of Appeals for the District of Columbia Circuit held that the 2010 DOL rule was invalid because DOL did not use notice and comment to issue the rule. Mortgage Bankers Association v. Harris, 720 F.3d 966 (D.C. Cir. 2013). The Supreme Court unanimously reversed the circuit court. It held that the 2010 rule was valid notwithstanding DOL's decision to issue it without using notice and comment because it fell within the interpretative rule exemption to the notice and comment

requirement. Perez v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015). Notably, however, DOL could not apply its new interpretation of its 2004 rule retroactively because FLSA has a provision that protects employers from having to pay overtime to employees when the employers had inadequate notice that the employees were entitled to overtime at the time the employers did not provide the employees with overtime pay.

Until late in the Nineteenth century, courts could not and did not review the vast majority of agency actions. The Supreme Court held that courts lacked the power to review exercises of executive branch discretion. A court could review an action taken by the executive branch (or a refusal to act) only in the rare case in which a statute compelled an agency to act in a particular manner. In that situation, the court was simply requiring the agency to take a non-discretionary ministerial action.

Over a period of about fifty years, the Court gradually eliminated the prohibition of judicial review of executive branch exercises of discretion. By early in the twentieth century, it was well settled that a court could review an agency exercise of discretion if Congress authorized judicial review of the action. In 1967, the Supreme Court began to apply a presumption of reviewability that has the effect of authorizing judicial review of an agency action when the intent of Congress with respect to the reviewability of the action is not clear.

Once courts began to review agency actions, they had to decide how much, if any, deference to confer on the agency. Over time, the Court has issued many opinions on that issue. For present purposes the most important are two opinions that announce doctrines that courts apply when they review agency interpretations of agency-administered statutes and one opinion that announces a doctrine that courts apply when they review agency interpretations of the legislative rules they issue. I describe those deference doctrines in detail in my treatise and in a recent essay that I have attached to

this statement. See Richard J. Pierce, Jr. I Administrative Law Treatise §§ 3.1-3.6 and 6.11 (5th ed. 2010) and 2015 Cumulative Supplement.

In its 1944 opinion in *Skidmore v. Swift and Co.* the Supreme Court announced that:

> "The weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier, and later, pronouncements, and all those factors that give it power to persuade, if lacking power to control."

The test was based on the comparative advantage of specialized agencies over generalist courts because of agencies' greater subject matter expertise and greater experience in implementing a statutory regime. The results of applications of the test suggest that it is deferential to agency decisions. Depending on the time period studied, researchers have found that courts have upheld agency actions in 55% to 73% of cases in which they applied the test. The *Skidmore* test has also produced inconsistent and unpredictable results, however.

In its 1984 opinion in *Chevron v. Natural Resources Defense Council,* the Court announced a new somewhat more deferential test that most people believed to be a replacement for the *Skidmore* test:

> "When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is

> silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute."

In other parts of the opinion, the court replaced "permissible" with "reasonable." The second step of the *Chevron* test is a restatement of the test to determine whether an agency action is "reasonable" or arbitrary and capricious that the Court announced in its 1983 opinion in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*:

> 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.

The Court based the *Chevron* test on constitutional and political grounds as well as on the basis of comparative expertise. The Court distinguished between issues of law that a Court can resolve by determining the intent of Congress and issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue.

The *Chevron* test has another beneficial effect in addition to the enhanced political accountability for policy decisions that it yields. By giving agencies the discretion to choose among several "reasonable" interpretations of an ambiguous statute, the *Chevron* test reduces geographic differences in the meaning given to national statutes by reducing the number of splits among the circuits that were produced by circuit court applications of the less deferential *Skidmore* test. At least for a time, *Chevron* had that effect as it was applied by circuit courts. A study of applications of *Chevron* by circuit courts the year after the court decided *Chevron* found that the rate at which courts upheld

agency interpretations of statutes was 81%--a rate between 10% and 30% greater than the rate at which courts upheld agency actions through application of the *Skidmore* test. Since there is only one agency and many circuit courts, that increased rate of upholding agency statutory interpretations necessarily produced increased geographic uniformity in interpretation of national statutes.

Chevron also had another effect that is more controversial. It created a legal regime in which a new Administration could change the interpretation of an ambiguous provision of a statute as long as it engages in the process of reasoned decision-making required by *State Farm*. Indeed, that is what the agency did and the Court unanimously upheld in *Chevron*. The Court explicitly confirmed that effect in its 2005 opinion in *National Cable & Telecomm. Ass'n v. Brand X*. The Court held that a judicial decision that upholds an agency interpretation does not preclude an agency from changing its interpretation if it provides adequate reasons for doing so. *Brand X* made it clear that the only kind of judicial opinion involving interpretation of an agency-administered statute that precludes an agency from adopting a different interpretation is one in which the court concludes that there is one and only one permissible interpretation of the statute. Thus, *Chevron* increased temporal inconsistency in interpretation of national statutes at the same time that it decreased geographic inconsistency in interpretation of national statutes.

Until 2000, most judges and scholars believed that the *Chevron* test had replaced the *Skidmore* test. In 2000, however, the Supreme Court issued an opinion in which it stated that *Chevron* applies to some statutory interpretations while *Skidmore* applies to others. Generally, the somewhat more deferential *Chevron* test applies to interpretations announce by agencies in rules that agencies issue through use of the notice and comment procedure, while the somewhat less deferential *Skidmore* test applies when agencies announce interpretations in rules that they issue without using the notice and comment procedure.

The Court first announced what is now called the *Auer* doctrine in its 1945 opinion in *Bowles v. Seminole Rock & Sand Co*. The Court inexplicably changed the name of the doctrine to the *Auer* doctrine in its 1997 opinion in *Auer v. Robbins*. The *Auer* doctrine is similar in its effects to the *Chevron* doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules. In the process of reviewing agency interpretations of agency rules the Court instructed courts to give the agency interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Court did not give reasons for the *Auer* test when it announced the test but many scholars have drawn the inference that the test was based primarily on comparative institutional expertise with respect to the field in which the rule was issued and the relationship of the rule to the statute the agency was implementing. The test has had effects similar to the effects of the *Chevron* test.

The *Auer* doctrine has produced a rate of judicial upholding of agency interpretations of agency rules that is slightly higher than the rate at which courts uphold agency interpretations of agency-administered statutes. An empirical study of 219 applications of *Auer* by district courts and circuit courts during the periods 1999-2001 and 2005-2007 found that lower courts upheld 76% of agency interpretations of agency rules. Richard Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Administrative Law Review 515 (2011.)

Auer also has the same effects as *Chevron* in the context of agency interpretations of agency rules. It reduces geographic differences in interpretation of rules that are supposed to have a uniform national meaning but it increases temporal differences in interpretation of rules.

In the attached essay, which will be published in the next issue of George Washington University Law Review, I summarize the history of the three deference doctrines. I conclude that they were never

as deferential as many judges and scholars once believed and that they have become less deferential over the past fifteen years. I predict that they will become even less deferential in the future.

I would like to see the Supreme Court make some changes in the legal doctrines it applies and instructs lower courts to apply in this important area of law. Specifically, I would like to see the Court make changes in the law applicable to the notice and comment process that would reduce the incidence and adverse effects of ossification of the rulemaking process and I would like to see the Court clarify the important distinctions between legislative rules that require an agency to use the notice and comment procedure and interpretative rules and general statements of policy that are exempt from that process.

I do not see any opportunity for Congress to make beneficial changes in this area of law by statute at present. The courts have ample discretion to make any needed changes or clarifications in this area of law without any changes in the statutes that now govern this area of law. Courts are in the best position institutionally to make the kinds of changes in legal doctrines that would have a realistic chance of improving the legal framework within which agencies make rules and the quality and timeliness of the resulting rules.

Mr. MARINO. Thank you. Professor Hammond.

TESTIMONY OF EMILY HAMMOND, ASSOCIATE DEAN FOR PUBLIC ENGAGEMENT & PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Ms. HAMMOND. Thank you, Chairman Marino, Ranking Member Johnson, Ranking Committee Member Conyers, and distinguished Members of the Subcommittee, for the opportunity to testify today.

We ask a great deal of courts when they review agencies: They police jurisdictional boundaries; they guard against serious errors; they incentivize agencies to engage in legitimizing behaviors, like promoting participation, deliberation and transparency. Now, these things could be achieved with de novo review, but there are important reasons for giving deference to the agencies. Agencies have experience with the statutes that they administer. Relative to the courts, agencies have superior expertise, particularly with respect to complex scientific and technical matters. And deference is an exercise in judicial self-restraint. By deferring to agencies' reasonable explanations, rather than substituting their own judgments, the unelected courts can avoid injecting their own policy preferences into judicial review. Judicial review attempts to balance all of these competing considerations.

Now, the topic of this hearing is *Chevron*, but I want to emphasize the empirical research that suggests that the court applies *Chevron* to less than half of the agency interpretations that are *Chevron*-eligible. There is a whole spectrum of deference regimes that are tailored to the variety of agency actions as particular circumstance warrant. Those approaches should be viewed together as part of a system. Deference is also not a rubber stamp. Under hard look review, for example, agencies must provide reasoned explanations for their interpretive choices or policy discretion. In other words, they must earn their deference.

By the way, this requirement of reason giving helps alleviate constitutional concerns about the administrative state. There are also times when deference is not warranted at all. For example, an agency cannot use a limiting interpretation to cure a statute that is defective on non delegation grounds. There are also a few very unusual cases in which the court has determined that Congress did not intend the relevant agency to exercise interpretive authority; *FDA v. Brown & Williamson*, and *King v. Burwell* are examples.

Finally, I want to contextualize this system of deference with the matter of remedies in administrative law.

The deference regimes work together with the remedies. For example, if courts find an agency action is unlawful, they also assess the particular circumstances to decide whether to remand with or without vacating the agency's action.

The point here is, yes, the system is imperfect, but attempts to legislate a fix to a particular deference doctrine are not likely to be effective. The better approach is to craft agencies statutory mandates with particularity to either expand or cabin agency discretion in a first instance, as this institution sees fit.

Thank you, again, for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Hammond follows:]

TESTIMONY OF EMILY HAMMOND
ASSOCIATE DEAN FOR PUBLIC ENGAGEMENT & PROFESSOR OF LAW
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE COMMITTEE ON JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

MARCH 15, 2016

Thank you, Chairman Marino, Vice-Chairman Farenthold, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning judicial deference to federal administrative agencies.

I am Associate Dean for Public Engagement and Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and the Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, I specialize in the deference doctrines of administrative law and the resulting relationships between Congress, the courts, and the executive branch. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on the subject of deference. Early in my career, I practiced as a civil engineer; that experience and training particularly inform my assessment of the deference doctrines when agencies make decisions involving scientific or technical complexity.

In my testimony today, I will first provide a general overview of the role of the courts in administrative law. Next, I will outline deference under the *Chevron* regime, emphasizing its limits and variations as well as its relationship to hard-look review. Thereafter, I will make note of how courts' remedial options fit within the deference regimes. I conclude by emphasizing that although this system is imperfect, a legislative fix is unlikely to improve the system and would likely have the opposite effect. This is because the overall system of deference regimes and remedies furthers important administrative law and constitutional norms.

I. The Role of Deference and the *Chevron* Regime

We ask a great deal of courts when they review agencies. They police the jurisdictional boundaries set by Congress, they guard against serious errors, and the fact of review incentivizes agencies to engage in legitimizing behaviors before the fact, such as promoting participation, deliberation, and transparency. In turn, these behaviors and judicial review facilitate external monitoring of agency behavior, whether by interested parties, the press, the executive, or Congress.

These things could be achieved with de novo review, but there are important reasons for giving some level of deference to agencies, most of which relate to comparative institutional competence and the constitutional roles of each of the three branches. The familiar test announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is directed at

those considerations.[1] The test provides that when a court reviews an agency's interpretation of a statute it administers, the court must ask first whether Congress has spoken clearly; if so, the clear language controls.[2] If not, the court must uphold the agency's permissible—that is, reasonable—construction of the statute.[3] The deferential aspect of *Chevron* in step two has often been criticized, but it is not particularly remarkable. Even prior to the enactment of the Administrative Procedure Act (APA), courts afforded at least some deference to agencies' legal interpretations in many circumstances.[4]

Indeed, as all the relevant cases suggest and as scores of scholars have articulated, there are often good reasons for deference by a court to an agency's judgment. Agencies have experience with the statutes they administer and the challenges that arise under the applicable regulatory regimes. Relative to the courts, agencies also have superior expertise, particularly with respect to complex scientific or technical matters. Agency officials are not elected, but they are subject to the oversight of the President, so there is more democratic accountability at the agencies than at the courts. All of these rationales stem from separation-of-powers principles relative to the court-executive relationship.

But there are also important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes. With thirty years' experience with *Chevron*, moreover, Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate. The *Chevron* doctrine also facilitates Congress's ability to monitor agencies by incentivizing agencies to use procedures that are more transparent, a point to which I will return below. Finally, I want to emphasize that *Chevron* is an exercise in judicial self-restraint: by deferring to agencies' reasonable constructions rather than substituting their own judgment, the unelected courts avoid inserting their own policy preferences into administrative law.

Notwithstanding these important reasons for deference, there are of course times when deference is not appropriate. The courts have delineated some guideposts here, too. First, agencies may not use a limiting interpretation to cure a statute that is defective on nondelegation grounds.[5] This limitation preserves the most basic of structural constitutional norms. Second, in rare cases the Court has determined that Congress did not intend the relevant agency to exercise interpretive authority. Although such cases, which include *FDA v. Brown & Williamson Tobacco Corp.*[6] and *King v. Burwell*[7] can seem jarring, they are best viewed as unusual and very context-specific cases.

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[1] 467 U.S. 837 (1984).
[2] *Id.* at 842-43 (1984).
[3] *Id.*
[4] *E.g.*, Skidmore v. Swift, 323 U.S. 134 (1944); NLRB v. Hearst, 322 U.S. 111 (1944).
[5] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
[6] 529 U.S. 120 (2000).
[7] 135 S. Ct. 2480 (2015).

Indeed, the third point is that deference is not a rubber stamp. At step two, agencies must explain their interpretive choices, including addressing any significant counter-arguments. That analysis is best understood as a special application of hard-look review, which balances administrative law and constitutional norms.[8] And in particular, by requiring reasoned decisionmaking from agencies via hard-look review, courts temper the nondelegation-related constitutional concerns inherent in the broad delegations of authority under which most agencies operate. As I wrote in my *Columbia Law Review* article *Deference and Dialogue in Administrative Law*:

> The reasoned decisionmaking requirement carries with it an important corollary: A court will consider an agency's reasoning only at the time the agency made its decision. . . . Before the APA's enactment, there was some indication that the presumption of constitutionality afforded legislatures would translate to an analogous presumption of lawfulness in administrative law. In a 1935 decision, for example, the Supreme Court wrote that, when reviewing an administrative order, "'if any state of facts reasonably can be conceived that would sustain [the order], there is a presumption of the existence of that state of facts.'" In other words, courts would be free to accept hypothetical rationales for an agency's actions, even if those rationales were not part of the agency's reasoning at the time it made its decision.
>
> This approach did not survive the massive transformation in the administrative state that came with the New Deal, the enactment of the APA, and the view that it was constitutionally permissible for agencies to exercise power broadly delegated by Congress. Now separation of powers and administrative law values justified treating agencies differently than the democratic Article I branch. As the Supreme Court wrote in its 1947 decision *SEC v. Chenery Corp.* (Chenery II), "a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency." [This] principle persists. It is a bedrock, unwavering rule, supporting the very legitimacy of the administrative state.
>
> The reasoned decisionmaking requirement likewise reinforces constitutional norms. In particular, the late 1960s and 1970s saw an explosion of risk regulation by federal agencies. While Congress was busy delegating broad authority to those agencies to make sweeping decisions in the face of scientific uncertainty, others—including the courts—were increasingly concerned about the possibility of agency capture by powerful interest groups. From this worry emerged the hard look approach, which enables the other branches to more closely monitor agency behavior. In this way, reasoned decisionmaking is crucial to "alleviating core separation of powers concerns associated with the administrative state." By enabling judicial review of an agency's reasons, moreover, procedural requirements like the details in notices of proposed rules and concise statements of basis and purpose further these goals.

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[8] *See* Emily Hammond et al., *Judicial Review of Statutory Issues Under the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 94-98 (2015).

> In sum, a commitment to meaningful judicial review comports with both administrative law and constitutional norms. Although much judicial rhetoric counsels deference to expert agencies, that theme is balanced by the *Chenery* . . . principle, the reasoned decisionmaking requirement, and related procedural rules. These doctrines promote "rationality, deliberation, and accountability," while drawing support from separation of powers principles.[9]

Finally, under both the *Chevron* framework and under hard-look review generally, courts can tailor the level of deference as needed to reinforce administrative law and constitutional norms. Consider this example. As the Court recently held in *Perez v. Mortgage Bankers Ass'n*, an agency's interpretive rule, which is exempt from notice-and-comment rulemaking under the APA, need not undergo notice-and-comment rulemaking when it memorializes a change from a prior interpretation.[10] While agencies may derive value from nonlegislative rules (and regulated entities receive guidance as to the agencies' views), there are prices to using them.

These prices are best imposed through the deference regimes. As instructed by *United States v. Mead Corp.*, agencies' procedural choices matter because they impact the level of deference that will be afforded on judicial review.[11] Where an agency has used full-blown notice-and-comment rulemaking to issue an interpretation, that interpretation will presumptively receive *Chevron* deference. But where the agency's procedures did not foster "fairness and deliberation"—as is often the case with nonlegislative rules—the interpretation is entitled to *Skidmore* deference, which is respect only to the extent that it is persuasive.[12] Under *Skidmore*, if an agency vacillates between positions it may be entitled to less deference. And a hard-look approach requires that the agency explain why it has changed its position. In other words, the applicable tests are tailored to the precise circumstances of agency behavior.

II. Remedies and Deference

Any discussion of deference should also account for the judicial approach to remedies in the administrative law context. First, petitioners challenging agency actions often seek stays pending litigation. To decide whether to grant a stay, courts consider equitable factors, including (1) the petitioner's likelihood of success on the merits; (2) the threat of irreparable injury absent the injunction; (3) the possibility of harm to others if the injunction is issued; and (4) the public interest.[13] This fact-specific standard represents a longstanding approach that courts have undertaken in all manner of cases, and has the benefit of flexibility for the many varieties of administrative actions courts might review.

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[9] 111 COLUM. L. REV. 1722, 1735-37 (2011) (footnotes omitted).
[10] 135 S. Ct. 1199 (2015).
[11] 533 U.S. 218 (2001).
[12] *Id.* at 235 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[13] *E.g.*, Winters v. Natural Resources Def. Council, 555 U.S. 7, 20 (2008); Nat'l Wildlife Fed. v. Burford, 835 F.2d 305, 319 (D.C. Cir. 1987). Agencies may also stay the effect of rules on their own. 5 U.S.C. § 705 (2012).

Should a court ultimately determine an agency's action to be unlawful, the appropriate remedy is a remand, either with or without vacatur. Again quoting from *Deference and Dialogue*:

> [T]he APA states that courts "shall . . . hold unlawful and set aside" agency action for various substantive and procedural failings. This language can be read to require vacatur of unlawful agency action, and courts frequently do just that. When an agency action is vacated, it is essentially extinguished; if the agency wishes to try again, it must initiate procedures anew. Courts, however, have not read the APA to require this remedy in all cases, and they often simply remand the action to the agency so that it can try again. When a court remands without vacatur, the practical impact is that the agency's action remains in force while the agency works to address the flaws identified by the court. Meanwhile, the court retains the power to vacate the action should the agency ultimately fail to take full corrective action.[14]

Remanding without vacatur has been criticized by opponents of hard-look review, who see the remedy as a way to justify a court's searching scrutiny. But it is better viewed as "an expression of judicial humility" that strikes a balance between searching review and an agency's discretion.[15] Provided the agency moves expeditiously to correct its error on remand—a matter that can be policed by the parties who can alert the courts if there is a problem—this remedy offers another way to tailor judicial review to the specific attributes of the agency action as well as the substantive standard of review.

III. Conclusions

The deference regimes are best understood as part of a larger constitutional framework, within which courts attempt to optimize their reviewing role, the legislature's desires as expressed in the statutory mandate, and the executive branch's policymaking discretion. Although tensions can arise between these norms in a given case, the deference regimes overall strike a reasonable balance. Furthermore, the various deference regimes work together to permit courts to tailor their review to the particulars of the agency actions before them. And those deference regimes also work in tandem with the equitable powers of the courts to further ensure a careful consideration of all the interests at stake. Although one can find reasons to criticize how courts apply these standards, any attempt to legislate a change would be even more problematic. No legislative standard can account for all of the variety in administrative law, and a piecemeal approach would severely interfere with the balance between and among the deference doctrines and remedies.

Thank you again for the opportunity to testify today. I look forward to your questions.

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[14] *Deference and Dialogue*, *supra* note 9, at 1737-38.

[15] *Id.* at 1738 (quoting Ronald M. Levin, *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 371 (2003)).

Mr. MARINO. Thank you.
Professor Beermann.

TESTIMONY OF JACK M. BEERMANN, PROFESSOR OF LAW AND HARRY ELWOOD WARREN SCHOLAR, BOSTON UNIVERSITY SCHOOL OF LAW

Mr. BEERMANN. Thank you, Chairman Marino and Ranking Member Johnson, and the distinguished Members of the Committee. It's an honor to appear before you to testify about *Chevron*. I've been teaching and writing in the administrative law field for about 30 years now, and in particular, I have written a couple of articles that are highly critical of the *Chevron* doctrine for included in your materials for today's hearing.

Now, I had—part of my opening remarks were going to be to repeat some of the criticisms you've heard of *Chevron*, but I apologize, Mr. Johnson, that I couldn't come up with a metaphor about chickens or foxes, but I think it would be beating a dead horse somewhat. So I'm going to refrain from using part of my time for that.

And I want to say that one of the things that we've seen over the last couple of terms of the Supreme Court is some sense there that more of the Justices are starting to feel uncomfortable with the *Chevron* doctrine, but I really think it's overreading them to say that the *Chevron* doctrine is about to be thrown out. That's been going on since the beginning of the *Chevron* doctrine. There's always been this disagreement. More than once, Justice Scalia, may he rest in peace, complained that some decision had just eviscerated *Chevron*, but yet, *Chevron* limped along, sometimes resulting in extreme deference to agencies and always creating confusion and uncertainty.

And I think that one of the effects we need to think about is the fact that it encourages agencies to be more adventurous in their statutory interpretations so that regardless of what the result is going to be at the Court, the agencies can feel they can go farther away from Congress' expressed intent when they are interpreting a statute.

Now, substance aside, in my opinion, *Chevron* has failed as a matter of legal craft. In the sense that, remember, it's a decision procedure, a framework for decision. It's not a substantive rule itself. And, yet, there's so much uncertainty about how it applies that it's really failed as a decision procedure.

There's a big issue about how it relates to the arbitrary capricious and abuse of discretion otherwise not in accordance with law standard that governs under the Administrative Procedure Act. Are *Chevron* decisions about policy or about statutory interpretation? There's one line of cases that says that Pierce questions of statutory interpretation are for the courts, which throws into doubt what *Chevron* is actually about. And I don't think anyone favors giving the sort of extreme deference outlines in *Chevron* step 2 to agency policy decisions. Rather, what we want is for a careful consideration of whether the agency examined the relevant factors, employed the correct legal standard, applied its expertise when making its decisions.

And many of the decisions reviewed under *Chevron* turned out to be really policy decisions, not statutory interpretation decisions. So what I want to do now is look forward to the idea of a possible statutory reform, and I spelled this out in my complete testimony before you, a proposal that I think will reorient agent—judicial review of agency action toward the will of Congress.

And the text, as I spelled it out, is as follows: Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo with due regard for the views of the agency administering the statute and any other agency involved in the decision-making process. And the words "due regard," they are not—obviously, they are not certain. There is some historical precedent for the use of those words in such a statute, and it would make clear to the reviewing courts that they have the primary responsibility for ensuring that agencies follow Congress' instruction, while acknowledging that there's room for deference when deference is warranted.

So courts, under this standard, would apply the traditional *Skidmore* of consistency, deliberation, thoroughness, and persuasiveness, but they wouldn't be locked into these standards, because there may be other factors that may seem relevant in a particular circumstance, and the courts may feel free to do that. Of course, this would not come anywhere close to eliminating all uncertainty in judicial review. It wouldn't become mechanical by any means, but it would eliminate the epic battles we see today about whether and how *Chevron* applies, and it would head off the sort of extreme deference to agencies that, in my opinion, often thwarts serious examination of legislative intent.

Now, one important point about this. Justice Scalia, in his defense of *Chevron*, was very concerned about flexibility. He viewed one of the virtues of *Chevron* that it preserved agency flexibility to change its views as conditions warranted.

Now, in his opinion, once *Skidmore* deference would apply, this sort of deference, that the agency would be locked in to whatever the Court approved. And I don't think that's actually necessary. I don't think this is insurmountable. I think courts could—in my opinion, they could, consistent with the rule of law, allow for continued agency flexibility whenever an agency interpretation had been accepted under the new due-regards standards, as long as it's clear that the decision was made with substantial deference to the agency.

Now, a bigger question has been raised by some of my copanelists is whether this would actually make a difference. As I point out in the articles included with this testimony, at least at the Supreme Court, the cases seem to be more decided along the ideological dividing lines that we are all familiar with at the Court rather than on differing views of deference.

Now, that may be true, but I think it would be less so if the governing standard of review nudged the courts more toward careful consideration of legislative intent. *Chevron* is a distraction from what should be the two key issues in judicial review: congressional intent and sensible policy. And some sort of reform, whether my proposal or something else, ought to reorient the law in that direction.

Thank you.
[The prepared statement of Mr. Beermann follows:]

"The *Chevron* Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies."

March 15, 2016

House Committee on the Judiciary: Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Testimony of Jack M. Beermann

Professor of Law and Harry Elwood Warren Scholar

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The question for discussion today is whether, and if so how much, federal courts should defer to federal agency decisions construing the statutes they administer. This is an important issue that has caused great controversy and confusion since the early days of the administrative state. The baseline for today's discussion is the Supreme Court's landmark 1984 decision in Chevron U.S.A., Inc. v. NRDC,[1] which, on its face, appears to greatly increase the degree to which federal courts should defer to agency decisions of statutory construction. In this testimony I will survey the origins and implications of *Chevron* deference, discuss scholarly views on *Chevron* deference and explore possible legislative action to reform the judicial practice of deferring to agency decisions of statutory construction.

1. The Administrative Procedure Act and Agency Statutory Construction.

The proper place to begin is with the language of the Administrative Procedure Act (APA).[2] Passed in 1946, the APA was the culmination of more than a decade of congressional concern over

[1] 467 U.S. 837 (1984).
[2] Pub.L. 79–404, 60 Stat. 237 (1946).

the proper legal framework for judicial review of agency action. APA section 706,[3] which spells out the standards that reviewing courts are supposed to apply when conducting judicial review of agency action, states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Reinforcing the judicial role in reviewing agency statutory interpretation, APA section 706(2) provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" This text strongly implies that Congress expected the federal courts to play a strong role in ensuring that agencies follow Congress's statutory commands.

Congress did not draft § 706 in a vacuum. Judicial deference to agency statutory interpretation was a live issue in the years immediately preceding the passage of the APA. The leading decisions on this matter are *NLRB v. Hearst Publications*[4] and *Skidmore v. Swift & Company*,[5] both decided in 1944. In *Hearst*, the Court reviewed the NLRB's decision that "newsboys" were employees entitled to the protections of the National Labor Relations Act. In the first part of its opinion, applying traditional methods of statutory interpretation, the Court upheld the Board's decision not to apply the tort law definition of "employee" in determinations of employee status under the labor laws. The Court did not appear to defer to the Board at all. Rather, it appeared to decide *de novo* that Congress did not intend for the tort law definition to apply. In the second part of its *Hearst* opinion, however, the Court deferred to the Board's decision that the particular newspaper vendors were "employees" under the Board's definition. The Court explained that "where the question is one of specific application of a broad statutory term . . . the

[3] 5 U.S.C. § 706.
[4] 322 U.S. 111 (1944).

reviewing court's function is limited."[6] The Court then applied a very deferential standard of review, stating that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[7]

In *Skidmore*, the Court provided a more comprehensive view on the degree to which reviewing courts should defer to agency statutory construction. In *Skidmore*, a group of the Swift Company's firefighting workers sued, claiming that the company had violated the Fair Labor Standards Act (FLSA) by not paying them for certain periods of inactivity. Although there was no agency decision involved in the case, the Administrator of the Department of Labor's Wage and Hour division filed a brief, *amicus curiae,* construing the FLSA to support the employer's arguments. The Administrator's view was based on the standards laid out in his previously issued bulletin construing the FLSA. The Court explained that in these circumstances, while the agency's views would be taken into account, they were not controlling. The Court concluded that reviewing courts should decide how much to defer to agency interpretive decisions based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." This is a sliding scale of deference based on the enumerated factors and a totality of the circumstances surrounding the agency's decisionmaking process.

As *Hearst* and *Skidmore* illustrate, the Court's decisions on how much deference reviewing courts owe to agency decisions of statutory construction were confusing at best and inconsistent at worst. This area of law needed clarification, and Congress appears to have done so with the language of the APA. It is in this light that the APA's language was understood by some to assign

[6] *Hearst*, 322 U.S. at 131.
[7] *Id.*

the primary role in statutory construction to the reviewing courts. As one court stated, in an opinion quoted in my colleague Professor John Duffy's excellent article on this subject, "[i]n enacting the Administrative Procedure Act Congress did not merely express a mood that questions of law are for the courts rather than agencies to decide,—it so enacted with explicit phraseology."[8]

II. The Road to Chevron

Although, as noted above, some courts recognized that the language of the APA seemed to assign primary responsibility for legal decisions to the courts, the early cases under the APA were not consistent on this score. In many cases, the Supreme Court decided issues of law without deferring to the agency and without even commenting on whether it should be deferring to the agency.[9] In others, however, the Court referred to pre-APA decisions like *Hearst* as if the language of the APA did not render them obsolete.[10] Still worse, in some decisions, the Court explicitly deferred to agency legal conclusions in the face of the apparently contrary language in the APA. For example, in a 1981 decision, the Court explained that

> in determining whether the Commission's action was "contrary to law," the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[11]

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[8] SEC v. Cogan, 201 F.2d 78, 86–87 (9th Cir. 1952), quoted in John E. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 194 n. 48 (1998).
[9] See, e.g., Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 409–12 (1971).
[10] See O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507–08 (1951).
[11] See Fed. Election Comm. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

In short, the Court decided that the APA's command that reviewing courts set aside agency action that is "not in accordance with law" requires only that the agency's decision have a reasonable basis in law, not that it actually be legally correct. However, it was not completely clear just how deferential this standard was, since the search for a "reasonable basis" in law was sometimes conducted via a substantial inquiry into the text, purpose and legislative history of the statute to ensure that the agency's view was not inconsistent with Congress's intent.[12] This was the confusing state of the law when the *Chevron* case arrived at the Supreme Court.

III. *Chevron*: Basics and Basis

A. The Chevron Two-Step Standard

In *Chevron U.S.A., Inc. v. NRDC*,[13] decided in 1984, the Supreme Court announced what appeared to be a startling new approach to judicial review of statutory interpretation by administrative agencies. In the first step of its now-familiar two-step formulation, *Chevron* stated that

> [w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[14]

Chevron's second step provides that:

[12] E.g. Democratic Senatorial Campaign Comm., 454 U.S. at 39-43.
[13] 467 U.S. 837 (1984).
[14] 467 U.S. at 842-43.

> [i]f, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[15]

Because *Chevron* stated that a statute is ambiguous whenever Congress has not "directly spoken to the precise question at issue," on its face, it appears to require courts to defer to a broad swath of agency decisions of statutory construction, much broader than ever before.[16]

B. Chevron's Basis.

The underlying basis of the *Chevron* decision is its most controversial aspect. *Chevron* is based on the Court's view that whenever Congress has passed an ambiguous statute or failed to directly address an issue, it intends to delegate primary interpretive authority to the agency administering the statute, rather than to the reviewing court. Not only is this inconsistent with the language of the APA, for numerous reasons, it is inconsistent with a common sense understanding of the legislative process and the intent of Congress.

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[15] 467 U.S. at 843-44.

[16] It is often noted that Justice Stevens, Chevron's author, and his colleagues on the Court probably did not intend to make a major reform in judicial review of agency statutory construction. See Thomas Merrill, The Story of Chevron: The Making of an Accidental Landmark, 66 Admin. L. Rev. 253 (2014). It is also clear, however that application of *Chevron* in later cases resulted in a major change, at least in how the cases are argued and understood.

When Congress does not address an issue in a statute, it is much more logical to assume that Congress simply failed to think of the issue.[17] As any student of the legislative process knows, it is unrealistic to expect a legislative body to anticipate every situation to which its enactments might apply. As far as ambiguity is concerned, it is much more likely that Congress tried, but failed, to express itself clearly on the issue. In both cases, based on *Marbury v. Madison*'s emphatic statement that it is "the province and the duty of the Judicial Department to say what the law is,"[18] the reviewing court should attempt, as best it can, to discern Congress's intent based on the language, context, structure and purpose of the statute.

Even Justice Scalia, often a proponent of deference to administrative agencies, thought that *Chevron* was based on "fictional, presumed intent" and not on an actual delegation of interpretive authority to agencies.[19] In my view, major decisions concerning the distribution of authority among the branches of the Federal Government should not be based on fiction.

There are undoubtedly instances in which Congress intends to delegate interpretive authority to an agency. In some statutes, for example, Congress employs language such as "as defined by" to indicate that it intends for the administering agency to make the legal determination, subject to judicial review for reasonableness.[20] There may also be sensitive areas such as foreign policy or national security in which it makes sense to defer to Executive Branch views on the meaning of congressional enactments. But with regard to the vast majority of statutes, there is no reason to believe that ambiguity or incompleteness implies delegation to an agency. Rather, either

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[17] *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) ("Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools.")
[18] 5 U.S. 137, 177 (1803).
[19] See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989).
[20] E.g., 7 U.S.C. § 87b(d)(2)(D) (2006).

Congress has expressed itself imperfectly or, as Justice Scalia believed, "didn't think about the matter at all."[21]

C. *Chevron* Applied

A. The Evolution of Chevron Step One

Regardless of one's views on the wisdom of *Chevron* or the accuracy of its assumption that silence and ambiguity indicate Congress's intent to delegate interpretative authority to agencies, the application of *Chevron* over the past thirty-plus years has been a complete mess, indicating that its two-step process is simply unworkable. In my view, the primary reason for *Chevron*'s unworkability is its lack of a sound, generally accepted, theoretical basis. This opens the door to disagreement among the Justices of the Supreme Court and Judges of the lower federal courts and spawns inconsistent characterizations and applications of the *Chevron* doctrine.

The Supreme Court contributed substantially to the failure of *Chevron* to create a stable, workable standard of judicial review of agency legal interpretations. In the *Chevron* opinion itself, the Court noted, in apparent tension with the rest of the opinion, that "[t]he judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law, and must be given effect."[22]

[21] Scalia, 1989 Duke L.J. at 517. See also David J. Barron & Elena Kagan, Chevron's Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 212–25 (agreeing that *Chevron*'s basis is a fiction).
[22] *Chevron*, 467 U.S. at 843 n.9.

This language, which has been picked up on in numerous subsequent decisions,[23] expands the scope of *Chevron* step one, thereby greatly increasing the likelihood that the reviewing court will not defer to the agency's statutory interpretation. Basically, it substitutes "traditional tools of statutory construction" for "directly spoken to the precise question at issue." This makes it more likely that the reviewing court will decide the case without deferring to the agency. To those who disagree with the narrower version of *Chevron* step one under which virtually all cases would be decided under the extremely deferential step two, the "traditional tools" doctrine might seem to be a virtue. Perhaps it would be if it were applied consistently. However, because reviewing courts are free to pick and choose which version of *Chevron* to apply, the whole enterprise runs the risk of devolving into a skirmish over judges' policy views rather than an application of the statutory standards specified by Congress.

B. Is Chevron about Statutory Construction or Policy?

A fundamental problem with the *Chevron* doctrine is that even now after more than thirty years of experience with it, it is unclear whether *Chevron* is about judicial review of agency decisions of statutory meaning or about agency policy determinations.[24] In one decision, the D.C. Circuit attempted to resolve this difficulty by adding a third step—judicial review of the agency's policy choice among available reasonable or permissible interpretations.[25] The Supreme Court has, on occasion, stated that *Chevron* step two is the equivalent of judicial review of the wisdom

[23] *See, e.g.*, Dole v. United Steelworkers of America, Inc., 494 U.S. 26 (1990); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).
[24] For scholarly commentary on this issue, see Michael Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron, 6 Admin. L.J. Am. U. 187, 189–90 (1992); Michael C. Harper, Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X, 89 B.U.L. Rev. 189, 210 (2009).
[25] See Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 338 (D.C. Cir. 1988). In this case, after determining that the agency's interpretation was reasonable under *Chevron*, the D.C. Circuit, in an opinion by Judge Harry Edwards, went on to examine whether the agency's decision to adopt that particular interpretation was arbitrary, capricious or an abuse of discretion. Judge Edwards' suggestion to add a third step to *Chevron* cases has not been adopted by other judges or courts.

of agency policy under the arbitrary, capricious standard.[26] But *Chevron* step two's focus on the reasonableness or permissibility of an agency's statutory construction is nothing like the careful consideration the Court often undertakes of the wisdom of agency policy under the arbitrary, capricious test. In those cases, the Court examines whether the agency has considered the factors made relevant by Congress, has provided a rational explanation for its decision and whether the agency's decision is plausible, such that it is safe to conclude that the agency applied its expertise to the problem.[27]

This conflation of *Chevron* step two with arbitrary, capricious review establishes another way in which the *Chevron* doctrine is inconsistent with § 706 of the APA. In § 706, Congress instructed reviewing courts to substantively review agency policy decisions for non-arbitrariness. In *Chevron* cases, the federal courts abdicate their responsibility for ensuring rational policymaking if they defer whenever an agency has reasonably or permissibly construed governing statutes. This is a fundamental problem with the *Chevron* doctrine that ought to be corrected.

The difficulty of distinguishing cases involving policy decisions from cases of statutory construction to which *Chevron* might apply is exemplified by the Court's opinion in *Judulang v. Holder*,[28] a 2011 decision in which the Court declined to defer to a Board of Immigration policy governing discretionary relief from deportation for noncitizen convicted criminals. The Court applied the arbitrary, capricious standard of review rather than *Chevron*, apparently on the ground that the case involved a policy decision, not a matter of statutory construction. The government

[26] Household Credit Services, Inc. v. Pfennig, 541 U.S. 232, 242 (2004). For scholarly discussions of this issue, see Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi-Kent L. Rev. 1253, 1276 (1997) (suggesting that *Chevron* Step Two is simply arbitrary, capricious review); Jack M. Beermann, Chevron at the Roberts Court: Still Failing after All These Years, 83 Fordham L. Rev. 731, 746 (2014).
[27] See Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983); Fox Television, 556 U.S. at 506 (2009).
[28] 132 S. Ct. 476 (2011).

argued that the Court should apply *Chevron*, but the Court demurred, observing that the decision could not be one of statutory interpretation since the statute "does not mention deportation cases."[29] But in *Chevron*, statutory silence was one of the grounds the Court cited as evidence that Congress had delegated a legal determination to the agency. As the Court stated in *Chevron*, "if the statute is *silent* or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[30] This further illustrates that the *Chevron* doctrine is crying out for reform.

C. Chevron Step Zero: The *Mead* Doctrine

The Court has further complicated the *Chevron* landscape with its jurisprudence on when *Chevron* applies when all agree that the agency decision under review is a matter of statutory construction. The Court recognized relatively quickly after the *Chevron* decision that not every agency pronouncement of statutory meaning deserved the extreme deference afforded by *Chevron* step two, even when all agree that the underlying statute is ambiguous. For example, agency positions taken exclusively for the purposes of litigation or in the context of informal, decentralized actions may not warrant *Chevron* deference.

The Court's first decision in this line involved a dispute over the application of the Fair Labor Standards Act to a local Sheriff Department's policy to require employees, under certain circumstances, to use their accrued compensatory time off. The employer wrote to the Administrator of the Wage and Hour Division for advice and in response received an opinion letter concluding that one aspect of the policy was illegal, but the Sheriff implemented it anyway. The employees argued that the Administrator's opinion letter was entitled to *Chevron* deference, but

[29] 132 S. Ct. at 483 n.7.
[30] *Chevron*, 467 U.S. at 843 (emphasis supplied).

the Court balked at this suggestion, concluding that the process of formulating the opinion letter lacked the formality necessary for *Chevron* deference: "Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference."[31]

United States v. Mead Corp.,[32] with its elaboration of *Christensen's* "force of law" standard for application of *Chevron*, has become the definitive statement of *Chevron* step zero. *Mead* involved whether tariff classifications issued relatively informally, but treated by the agency as binding between it and the party whose product has been classified, should receive *Chevron* deference. The determination that Mead's product was subject to a 4% tariff was made in a pair of ruling letters issued by the Customs Headquarters. While the first letter contained virtually no reasoning, the second letter, issued after Mead's protest, was characterized by the Supreme Court as "carefully reasoned."[33]

Justice Souter's opinion for the Court in *Mead* noted that the lynchpin for applying *Chevron* is whether Congress delegated interpretive authority to the agency. In *Mead*, as in *Christensen*, the Court characterized this delegation as agency power to make decisions with the force of law. In *Mead*, the primary factor the Court relied upon for determining whether such a delegation had been made was the formality of the procedures Congress authorized the agency to employ. As the Court stated:

[31] Christensen v. Harris County, 529 U.S. 576, 587 (2000).
[32] 533 U.S. 218 (2001).
[33] 533 U.S. at 225.

> We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed. It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.[34]

The *Mead* doctrine compounds *Chevron*'s fundamental error of equating statutory ambiguity and silence with delegation of lawmaking power by measuring delegation on an unrealistic and unclear yardstick.

It is simply unrealistic to equate procedural formality with delegation of lawmaking power. Congress takes a variety of factors into account when it determines the level of procedural formality that agencies should employ. These include meeting the requirements of the Due Process Clause, ensuring that all policy interests are fairly represented in the agency decisionmaking process, facilitating the provision and careful consideration of technical input, and ensuring that agency decisionmaking accurately reflects the intent of Congress. *Chevron* was wrong to equate silence and ambiguity with delegation of lawmaking power and *Mead* is incorrect when it equates procedural formality with delegation of lawmaking power.

Even more troubling, the Court expressly disclaimed clarity in *Mead*, creating even more uncertainty over when *Chevron* applies. The Court disclaimed reliance on the procedural informality alone to deny *Chevron* deference to the agency's ruling in *Mead*:

[34] *Mead*, 533 U.S. at 229-30.

> [T]he want of that procedure [notice and comment] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded. The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*.[35]

The Court then listed additional factors supporting its determination that *Chevron* deference was not warranted in *Mead*, including the decentralized nature of the decisionmaking process, the high number of decisions concerning tariff classifications and the "independent" judicial review available in the Court of International Trade. The Court did not explain why these factors are relevant to Congress's intent to delegate lawmaking power, but perhaps their inclusion shows that the Court itself recognizes procedural formality often has little to do with delegation of power to take action with the force of law.[36] As Justice Scalia lamented in dissent, the Court has created a "wonderfully imprecise" standard for determining when *Chevron* applies.[37]

This is not an exhaustive analysis of the controversies over the reach of *Chevron*, but it should serve to illustrate the morass that *Chevron* has spawned. In my opinion, it is time to consider reforms that might clarify the doctrines that govern judicial review of important agency policy decisions and reinforce the primacy of congressional intent in statutory interpretation.

D. Additional Problems with Chevron

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[35] *Mead*, 522 U.S. at 231.

[36] Scholarly commentary on *Mead* has generally been negative. A good example is Lisa Schultz Bressman, How Mead Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443 (2005).

[37] For very recent examples of cases in the Courts of Appeals that presented difficult questions under *Mead*, *see* Ford Motor Co. v. U.S. 809 F.3d 1320 (Fed. Cir. 2016) and Knox Creek Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin., 811 F.3d 148 (4th Cir. 2016). In the Ford Motor Co. case, Judge Reyna dissented from the majority's decision to apply *Chevron*. *See* 809 F.3d 1320, 1331-33 (Reyna, J. dissenting).

The *Chevron* doctrine poses numerous additional problems. Many are stated and analyzed in a comprehensive law review article appended to this testimony which I published in 2010.[38] One serious problem raised in the article worth mentioning here implicates the authority of Congress. *Chevron* encourages agencies and reviewing courts to ignore congressional intent. Agencies expecting that their interpretive decisions will be reviewed under a deferential version of *Chevron* are free to disregard congressional intent and impose their own policy views even when it is possible to have at least a good sense of how Congress would have wanted the agency to act.[39] Reviewing courts can brush off serious challenges to agency decisions by invoking *Chevron* without engaging in serious consideration of whether the agency is thwarting imperfectly expressed congressional intent. This has altered the balance of power over lawmaking that Congress sought to preserve when it passed the APA.

E. *Chevron*'s Virtues.

Despite all of the criticisms detailed above, *Chevron* is thought to have its virtues. Professor Richard Pierce, a supporter of deference to agencies generally and of *Chevron* deference in particular, has explained two, involving democracy and clarity. Pierce argues forcefully that insofar as *Chevron* results in greater acceptance of agency decisions, it increases democracy and accountability because the alternative to deference is less accountable judicial decisionmaking.[40]

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[38] Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 9 (2010).

[39] This helps explain why the rate of affirmance of agency action has not increased substantially under *Chevron*. The possibility of extreme deference encourages agencies to depart further from statutory language, leading to more serious questions of agency statutory construction on judicial review. This phenomenon has been observed at the Environmental Protection Agency. *See* E. Donald Elliott, Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1, 8 (2005).

[40] Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 562 (2006) (describing *Chevron* as "a major step toward legitimating and democratizing the administrative state").

Pierce echoes Justice Scalia's concern that non-deferential judicial review leads to judges making value judgments that should be left to the political branches of government.[41]

The second virtue Pierce finds in *Chevron* is its potential to greatly simplify judicial review of agency legal decisions.[42] This is only a potential virtue because it depends on courts consistently applying the original, very narrow, version of step one under which nearly all agency action would be reviewed under the highly deferential step two. Reviewing agency interpretations for reasonableness or permissibility is much simpler than actually exploring the language, context, structure, purpose and legislative history of a statute and would result in much more deference to administrative agencies.

Another important virtue of *Chevron* is that it allows for agency flexibility. Under non-deferential judicial review, once a reviewing court has determined the meaning of a statute, that decision is binding unless and until the court decides to overrule its prior decision.[43] Because a reviewing Court applying *Chevron* does not impose its own view of the meaning of the statute at issue, the fact that an agency interpretation has been upheld under *Chevron* step two does not preclude the agency from changing its view and adopting a different, but permissible or reasonable, construction in the future.[44] This has led Justice Scalia to express concern over the loss of agency flexibility whenever it appears that the Court is not following *Chevron* but rather determining the

[41] See Richard J. Pierce, Jr., Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 313 (1988).
[42] See Richard J. Pierce, Jr., Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 311 (1988).
[43] *See* Maislin Industries, U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990); Lechmere Inc. v. NLRB, 502 U.S. 527 (1992).
[44] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218, 244 (2001) (Scalia, J., dissenting).

meaning of a statute itself.[45] It is an open question, discussed further below in the section on statutory reform, whether reviewing courts would allow agencies to change their views on matters of statutory construction approved under a standard other than *Chevron* deference.

IV. Scholarly Views on Chevron

There has been a tremendous volume of scholarship on the *Chevron* doctrine, much too much to review here. Although in my view the weight of scholarly opinion is critical of *Chevron*, the scholarship is far from uniform. In the immediate aftermath of the *Chevron* decision, some scholars argued that *Chevron* was inconsistent with separation of powers. For example, distinguished Harvard Law School administrative law scholar Clark Byse argued in 1988 that the *Chevron* standard violated separation of powers by reducing judicial control over administrative agencies.[46] Other distinguished scholars sounded similar themes in the wake of *Chevron*.[47] My article lists ten significant problems with *Chevron*.[48] Other scholars have also noted the complexity of *Chevron* and its tendency to spawn tricky collateral issues. For example, in 2001, Thomas Merrill and Kristin Hickman noted fourteen unanswered questions concerning the scope of *Chevron*.[49]

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[45] See *Mead*, 533 U.S. at 247 (Scalia, J. dissenting) ("[T]he majority's approach will lead to the ossification of large portions of our statutory law. . . . Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed.")

[46] Clark Byse, Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two, 2 Admin. L.J. 255, 261 (1988).

[47] *See* Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 2 (1983) (characterizing *Marbury* as suggestive of a condemnation of judicial deference to administrative construction of law); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 478–81 (1989) (describing how the nondelegation doctrine prohibits the legislature from ceding lawmaking authority to another entity).

[48] Jack M. Beermann, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 9 (2010).

[49] Thomas W. Merrill & Kristen E. Hickman, Chevron's Domain, 89 Geo. L.J. EO. L.J. 833, 849-52 (2001).

The negative view of *Chevron* is, however, not unanimous. Professor Richard Pierce, for example, has argued that *Chevron* is a step toward increasing the legitimacy of the administrative state.[50] Professor Lisa Schultz Bressman, in a fine article, has argued that scholars have exaggerated the extent to which *Chevron* is built on a fictional view of congressional intent.[51]

V. Possible Statutory Reforms

The final question I will address is whether it would be desirable to recommend statutory reforms to the *Chevron* doctrine and if so, what form might such reforms take. In my view, it would be appropriate for Congress to craft legislation in reaction to all of the problems *Chevron* deference has caused. There is ample precedent for legislative reforms directed at the proper standard of judicial review. Going way back, Congress re-shaped judicial review of formal adjudicatory hearings when it was concerned that courts were being too deferential to agencies.[52] More recently, Congress enhanced judicial review of Federal Trade Commission (FTC) unfair and deceptive practice rulings after courts recognized the FTC's power to define unfair and deceptive practices by rule.[53]

There may be concern that statutory reform would be futile because the courts would interpret statutory language to be consistent with current practice. Although I recognize that this is a possibility, I do not think it is likely that the courts, including the Supreme Court, would ignore legislative reform of a major doctrine like *Chevron*. Congress has stated emphatically and

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[50] *See* Richard J. Pierce, Jr., Democratizing the Administrative State, 48 Wm. & Mary L. Rev. 559, 562 (2006) (describing *Chevron* as "a major step toward legitimating and democratizing the administrative state")
[51] *See* Lisa Schultz Bressman, Reclaiming the Legal Fiction of Congressional Delegation, 97 Va. L. Rev. 2009, 2009 (2011).
[52] This was discussed extensively by the Supreme Court in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 476-92 (1951).
[53] See the federal Trade Commission Improvement Act of 1974, codified at 15 U.S.C. § 57a (requiring "substantial evidence" review of FTC trade regulation rules).

repeatedly that Congress is the master of administrative procedure and that courts lack the authority to impose their own views of proper administrative process.[54] I would expect the Court to accept and apply any reform of APA § 706.

I now turn to the question of what form an amendment directed at *Chevron* should take. My suggestion is to add the following language to APA § 706, after sub-section 2(F):

> Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would likely apply the pre-APA *Skidmore* factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.[55]

If Congress, through the passage of this statute and in legislative history, expresses serious misgivings about judicial deference to agency legal decisions, courts might conclude that "due regard" implies minimal deference. There might be contexts in which minimal deference is inappropriate, for example where Congress has expressed strong policy preferences but in ambiguous language. In my opinion, however, omitting the "due regard" language altogether would go too far: courts have always considered the views of the agency at least to some extent when reviewing agency legal decisions. Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*.

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[54] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990).
[55] For clarity's sake, § 706 with the proposed amendment is reproduced in Appendix A to this testimony.

This reform would have several advantages over *Chevron*. For one, it restores the law to the standard prescribed in the APA by making it clear that the Court was incorrect when it equated statutory silence and ambiguity with congressional intent to delegate statutory interpretive authority to the agencies. It also confirms that the Court was incorrect when it concluded that relatively formal procedures signaled a similar congressional intent. Rather, only explicit statutory language should be sufficient to determine that Congress has delegated final lawmaking authority to an agency.

Second, *Skidmore* includes a sensible set of criteria for determining whether an agency interpretation is worthy of deference. These factors are "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." These have long been the factors that courts not following *Chevron* have applied when deciding whether to defer to agency statutory interpretation. Agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds). These factors are good indications that the agency has applied its expertise to the matter and acted with due regard to Congress's intent underlying the statute being construed.

Third, by requiring express language to increase (or decrease) deference from the APA baseline, this reform would restore to Congress the determination of how much deference reviewing courts should give to agency legal decisions. Under *Chevron*, that determination is made by reviewing courts using unrealistic and indeterminate criteria. This reform would require de novo review of legal decisions unless Congress expressly provides otherwise.

This reform proposal raises three concerns that I would like to address here. First, as Justice Scalia stated in his *Mead* dissent, traditionally, when a court approves an agency's statutory construction under *Skidmore*, the court's determination of the meaning of the statute is considered final even if the court found that, under *Skidmore*'s factors, the agency's interpretation was entitled to deference. In other words, when an agency's statutory interpretation is approved under *Skidmore*, it is considered the only correct construction of the statute. While Justice Scalia's view of the tradition was correct, it need not be so. There is no reason why Congress could not preserve *Chevron*'s flexibility by clarifying in the legislative history underlying this reform that when a court defers to an agency's interpretation, this does not ordinarily foreclose the possibility that the agency might, in the future, adopt a different interpretation that could also be affirmed on deferential review.[56]

It should be noted that Justice Scalia expressly rejected the idea that an agency was free to change a statutory interpretation that had been approved on judicial review under the *Skidmore* factors. Justice Scalia opined that this "is probably unconstitutional. . . . Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."[57] With all due respect, I disagree with Justice Scalia's conclusion here. He is correct insofar as the agency is bound to honor the judgment in the particular case, but there is no constitutional problem if an agency proposes, in a different case, a different view of the meaning of a statute. Further , Justice Scalia's concern is met by the proposed amendment's specification of de novo judicial review of agency statutory interpretation, subject to discretionary deference to the agency's views. The Executive Branch is not ignoring or reversing any judicial decision. Rather, an agency decision to

[56] Of course, the fact that the agency's new interpretation was inconsistent with its prior views weighs against deference under *Skidmore*. But that should not be fatal to arguments for deference under other factors.
[57] National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 1017 (2005) (Scalia, J. dissenting).

alter its previously announced interpretation would still be subject to judicial review under APA § 706, as amended.

The Court's willingness to consider agency changes in statutory interpretation is illustrated by *FCC v. Fox Television Stations, Inc.*,[58] a decision written by Justice Scalia involving application of the Communications Act's prohibition of "obscene, indecent, or profane language" on broadcast media between the hours of 6 a.m. and midnight. For years, the FCC interpreted this not to prohibit fleeting, nonliteral uses of vulgar language, but in 2004, the agency reversed its view and began to take action against broadcasters even over nonliteral single uses of vulgar language. On judicial review, the Court approved the FCC's changed interpretation under the arbitrary, capricious standard. Although the Court treated the case as if it involved only a change in policy, in truth the FCC had changed its construction of the statute,[59] and the Court did not find that problematic as long as the agency provided an adequate explanation for the change.

Of course, if a reviewing court finds that there is only one correct interpretation of a statute, the agency would not be free to alter its interpretation. In such cases, change could occur only through legislation or by convincing the reviewing court to overrule its prior decision. This is already true when the courts determine the meaning of a federal statute under *Chevron* step one and it would thus place no greater burden of specificity on the courts than exists today.

The second potential problem with the proposed reform is that it introduces a number of vague standards into an important determination. There is no question that the proposal's "due regard" standard leaves discretion to the reviewing courts to determine whether a particular agency

[58] 556 U.S. 502 (2009).
[59] This is discussed in Jack M. Beermann, Chevron at the Roberts Court: Still Failing after All These Years, 83 Fordham L. Rev. 731, 743-44 (2014).

interpretation is entitled to deference. However, these factors are not as uncertain as might be feared. For one, pre-*Chevron* caselaw, including *Skidmore*, provides substantial guidance on when agency statutory construction merits deference. Further, the proposal's specification of "de novo" review will lead courts to err on the side of not deferring, just as the Supreme Court understood in 1951 that the APA expressed a "mood" in Congress indicating that judicial review under the substantial evidence test should be made less deferential than it had previously been.[60]

Third, my colleague Gary Lawson has expressed the fear that if *Chevron* is eliminated, reviewing courts may re-characterize cases as raising policy concerns, not statutory interpretation questions, and thus turn to arbitrary, capricious review rather than the statute's version of *Skidmore* deference. This is, in my view, a real possibility, but it should be viewed as a virtue of the proposal rather than a concern, for at least three related reasons. First, it is clear that under current law, policy decisions are often reviewed under *Chevron* step two's hyper-deferential standard when they should be analyzed under *State Farm* and *Overton Park*'s arbitrary, capricious factors. Second, review under the arbitrary, capricious standard is more faithful to the language of the APA than review under the non-statutory *Chevron* standard. Third, because the boundary between *Chevron* and arbitrary, capricious review is so unclear, courts already have this discretion, so at worst the proposal would not make any change in governing standards of review. In sum, had the Court simply applied the APA's arbitrary, capricious standard to cases currently reviewed under *Chevron*, there would be no need for this hearing.

VI. Conclusion

[60] See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487 (1951) ("It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications.")

From the start, there have been grave concerns that *Chevron* was contrary to the APA. This alone should give pause. Even if that is not sufficient reason for reform, after more than thirty years of experience, it is clear that the *Chevron* doctrine has failed to bring clarity and consistency to judicial review of agency statutory interpretation. The doctrine is ripe for reexamination in a judicial or legislative forum. While pre-*Chevron* practice under *Skidmore* may not have been perfect, it was easier to administer and led to decisions that were more consistent with Congress's intent. *Chevron* has spawned a deeply flawed, complex and unclear set of rules and practices that, over time, venture farther and farther away from Congress's intent as embodied in regulatory statutes and the APA. In some technical and sensitive areas of law, complexity and uncertainty are inevitable and perhaps worthwhile. But in administrative law, clarity and realism are important virtues. Administrative law cuts across a wide swath of governmental functions, implicating important policy issues and fundamental separation of powers concerns. There are good reasons to consider, at this time, reforms designed to make judicial review more responsive to Congress's intent and to bring judicial review back in line with the principles underlying the APA.

APPENDIX A

5 U.S. Code § 706 - Scope of review [with proposed amendment in brackets]

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

[Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.] In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Mr. MARINO. Thank you, Professor.

Each of the witness' written statements will be entered into the record in its entirety. We will now move to the Congressmen and women's 5 minutes of questioning, and I will begin by recognizing myself.

Professor Turley, in Federalist 51, James Madison wrote that the Constitution's separation of powers was structured to make "ambition counteract the ambition," between Congress, the Executive, and the Judiciary in order to preserve liberty. How does the *Chevron* doctrine alter the incentives of the three Federal branches to undermine the checks-and-balances system?

Mr. TURLEY. I think it's a critical component in terms of the rise of this administrative state. And I do think that we have to be honest that the creation of this effective fourth branch was not part of the original design. It creates new pathways, new centers, within the system. And we have to be at least concerned about how, for example, administrative courts have become the dominant forms of adjudications in our system. It wasn't designed for that. And, yet, when citizens go to those courts, they find they have fewer rights. They find a system that many view is fairly heavily weighted toward agencies.

And, so, I think if you look at *Chevron* in that context, you see that it's actually undermining both legislative and judicial functions within the system. And where I disagree with my esteemed colleagues, is, I don't see any cognizable principle at all coming recently out of the *Chevron* cases. The courts seem to be—to think that putting additional layers of ambiguity onto *Chevron* will create clarity, and it hasn't. In the last case of *King v. Burwell*, when we are looking at, what's the dividing line? What's the role of courts? The Court says, well, this is a question of deep economic and political significance, and seems to avoid the *Chevron* analysis. That's no better than *Chevron*, itself. We have this confusion in this area that is very, very dangerous in terms of legislative authority, in terms of judicial authority.

Mr. MARINO. Thank you.

Professor Shepherd, Dr. Shepherd, one of the great oddities in modern jurisprudence is that the courts have never really explained how *Chevron* deference is consistent with the APA, which prescribes a standard of judicial review that seems to preclude deference to agencies' interpretations of the statutes, but honors still—your written testimony suggests that the legislative history of the APA demonstrates that Congress, in 1946, actually refused to adopt a deferential standard of review similar to *Chevron*'s. Can you explain that in more detail, please?

Mr. SHEPHERD. Yes. What is referred to in my written testimony, the majority—there was an attorney general's committee on administrative law that produced two reports: One was the majority report, which was more in tune with the New Deal liberals; and the minority report, which was more conservative. The majority report proposed an approach like *Chevron*. It suggested that that might be a good idea. It was proposing that to the courts. However, the statute that eventually became law, the APA, did not include that proposal. So that was rejected. The APA was the compromise, and the compromise that ended up had some things for conservatives,

and some things for liberals, and the compromise did not include that *Chevron* approach.

Now, the question of how did *Chevron* possibly occur given that the APA is very clear that there should be no deference on the issues of law? Time passes. I don't know. It's a puzzle.

Mr. MARINO. Thank you.

Professor Duffy, how can it be that in all these years since *Chevron*, the courts have never grappled with this legislative history of the APA that shows how *Chevron* is flatly inconsistent with the specific legislative compromise reached in the APA?

Mr. DUFFY. Well, I agree that it is a mystery. Indeed, I think that my colleague, Professor Hammond, said that this doctrine of *Chevron* is a model of judicial self-restraint. And, really, I think it's quite the opposite. Because there was a specific statute that governs judicial review. And not only did the Court go against that, go against the history, but it didn't even attempt to read the statute. It didn't even engage in the statute, and it still hasn't engaged in the statute. Indeed, some of the oddities is that Justice Scalia, at times, even in his writing, and recently in a judicial opinion, recognized that the *Chevron* doctrine seem to be completely inconsistent with the APA. So it is a mystery.

Now, I think that creates the confusion, too, that you've got one set of principles, like *Chevron* with its two steps, and then you've got the APA, and that those two things keep passing in the night. So I think that is unfortunate.

Mr. MARINO. Thank you. My time has expired.

And the Chair now recognizes the gentleman from Georgia, Congressman Johnson.

Mr. JOHNSON. Thank you.

On occasion, Congress passes broad and open-ended laws leaving it to Federal agencies to fill the gaps of delegated authority through regulation. This has been the case since the times, 1790's that you cited, Professor Turley.

Do you believe that the level of public safety regulation in 1790 is appropriate—is an appropriate benchmark to compare today's administrative process to?

Mr. TURLEY. That's a valid point. There's no question that the Federal Government has changed, and this is a new reality. I don't believe that that warrants the type of change that has been brought forth in *Chevron*. In fact, back in that day, the Framers were concerned with what was called the royal prerogative that James I, talked about, where he said that, really, passing legislation is just the beginning of the process, and that he uses his own logic to improve it. And the Framers rejected that. And I think *Chevron* creates a sort of an agency prerogative, where agencies treat legislation as just the start of the legislative process. I think that's dangerous for legislative authority.

Mr. JOHNSON. Well, do you think that the legislature, then, should draft more specific legislation? Is that the solution rather than judicial scrutiny? Can we apportion some of the blame that we are assessing to the judicial branch through the legislative branch in terms of its inability to formulate a strict, all-encompassing, legislation that needs no rulemaking?

Mr. TURLEY. I think that's a very valid point, again. But I do want to differ in one sense.

Mr. JOHNSON. Is it practical? Is that practical, though——

Mr. TURLEY. I believe it is practical in the sense that——

Mr. JOHNSON [continuing]. In this Congress?

Mr. TURLEY.—I think obviously agencies are going to have interpretive roles. There's application to laws that are going to deal with questions that this body cannot answer. What I think is dangerous about *Chevron* is the assumption that there's an applied delegation of Congress to have agencies perform this legislative role. That's what I reject. I think that's a very dangerous presumption to make, because it robs this institution of a very important role. Congress is so vital to that tripartite system, because it's in this body where factional disputes results in majoritarian compromise, at least ideally they do. But this is where that magic is supposed to happen. If you shift the center of gravity over to agencies performing a legislative role away from you, that doesn't have the same impact politically the Framers wanted.

Mr. JOHNSON. Okay. Thank you.

Professor Hammond, what is your response to Professor Turley's remarks?

Ms. HAMMOND. Well, first of all, I'd like to say about this idea of implicit delegation of interpretive authority, the courts themselves recognize that that is a fiction. The courts have adjusted the deference doctrines and the standard of review to the fact of broad delegations of authority. So, for example, while the nondelegation doctrine is a very easy test to pass, agencies are required to provide reasons for what they do. There is no presumption of regularity in the same way that a court reviewing a legislative enactment would provide. And so when courts are reviewing agencies, by asking the agencies to explain themselves, not rubber stamping what they do, courts are actually fulfilling a constitutional role themselves, and policing the boundaries of what agencies are doing.

Mr. JOHNSON. Thank you.

Professor Beermann, as a general matter, do you endorse enhanced judicial review when it comes to deregulatory actions?

Mr. BEERMANN. Well, you see, that's a great——

Mr. JOHNSON. Yes or no?

Mr. BEERMANN. Yes. And I think that raises a great point about the origins of *Chevron*, because *Chevron* was a decision in a period of deregulatory government action. And it was originally the proponents of *Chevron* were the people favoring less regulation, and the opponents of *Chevron* where people were saying bring more regulation. It was viewed that what was going to happen under *Chevron* was it was going to let the agencies get away with more deregulation, contrary to what Congress had said in the statutes. And I think that's an important point. To me, I am just completely neutral on what the substance of the Congress' output is. To me, the appropriate focus for judicial review should be on what Congress wanted the agency to do. And I think, too often, the *Chevron* doctrine allows for the courts to ignore what Congress wanted the agencies to do, regardless of whether it's regulatory or deregulatory.

Mr. JOHNSON. All right. My time is up. Thank you.

I yield back.

Mr. MARINO. The Chair now recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you. Thank you, Mr. Chairman.

Professor Turley, good to see you again.

Mr. TURLEY. Thank you, sir.

Mr. ISSA. I'm going to address this to you, and as we go up and down the dais, I have no doubt that many of the questions will be similar to this. But earlier today, we had a lengthy hearing in which DACA executive action that has not been stopped, but clearly, is not a court decision, and the Affordable Care Act, where there's been multiple decisions, so I'm going to focus on the Affordable Care Act for this afternoon.

In that hearing, we seem to hear, essentially, we commend the court led by Chief Justice Roberts, in ignoring a few words in the Act and looking at the meaning. And to a certain extent, that's what we're talking about this afternoon, that *Chevron* is, in fact, ignore the words, focus on the meaning. Would you say that's a fair recognition of what, if you will, the doctrine asks the Court to do, or the Court, under that doctrine, asks itself to do?

Mr. TURLEY. Well, I would certainly agree to the extent that I believe that *Chevron* gives license for analysis that ignores the text. In fact, *Chevron* itself ignores the text of the APA, which is section 706. This body actually did a good job in saying, this is the function of the Court. If you read section 706, it makes abundant sense, and the Court simply ignored that language, and I think it's——

Mr. ISSA. And that's where my question leads. Thank you, Professor. You've done it again. You've anticipated.

In this body, in future legislation, limiting the Court by deciding that what is in a particular law is all that there is, would use similar language to the Affordable Care Act. We would say, you know, if there's any ambiguity, come back to us, no extension beyond explicitly those granted shall be there.

The words would probably not be as simplistic and profound as the Constitution, where we've been arguing over what the State has and what the Federal Government has for years, but it would be similar. You know, Federal Government only gets such powers as are explicitly given to it, all the rest belongs to the States or the people.

If we cannot use the language of the Affordable Care Act to make it clear that we don't want limitations, unless, of course, we want them, which is what had happened in the first Affordable Care Act portion, how do we structure language as the body, the only body that can make law? How do we structure language to limit the excesses, erroneous conduct, or outright deliberative abuse of laws that allow for a regulatory creation?

Mr. TURLEY. It's an excellent question. What I suggest in my testimony is that we may want to consider, both in terms of amending the APA to deal with the issuance of judicial review, but also the inclusion of what would effectively be a *Chevron* provision in laws that make it clear that this body is not delegating authority over issues like legal interpretation, certainly, not when it comes——

Mr. ISSA. But isn't that what was in the Affordable Care Act, that, in fact, the Court ignored by finding ambiguity and, thus, you know, applying the meaning? I mean, by the way, I'm one of those people that understands that the Republicans who voted against it knew what they didn't want, and the Democrats wanted the government to pay for it, make happen, and so on. I mean, I think Chief Justice Roberts, in a sense, hit one thing right in that case. He did order a solution that allowed the people who voted for that Act to get what they wanted, not what they wrote, but what they wanted.

So I sort of reiterate, if it didn't work there, what language would you say would be unambiguous enough to keep lifetime appointments from saying, we see it, but we don't read it. And I'll follow up, because my time is running out. But the second half of the question is, wouldn't the alternative of expressly having all regulations expire, not just all law, but all regulations expire within a period of time; in other words, can't we make an act and all future acts that say, you know, you may produce regulations, but those regulations have to be codified, otherwise, they're only good for the 5 years, or until the reauthorization of the act? Isn't, ultimately, a time limit on regulations a better solution than, in fact, trying to say, you won't go there when, in fact, there's a record that going there doesn't have a penalty sometimes?

Mr. TURLEY. Well, I clearly disagree with aspects of the ACA ruling by the Supreme Court. We agree on that. I do think that you have the authority to do precisely that. I also thought that you have authority under congressional approval statute along the lines of the REINS Act. All of that, I think, is within the power of Congress.

I think what they have to do is, this body has to be aggressive in trying to get back this authority. The Court has made a colossal mess of this area, particularly on *Chevron*. I don't know anyone that would think that *Chevron*, at this point, that we have an absolute certainty on this—behind this table of what *Chevron* even means anymore, except that it insulates agencies from effective review.

Mr. ISSA. Mr. Chairman, thank you very much. I appreciate—I would have liked to have heard from all the witnesses, but I understand the limited time, and I yield back.

Mr. MARINO. The Chair now recognizes the gentlelady from Washington, Congresswoman DelBene.

Ms. DELBENE. Thank you Mr. Chair, and thanks to all of you for being here today.

Professor Hammond, I wanted to ask if you are familiar with the U.S. Department of Education's gainful employment rule?

Ms. HAMMOND. I'm not.

Ms. DELBENE. So the gainful employment rule is an attempt to—has been attempted to find gainful employment so that taxpayer-funded financial aid for career education programs is actually going to students who are really being trained for real careers, and attempt to deal with some of the challenges that they've seen, especially with for-profit colleges. I bring that up, because when the Department of Education first put the rule in place, it was challenged and struck down. But in that case, the judge did uphold the De-

partment of Education's authority to issue regulations enforcing the gainful employment requirement in the relevant statute.

The judge commented that, "The Department had gone looking for rats in rat holes as the statute empowers it to do." The Department of Education went back to the drawing board, and after notice and comment, put forward a revised rule, and that rule was upheld in court just last week. Now, it seems—it seems that this is a pretty good example of the process working well, where a problem impacting families was identified, the relevant agency acted within the authority that Congress granted it, and through a transparent and accountable process, a solution was formed. So I wondered if you think that we put—do we put this process at stake if we start tinkering with the current legal framework by putting together piecemeal legislation?

Ms. HAMMOND. Yes. That's a great question. And I have published an article in the Columbia Law Review on this issue of what I call serial litigation. So an agency's action is challenged; it's remanded; the agency then corrects itself; the action is challenged again. And courts very often do reward agencies the second time for paying attention.

Our current deference regimes enable this kind of dialogue. When courts explain in a first instance what the agency has done wrong, but remands to the agency for a chance to fix it, this furthers the responsiveness of our administrative state. It's acting within the bounds that the courts have reiterated, and then when it does that, when an agency does that, deference the next time around is appropriate.

Ms. DELBENE. So do you think that it's possible that legislation could actually create new or, you know, worse, in some cases, legal uncertainties in cases where the agency rulemaking actually seeks to, and clarify in this case, an ambiguous part of the law that Congress chose not to define?

Ms. HAMMOND. Yes. If we ask courts to review de novo, we lose that ability to really bring in the expertise of the agencies and the responsiveness in a dialogic kind of way with—between the agencies and the courts.

Ms. DELBENE. And in—so if we, in Congress, want to be crystal clear and preempt agency rulemaking on a particular point in legislation, obviously, we can do that through careful and considered drafting ourselves? Isn't that correct?

Ms. HAMMOND. That's right.

Ms. DELBENE. Professor Pierce, I wondered if you had a comment on this, on the rulemaking example I brought up, and also on whether you think legislation can be helpful or would create more uncertainty?

Mr. PIERCE. I actually think, over time, it would have no effect at all. And this goes back to where I was totally wrong on *Chevron*. I looked at *Chevron* and said, I thought it made sense. Maybe I'm right, maybe I'm wrong. I wrote a bunch of books and articles about how good it was and then about how much is changing. It hasn't. And I don't think—change isn't tinkering in language. You know, they're always going to be deferring. They have to defer. They don't know much about nuclear energy. They don't know much about water pollution. Agencies know much more about it. So

there's always going to be a degree of deference, and there's always going to be, on the other side of it, a tendency to check to make sure they only do things that they can explain pretty well, and that they only do things that are within statutory boundaries. And that's the nature of the beast. And you could describe it 100 different ways, and it's not going to change what the courts actually do.

I will—I have to say that one of the problems—going back to an earlier exchange, one of the problems, there are horribly drafted bills.

The Chief Justice added a paragraph in his opinion in *King v. Burwell*, in which he alluded to the process through which that legislation became law. And it was a process that led to a mess that where it's very difficult to reconcile the purposes of one part with the language of another part. And the clean air—power plant has a bigger problem that in 1990, the House put one provision in section 111, and the Senate put another provision. They are totally inconsistent, and then both were enacted.

Ms. DELBENE. My time has expired.

Mr. PIERCE. So the courts have to decide which of the things that the Congress said to take seriously, because one says yes, and the other says no.

Ms. DELBENE. Thank you.

I yield back, Mr. Chair.

Mr. MARINO. The votes have been called. We are going to try to get the other two gentlemen in before, because I don't want you to have to wait here for a half hour or so.

The Chair recognizes the gentleman from Texas, Mr. Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

So I've only been in Congress for the last 15 months, but in that period of time, I've already been able to have hundreds of conversations with small business owners and farmers and community bankers, independent insurance agents across the rural Northeast Texas district that I represent that all those conversations end in frustration over the endless burden of regulatory agencies and rules. Sometimes it relates to ObamaCare; sometimes it relates to the EPA regulating puddles in people's backyards, or trying to tell my constituents what kind of light bulbs they have to buy, and this frustration is really heightened, because when I came into Congress, I came in as part of a historic majority here in the House, and as part of the Congress where we took over the Senate as well, and I think my constituents expected things to change, hoped that Republicans would put a stop to a run-away administrative state in this country. But admittedly, very little has changed. And we can talk about executive overreach, but I'm willing to admit and acknowledge that part of the problem here is legislative underreach, and with respect to the *Chevron* doctrine and other things.

So I'm certainly grateful that we're having this hearing today. We have an opportunity to talk about the possibility of solutions to this pervasive problem, and so I want to start with you, Professor Turley, because in your written testimony you said that—and I'll quote you here, "Fear that the growth of Federal agencies is reaching a critical mass within our system, a point where rapid exponential and irreversible expansion will occur."

So, in your opinion, first, let me ask you, what are the greatest drivers of this agency expansion? And where does *Chevron* fall on that list?

Mr. TURLEY. Well, thank you very much for that question. I think that the danger itself is existential for the system. I happen to agree with many things that agencies do. But for us to pretend this isn't a new system with new dimensions of power and pathways is to ignore reality. Part of the frustration that your citizens have is they sense correctly that the center of gravity of the government has shifted away from them, that they are more the subject of government power than the source of government power. And I do think that that's a legitimate concern, and I think *Chevron* is part of it. If you want to deal with the independence of agencies, you have to deal with the insulation of agency decisions that is exposed to *Chevron*. But *Chevron* also captures this idea that the administrative state is a new reality. When we hear some of my colleagues talk, and they say, well, we have to assist the administrative state. And that's exactly what it is. It's becoming a state with legislative and judicial and executive powers combined. And I think that would horrify the Framers.

Mr. RATCLIFFE. So I'm going to ask you to speculate here. Let's say that Congress were to pass legislation overturning—essentially, overturning *Chevron* and a President, not necessarily this President, were to sign that into law, in your estimation, how far would that go in addressing this vast agency expansion that we're talking about?

Mr. TURLEY. Well, it would not take—it would not dismantle the administrative state. And I think we all have to accept that there's going to be a role of the Federal agencies. This is part of this large government that we have. But it's a very important first step. I think the court should look at things like the REINS Act and other ways to force agency decisions to come back before Congress. But the most important thing about attacking *Chevron* is to tell courts that you are wrong. You can't just imply that we are delegating legislative authority to the agencies every time you have ambiguity, even on legal questions. And you certainly can't do that on a question of jurisdiction. That's why the City of Arlington case really is so chilling for me, is that we always assume that would be the rubicon, at least agencies wouldn't get deference on defining their own jurisdiction. And I think Congress needs to attack that very aggressively.

Mr. RATCLIFFE. Thank you.

Professor Shepherd, I want to give you an opportunity to talk about an issue that I noticed from your testimony. One of the oddities here in modern jurisprudence is the fact that courts have never really explained why the *Chevron* deference is consistent with the APA, which prescribes a standard of judicial review that seems to preclude deference to agency interpretation of statutes. Your written testimony suggests that the legislative history of the APA demonstrates that Congress, in fact, actually refused to adopt the deferential standard of review similar to *Chevron*. And I want to give you an opportunity to explain that.

Mr. SHEPHERD. I've already mentioned that briefly, that that's exactly what happened. There was a proposal to—from an attorney

general's committee to allow *Chevron*-style deference, and that proposal did not find its way into the ultimate compromise.

Mr. RATCLIFFE. Well, thank you.

My time has expired. I did want to—Professor Duffy, I appreciate your comments regarding a de novo standard, and I will tell you that I agree with you.

And I'll yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. I thank the Chair, and I thank the witnesses for what has been a very thoughtful discussion.

Professor Turley, is it my understanding that one of your concerns with the *Chevron* doctrine is that the Court seems to be coming to the conclusion that the ambiguity in the statute effectively means that Congress is delegating authority to the administrative agencies? Is that right?

Mr. TURLEY. Well, there's an assumption of implied delegation that underlies many of these cases that I think is misplaced. It gives agencies, in my view, far much—too much insulation from review under the *Chevron* doctrine.

Mr. JEFFRIES. And would you agree there's been an active discussion around the rise of the regulatory state that perhaps even dates back to Justice Scalia's days as a university professor connected to an article that he wrote, I think it was in 1981?

Mr. TURLEY. Yes. Yes, I think so.

Mr. JEFFRIES. And so that, essentially, means that for at least 35-plus years, there's been this concern that an administrative state, a fourth branch of government, has arisen, and the linchpin for it is the ambiguity that continues to exist coming out of bills passed by this House and that Senate, correct?

Mr. TURLEY. Yes. I would qualify it in this one respect. Because I do agree with an earlier statement made that there are statutes that have gone to the courts that I don't consider to be ambiguous, that the interpretation has been yielded to Federal agencies, in my view, improperly by the courts. And I think that undermines both the judicial branch and the legislative branch.

Mr. JEFFRIES. But would you agree that it certainly is the case in many instances, statutes that are being passed by this Congress remain broadly vague in ways that allow for, perhaps, judicial overreach?

Mr. TURLEY. Oh, I think that's certainly the case in many statutes.

Mr. JEFFRIES. And so at a certain point, don't you think it's reasonable for the courts to assume not just that there's implied delegation, but that the absence of a mechanical precise focus by this Congress over decades, notwithstanding the active debate and the view by many that there's been judicial overreach, to continue to send out statutes that are vague? At a certain point, it does seem to me, perhaps, that some could reasonably conclude that Congress is implying, we don't have the expertise; we don't have the time; we don't have the tolerance to enact these statutes in a more precise fashion?

Mr. TURLEY. I think that's an excellent point. I would qualify it in two respects where we may disagree. One is that part of the problem of the *Chevron* doctrine is that the Court is putting these layers of ambiguity on *Chevron* to the point that you have the deference, but the rationales change. And I think that's dangerous.

Second, I don't think Congress does imply delegation for legislative actions. I think that there are lots of reasons why there's ambiguities, but nobody here is suggesting that agencies shouldn't interpret. No one is suggesting that they shouldn't get a—that the Court should not defer to some extent. The question is the extent. And it certainly should not extend to legal reasoning or jurisdictional questions, some of the reach we've seen with *Chevron*. But agencies are going to be given a certain amount of weight. That was what happened under *Skidmore*. *Chevron* solved a problem that didn't exist in my view, and it's made it a lot worse.

Mr. JEFFRIES. Now, you, in terms of, sort of, the original intentions of the Founders and thinking about, sort of, how Congress was constructed and the notion that every Member of Congress would be a generalist, and then there would be a subset of specialists who would work through the Committee process. Is that a reasonable definition of how Congress, at least, has evolved and been thought of in terms of the Framers' intentions?

Mr. TURLEY. Well, I think you're right about being generalists, but I would caution that the Framers believed that the structure of the system would actually help direct compromise, would help diffuse divisions by reaching majoritarian compromise. What has happened is that we've created this whole new bureaucracy of the administrative state which is answering those questions that are supposed to be answered here. Whether it's convenient or not, I think it has pretty dire consequences for our political system.

Mr. JEFFRIES. Thank you for that. And I would say that I do think Professor Pierce's observation about the expertise necessary in an increasingly complex society that it's possessed, in some regard—and, certainly, I have great respect for Chairman Marino and others on this panel, got certain subset of expertise, particularly in law enforcement, but that in some of these other areas, whether it involves the energy sector, food, safety, toxic water, that there is a degree of administrative expertise that exists most specifically at these agencies, and that in some sense, it is reasonable for there to be some understanding of deference given to them.

And I thank you, all, for your thoughts.

And I yield back.

Mr. TURLEY. Thank you.

Mr. MARINO. Thank you.

This concludes today's hearing. And thanks to all our witnesses for attending.

Without objection, all Members will have at least 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned, and we have to run to vote.

[Whereupon, at 3:49 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, The George Washington University Law School

Dear Chairman Goodlatte:

Thank you for giving me the opportunity to testify in the March 15, 2016, hearing entitled "The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies." In this letter I respond to questions for the Record from Representatives John Conyers, Jr. and Henry C. Johnson.

Question 1a: "Why has the Supreme Court historically rejected a de novo standard of review where Congress has clearly delegated authority to an agency and the agency acts within the scope of that authority?"

Answer:

The reasons the Supreme Court always confers some degree of deference on agencies when they act within the scope of their authority follow logically from the reasons Congress frequently delegates decision making power to special purpose agencies.

Congress delegates decision making power to special purpose agencies for two main reasons. First, Congress is not omniscient. Congress does not have the kind of detailed knowledge and expertise in each important area of government decision making that would allow it to make well-informed decisions about complicated matters like how to improve air quality and how to protect the integrity of financial markets. Congress also lacks the time and resources required to make the thousands of decisions some government institution must make in the process of implementing any regulatory or benefit program. Congress wisely recognizes its institutional limitations by delegating implementation of regulatory and benefit programs to the specialized agencies Congress has created to make the thousands of day-to-day decisions required to perform those functions.

Second, Congress delegates primary decision making power to special purpose agencies, rather than to generalist courts, because Congress recognizes the institutional limits of federal courts. Like members of Congress, generalist judges lack the kind of detailed knowledge and expertise required to make well-informed decisions in areas like air quality and financial markets. Like members of Congress, judges also lack the time and resources required to make the thousands of decisions that are required to implement a regulatory program or a benefit program.

Agencies also have another important institutional advantage vis a vis courts. Many of the decisions required to implement a regulatory program or a benefit program are policy decisions. Policy decisions should be made by politically-accountable officers and institutions. Judges are the least politically accountable government officials. They are not elected. They have no constituency. They serve for life and cannot be held accountable by the electorate. By contrast, agency decision makers are accountable to the President, who, in turn, is accountable to the people. To the extent that Congress has been unable to make a decision with respect to some issue of regulatory policy because of the institutional limits of Congress, that decision should be made by a politically-accountable agency rather than by a politically unaccountable judge.

The Supreme Court has issued scores of opinions in which it has explained why it always confers some degree of deference on agencies when they act within the scope of jurisdiction Congress has conferred on them and why it instructs lower courts to confer some degree of deference on agencies in that situation. Those decisions invariably refer to some combination of judicial respect for the decisions of

Congress to confer decision making power on agencies and judicial respect for the reasons why Congress delegates decision making power to agencies. Courts defer to agencies because agencies are superior to courts with respect to both their relative expertise and their relative political accountability.

It is important to remember that, while judicial review of agency actions has always been deferential, courts never act as rubber stamps for agency decisions. They invariably reject an agency action if it is inconsistent with a statute, inconsistent with the evidentiary record the agency considered, or unsupported by adequate reasoning. That is as true under Chevron as it is under each of the other review doctrines the Supreme Court has announced and applied over the last century.

Question 1b: "Would H.R. 4768 reduce agency efficiency and increase delays in finalizing new regulations?"

Answer:

In my opinion, H.R. 4768 would have little, if any, effect of any type on agency decision making. As I understand it, H.R. 4768 is motivated by the desire of some members of Congress to prohibit courts from applying Chevron deference when courts review agency interpretations of ambiguous provisions in agency-administered statutes. My opinion that H.R. 4768 would have little, if any, effect is based on my current views on Chevron. Those views have changed significantly over time.

When the Court first issued its unanimous opinion in Chevron, I praised the opinion because of my belief that it furthered the values reflected in the Constitution and that it was consistent with the comparative institutional advantages of Congress, courts, and agencies. I also expected it to have the desirable effects of increasing consistency in judicial review of agency interpretations of statutes and in the geographic consistency of federal law. See e.g., Richard Pierce, Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vanderbilt Law Review 301 (1988). Judge Scalia expressed similar views before he became Justice Scalia. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke Law Journal 511 (1989).

Over time, it became apparent that the Supreme Court was not willing to implement Chevron in the clear and consistent manner that I expected. The Court increasingly blurred the Chevron doctrine with much older, seemingly less deferential doctrines. The many empirical studies of Chevron found that it had little actual effect on the patterns of decisions of reviewing courts. They upheld about 70% of agency actions no matter what test they said they applied. See generally Richard Pierce, What Do the Studies of Judicial Review of Agency Actions Mean? 63 Administrative Law Review 77 (2011).

Opinions issued by the Supreme Court over the last few years have reinforced my view that Chevron is having little, if any, effect on the decision making process used by courts that review agency actions. I explained that view in an article that I attached as an appendix to my testimony in this hearing. That article will be published in the next issue of George Washington University Law Review. Richard Pierce, The Future of Deference, forthcoming in 2016 in George Washington Law Review.

Since I do not believe that Chevron is having any significant effect on judicial or agency decision making today and I expect it to have even less effect in the future, I believe that H.R. 4768 would have little, if any, effect on judicial or agency decision making.

Question 1c: "Under a less deferential judicial review standard would agencies—in order to avoid judicial reversal—amass substantial records that that could substantially slow down the rulemaking process and make it more cumbersome and expensive?"

Answer:

For the reasons I gave in answer to question 1b, I don't think that a change in the standard courts use to review agency interpretations of agency-administered statutes would have any effect – good or bad—on the rulemaking process. The problem of ossification of the rulemaking process is independent of the choice of review standard. It is primarily attributable to judicial interpretations of section 553 of the Administrative Procedure Act that bear no relationship to the language of that section. See, e.g., Richard Pierce, Rulemaking Ossification Is Real, 80 George Washington Law Review 1493 (2012); Richard Pierce, Seven Ways to Deossify Agency Rulemaking, 47 Administrative Law Review 59 (1995).

Question 3d: "Is public participation in agency decision making highly sensitive to cost and delay?"

Answer:

Meaningful public participation in the agency decision making process is limited almost exclusively to regulated firms and their representatives. See Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards, 63 Administrative Law Review 99 (2011): Kimberly D. Krawiec, Don't "Screw With Joe the Plummer": The Sausage-Making of Financial Reform, 55 Arizona Law Review 53 (2013).

Question 3e: "Would enhanced judicial review enable well-financed interests to exert greater influence over the factual conclusions of an agency proceeding than smaller organizations or even the agency itself?"

Answer:

Yes, but the status quo already allows well-financed firms to dominate the process. See the studies cited in my answer to Question 3d.

Question 1f: "Are small businesses or individuals able to provide sophisticated scientific or technical evidence in support of their position that could balance a large corporation's ability to flood he record with scientific studies that support its position?"

Answer:

No. See the studies cited in answer to Question 3d.

Question 2: "Do you have any other concerns related to H.R. 4678?"

Answer:

Yes. I think it is a bad idea for Congress to try to micro-manage the process of judicial review of agency actions.

Response to Questions for the Record from Emily Hammond, Associate Dean for Public Engagement & Professor of Law, The George Washington University Law School

The Honorable Bob Goodlatte
Congress of the United States
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Attn.: Andrea Lindsey
via Email

May 19, 2016

Dear Chairman Goodlatte:

Thank you for the opportunity to testify at the March 15, 2016 hearing entitled "The *Chevron* Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies." This letter responds to the additional question from the Honorable John Conyers, Jr. and the Honorable Henry C. "Hank" Johnson, Jr., which states:

1. H.R. 4768, the "Separation of Powers Restoration Act of 2016," would amend section 706 of the Administrative Procedure Act "APA" to require a *de novo* standard of review for "all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules."

   a. Would requiring a de novo standard of review for agency rulemaking raise countervailing separation of powers concerns?
   b. What effect would H.B. 4768 have on judicial activism?
   c. What effect would an increase in judicial activism have on separation of powers and the Legislative Branch?

2. Do you have any other concerns relating to H.B. 4768?

My response is as follows:

I have significant concerns about H.B. 4768. First, a required de novo standard of review indeed raises separation of powers problems. With respect to the executive branch, a de novo standard is in tension with the Take Care Clause and the Vesting Clause—that is, a de novo standard overlooks the many interstitial policy questions that agencies must answer to simply carry out the work of the government. Moreover, judicial doctrine already provides important checks on agencies to ensure their constitutional legitimacy as well as their fidelity to statute, as I explained in my prior written testimony.

Second, H.B. 4768 opens the door to judicial activism, which I define as judges substituting their own policy preference for those of Congress and the agency. This has important consequences for separation of powers. With respect to the legislative branch, a de

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novo standard risks overlaying judicial preferences onto *legislative* decisions. Statutes delegate authority to agencies with the expectation that the agencies will fill the policy gaps as needed—not the courts. With respect to the agencies, judicial activism risks the separation of powers concerns already mentioned. Third, here is how an increase in judicial activism would impact the legislative branch: Expect surprises. De novo review adds an unnecessary layer of uncertainty to administrative law because it makes statutes vulnerable to judicial whim.

I note several other concerns relating to H.B. 4768. First, it will make outcomes of judicial review more difficult to predict. Already, the *Chevron* doctrine includes a component of de novo review, which takes place at step one. If Congress has spoken clearly, it is up to the courts to independently recognize and enforce that clarity. But step one is already the focus of much debate regarding *how* this de novo step should be conducted. My co-authors and I collect a number of examples in our book chapter on the *Chevron* doctrine.[1] Second, as *Chevron* itself demonstrates, it is not always easy to separate pure questions of law from mixed questions of law and fact. Prior to *Chevron*, the courts grappled with this issue even though they seemed to follow the principle that pure questions of law received de novo review: in fact, courts mixed de novo standards with deference, much as the current *Chevron* doctrine anticipates.[2] At best, H.B. 4768 therefore does little; at worst, it creates the important separation of powers problems that I have described.

I appreciate the opportunity to provide this response and would be happy to respond to any additional questions.

Sincerely yours,

Emily Hammond
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[1] Emily Hammond et al., *Judicial Review of Statutory Issues Under the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (2015).
[2] *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1944); NLRB v. Hearst, 322 U.S. 111 (1944).

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