AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. Hrg. 114–33

EXAMINING THE PROPER ROLE OF JUDICIAL REVIEW IN THE FEDERAL REGULATORY PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

APRIL 28, 2015

Available via http://www.fdsys.gov

Printed for the use of the Committee on Homeland Security
and Governmental Affairs

U.S. GOVERNMENT PUBLISHING OFFICE

94–906 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

RON JOHNSON, Wisconsin, *Chairman*

JOHN McCAIN, Arizona
ROB PORTMAN, Ohio
RAND PAUL, Kentucky
JAMES LANKFORD, Oklahoma
MICHAEL B. ENZI, Wyoming
KELLY AYOTTE, New Hampshire
JONI ERNST, Iowa
BEN SASSE, Nebraska

THOMAS R. CARPER, Delaware
CLAIRE McCASKILL, Missouri
JON TESTER, Montana
TAMMY BALDWIN, Wisconsin
HEIDI HEITKAMP, North Dakota
CORY A. BOOKER, New Jersey
GARY C. PETERS, Michigan

KEITH B. ASHDOWN, *Staff Director*
GABRIELLE A. BATKIN, *Minority Staff Director*
JOHN P. KILVINGTON, *Minority Deputy Staff Director*
LAURA W. KILBRIDE, *Chief Clerk*
LAUREN CORCORAN, *Hearing Clerk*

SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

JAMES LANKFORD, Oklahoma, *Chairman*

JOHN MCCAIN, Arizona
ROB PORTMAN, Ohio
MICHAEL B. ENZI, Wyoming
JONI ERNST, Iowa
BEN SASSE, Nebraska

HEIDI HEITKAMP, North Dakota
JON TESTER, Montana
CORY A. BOOKER, New Jersey
GARY C. PETERS, Michigan

JOHN CUADERESS, *Staff Director*
ERIC BURSCH, *Minority Staff Director*
KELSEY STROUD, *Chief Clerk*

CONTENTS

	Page
Opening statement:	
Senator Lankford	1
Senator Heitkamp	2

WITNESSES

TUESDAY, APRIL 28, 2015

Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis, and Chair, Judicial Review Committee for the Administrative Conference of the United States	3
Andrew M. Grossman, Associate, Baker and Hostetler LLP, and Adjunct Scholar, The Cato Institute	5

ALPHABETICAL LIST OF WITNESSES

Grossman, Andrew M.:	
Testimony	5
Prepared statement	52
Levin, Ronald M.:	
Testimony	3
Prepared statement	31

EXAMINING THE PROPER ROLE OF JUDICIAL REVIEW IN THE FEDERAL REGULATORY PROCESS

TUESDAY, APRIL 28, 2015

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Portman, Ernst, Heitkamp, and Peters.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning. This is the second in a series of hearings the Subcommittee will hold examining the issues and solutions surrounding Federal regulations.

I want to welcome our witnesses. Thank you, gentlemen, for being here today. We are fortunate today to have two witnesses who are experts in the field of administrative law. I thank you for your thoughtful written testimony and look forward to speaking to both of you.

Today's hearing will focus on the role of the judiciary in the Federal rulemaking process. Since the founding of this country, Article III courts have served as the final guardians of our Constitution, providing independent judgment, applying law to the facts in the case before them.

In the landmark decision of *Marbury* v. *Madison,* Chief Justice John Marshall articulated the role of judicial review, declaring it is emphatically the providence and duty of the Judicial Department to say what the law is. From that moment forward, it has been established the courts are entrusted with the duty to invalidate laws that are incompatible with our Constitution.

However, as the administrative law State has expanded, the courts have deferred more and more to agencies, substituting agency judgment for their own. As a result, the modern administrative State has blurred the lines that once separated the Legislative Branch, the Executive Branch, and the Judicial Branch.

For example, with more and more frequency, we see examples of an Executive Branch agency that creates the rules, interprets the

meaning of those rules, and enforces those rules according to their own interpretation. We must ask fundamental questions about the constitutionality of such a scheme.

In the realm of administrative law, Congress clearly intended for the courts to review delegated agency action. The Administrative Procedures Act requires the courts to decide all relevant questions of law and interpret constitutional and statutory provisions. Today, we have an opportunity to consider these and other issues in an effort to examine the proper role and duty of the courts in the Federal rulemaking process.

I look forward to discussing these issues with our members and witnesses today, and I understand full well these are heady issues and difficult things to struggle with. We probably will not resolve this in the next hour—— [Laughter.]

Though if we would, it would help the Nation. But, this is a great conversation to initiate where are we, how did we get here, and what are some solutions to get out of this in a way that actually helps what we are going to do as a Nation and as we function through very difficult areas of administrative law and deference in decisionmaking.

With that, I would like to recognize Ranking Member Heitkamp for her opening statement.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Chairman Lankford.

Today's hearing continues our Subcommittee's examination of the overall topic of Federal regulatory policy. I look forward to hearing from both of our witnesses today on judicial review of the regulatory process and how to best approach that review.

It is critical that Congress continues to review how Federal agencies operate as well as how Congress interacts as a body with other branches of the government. This is especially true on the issue of regulation, regulation today that touches every facet of our society. In examining this issue, I think it is critically important to take a look at our current system.

In the regulatory process which has matured over time, legislative action and judicial review—are those processes flexible enough to handle most circumstances? Does it offer fair consideration to concerns of business and everyday Americans? Does Congress and the Administration, both of which are elected by and responsible to the people, maintain that critical role in advancement of regulation?

Those are just some of the fundamental questions we have to consider any time we delve into reforming our regulatory process. Our Nation needs both effective and efficient regulation.

Obviously, a huge part of that regulation is what happens after those regulations are promulgated and how do we best have a system of analyzing and reviewing regulation, and as we talk about judicial review, one thing that we have forgotten is that once regulations are promulgated, nothing prevents the Congress from also responding if, in fact, the will of the Congress is not done. And, so, I think all too often, Congress abrogates its responsibility on oversight of regulation to the judiciary, creating further uncertainty and a lack of ability to actually respond, leaving it up to the judici-

ary. I think today, we are in exactly that situation with *King* v. *Burwell*.

And, so, I look forward to this testimony. I think that this is incredibly important, and as somebody who, as a lawyer, practiced in this area, I look forward to hearing the shortened version of your testimony and I want to congratulate you both before we begin at the high quality of the work that was done on behalf of this Committee in preparing for this testimony.

So, thank you, Mr. Chairman, for introducing this important subject and I look forward to the testimony.

Senator LANKFORD. Thank you.

Let me give the introduction of our witnesses and then we will go straight to your testimony.

Andrew Grossman is an Adjunct Scholar at the Cato Institute and practices appellate and constitutional litigation in the Washington, D.C. office of Baker and Hostetler LLP. Prior to joining Cato as an Adjunct Scholar, Mr. Grossman was affiliated for over a decade with the Heritage Foundation, most recently serving as Legal Counsel to Heritage's Edwin Meese III Center for Legal and Judicial Studies.

Ronald Levin is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. Professor Levin also currently serves as a public member of the Administrative Conference of the United States and Chair of its Judicial Review Committee.

It is the custom of this Subcommittee to swear in all witnesses that appear before us, so if you do not mind, I would like to ask you to stand and raise your right hand. Thank you.

Do you solemnly swear the testimony that you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. LEVIN. I do.

Mr. GROSSMAN. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect the witnesses answered in the affirmative.

We are using a timing system today. We have received your full testimony, which is extensive, and we appreciate very much your written testimony for that. We would ask that you keep your oral testimony to around 5 minutes. I will be graceful in my protection of the clock today, since we have the two witnesses.

Mr. Levin, I am very glad that you are here and we would be honored to receive your testimony first.

TESTIMONY OF RONALD M. LEVIN,[1] WILLIAM R. ORTHWEIN DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY IN ST. LOUIS, AND CHAIR, JUDICIAL REVIEW COMMITTEE FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. LEVIN. OK. Chairman Lankford, Ranking Member Heitkamp, thank you for the privilege of testifying today.

All of us agree, I know, that judicial review of the regulatory process provides an essential check on abuses by the Executive

[1] The prepared statement of Mr. Levin appears in the Appendix on page 31.

Branch. In the past, Congress has from time to time passed legislation that opened up access to judicial review by removing unfounded jurisdictional barriers. That legislation was necessary in its time, and today, the Administrative Conference is continuing to work on proposals for improvements, such as the reform of Court of Federal Claims jurisdiction that I have discussed in my written statement.

On the whole, however, the existing system for judicial review of regulations is functioning pretty well, in my judgment, and it does not seem to need a major overhaul. And, in that context, I am going to discuss two pending ideas for change that, in my judgment, are not promising.

One of them was advanced by Dr. Jerry Ellig at a hearing of your Committee 2 months ago. He proposed that the methodology that agencies use in conducting cost-benefit analysis should be made judicially enforceable. This is a dubious idea, in my view, because courts are not expert in the complex and subtle techniques of policy analysis and also because it is not necessary.

The administrative law system has for many years operated with a better alternative. Studies that are produced through regulatory analysis are routinely included in the administrative record and courts do consider whether the ultimate rule is reasonable in light of that record. Well, experience shows that review can be quite probing and it gives agencies a strong incentive to conduct their analyses carefully.

The second topic that I have been asked to address is the doctrine known as *Auer* deference. Essentially, this doctrine means that the Federal courts should generally hesitate to overturn an agency's interpretation of its own regulation. Agencies do not get a blank check, but they do get some leeway to allow them to implement their mandates effectively.

Since 2011, however, several Justices of the Supreme Court have called *Auer* deference into question, most recently in *Perez* v. *Mortgage Bankers Association* last month, and so I want to briefly describe why I disagree with their critique.

Justice Scalia, who has led this charge, has criticized *Auer* deference on separation of powers grounds as well as policy grounds. The constitutional argument is that fundamental separation of powers principles are offended when the task of writing laws and interpreting laws rests in the same hands.

It is true that administrative agencies routinely write regulations and interpret them later, but they have done this for decades and the court has never seriously questioned the constitutionality of that arrangement. Of course, the Constitution does mandate some divisions of responsibility among the branches, such as between the roles of Congress under Article I and the President under Article II. But, Justice Scalia's principle has not been traditionally recognized in the very different context of the relationship between courts and agencies.

So, if we are going to adopt a new principle of this kind, we need to ask whether the extension of doctrine would serve a convincing modern day purpose. And, supposedly, it does. Critics of *Auer* argue that the doctrine gives the agency an incentive to write vague regulations because the agency can then interpret them without the re-

straints of rulemaking procedure, but still receive deferential review.

Well, the problem with that theory is that its proponents have never cited any evidence that agencies actually do write vaguer regulations because of this incentive. The incentive may exist, but so too does a rulemaking agency face countless other incentives pressing in various directions, ranging from the political program of the Administration to the desire to satisfy stakeholders. We simply have no clear sense of how much difference the *Auer* incentive makes, if it makes any at all. And, to me, that abstract argument against deference is far too weak to justify throwing out a judicial review doctrine that has been well accepted for decades.

Finally, even if it were a good idea to abolish or modify *Auer,* I believe Congress should leave that job to the courts. Case by case development of doctrine can be sensitive to the enormous variety of situations that can arise in this area, but a statutory response is likely to be too inflexible and give rise to unintended consequences.

That completes my statement and I will be happy to respond to your questions. Thank you again for asking me to testify.

Senator LANKFORD. Thank you. Mr. Grossman.

TESTIMONY OF ANDREW M. GROSSMAN,[1] ASSOCIATE, BAKER AND HOSTETLER LLP, AND ADJUNCT SCHOLAR, THE CATO INSTITUTE

Mr. GROSSMAN. Mr. Chairman, Ranking Member Heitkamp, and Members of the Subcommittee, thank you for holding this hearing today and for inviting me to testify.

My statement today, like my written testimony, focuses on the intersection of the constitutional separation of powers and administrative law. This is, I think, a surprisingly hot topic of late, and it should be.

As the Chief Justice wrote in a recent dissent, the Framers could hardly have envisioned today's vast and varied Federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities. We must be attentive, he said, to, quote, "the danger posed by the growing power of the administrative State, and it is Congress, in particular, that must pay attention, because it is Congress that authorizes the components of the administrative State and it is Congress whose intentions are thwarted when agencies come to view their authorizing statutes as springboards and statutory restrictions as speed bumps. The citizen confronting thousands of pages of regulations," the Chief Justice observed, "can perhaps be excused for thinking that it is the agency that is really doing the legislating. That should be no small matter to the actual Legislative Branch."

I agree with the Chief Justice that deferential judicial review of agency actions is responsible, in part, for this phenomenon. Congress, after all, plays no role in the execution of the laws, and so it is the courts that provide the vital check on agencies to ensure that they carry out Congress's will. Yet, for so many years, that aspect of judicial review took a back seat to concerns over judicial ac-

[1] The prepared statement of Mr. Grossman appears in the Appendix on page 52.

tivism, which, to be fair, was and is a real concern. But, it is possible that the courts over-corrected and went beyond mere judicial modesty, and now, slowly but surely, the pendulum seems to be swinging back the other way.

The most visible sign of this is the Supreme Court's growing uneasiness with so-called Seminole Rock or *Auer* defense, which applies to agencies' interpretations of their own regulations. I tend to agree with Professor John Manning's view. The deference of this sort raises serious separation of powers concerns because it allows a single body to both make and execute the law.

One would expect this to encourage vague regulations so that agencies maintain maximum interpretative flexibility, and there is some evidence that this has actually been the result in certain instances. Other consequences include the elimination of any independent check on policymaking, reduced notice of the law to the public, fewer restraints on agencies when enforcing the law, greater variation in application of the law, and reduced accountability, as agencies hide major policies in open-ended language or discover them there.

These criticisms have found a receptive audience on the Supreme Court, as Professor Levin has described. To date, four Justices have written separately to express their willingness to reconsider Seminole Rock. Of course, it takes five to tango on the Court. There is no way to tell at this point whether the next case will topple Seminole Rock.

Yet, the Supreme Court does not have the final word on these things. Congress does. And, Congress could, by statute, direct the courts to defer to agency interpretations only to the extent of their power to persuade, that is, the old *Skidmore* standard. As discussed in my written testimony, rejecting Seminole Rock would have the benefits of fortifying the constitutional separation of powers, improving notice of the law and ultimately advancing individual liberty. It is a reform at least worthy of serious consideration.

Another issue worthy of consideration, and one that cannot be rectified by the courts, is the Administrative Procedures Act's (APA) exemption of interpretative rules from ordinary rulemaking procedures, including notice and comment. The great breadth of this exception made good sense in the 1940s. If this Congress was trying to rein in agency excesses and regularize their conduct, it recognized the value in providing informal guidance.

But, as Justice Scalia explained in his recent separate opinion in Perez, by supplementing the APA with judge-made doctrines of deference, the court has revolutionized the import of interpretative rules' exemption from notice and comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them.

The solution, I think, is to align the scope of the exception with its purpose by limiting judicial defense to rules promulgated through notice and comment. Again, such interpretations could still receive deference according to their power to persuade, but there is no reason to go beyond that.

Finally, let me address *Chevron* deference, which counsels a court to defer in certain circumstances to an agency's reasonable

interpretation of statutes it administers. First, let me say that the mood of deference that accompanies *Chevron* has lately worked a sea change among executive agencies. The search for meaning in Congress's commands has been replaced with a hunt for ambiguities that might allow the agency to escape its statutory confines.

In my practice, I see this quite regularly of late with the Environmental Protection Agency (EPA's) major rules, which seek out, or sometimes invent, ambiguity as an escape hatch from seemingly clear statutory language. And, it is not just the EPA. The Federal Energy Regulatory Commission (FERC), the Internal Revenue Service (IRS), the Federal Communications Commission (FCC), and others have all adopted this non-interpretative interpretative approach to bring to fruition regulatory policies that just a few years ago were considered dead because they could not pass Congress. How quaint that now seems.

Chevron's impact on judging, however, is more difficult to pin down. That said, the *Chevron* formula does have a certain logical appeal. If actual gaps in statutes are to be filled up between the courts and the agencies, I know which I would choose to do it. But, the problem is that there are not gaps every single time a court chooses to defer. So, what to do about it.

Well, I agree with Justice Scalia, *Chevron's* chief advocate and not one known for excessive deference, that the fox in the hen house syndrome is to be avoided not by abandoning the idea of deference, but by taking seriously and applying rigorously in all cases statutory limits on agencies' authority. But, how?

One way to do that is to pack the Federal bench with more Scalias. Another is to avoid capacious authorizations of agency power and trim back those that rely more on unstated understandings than text.

But, what about changing *Chevron*? Well, nothing I have seen suggests that it would do much good. That does not mean, however, that it is not a fit topic for discussion and debate. It surely is. At the very least, it would be a worthwhile task to identify and consider reforming those statutes that are the most subject to abuse. More hearings like this one will be necessary for Congress to begin to reclaim what it has lost.

Again, I thank the Committee for the opportunity to offer these remarks and I look forward to your questions.

Senator LANKFORD. Thank you for your input.

We are going to have one more formalized round of questions, and in the second round, I will be more open and we will have a more open dialogue as we walk through this together. I appreciate very much this ongoing conversation.

There is a real challenge that we have to face on this, and that is the difference in separation of powers and that where we are going. It is not where we are and where we have been, but it is also where we are going.

You gentlemen are extremely aware of where we have been on this. The question is, what is the next step? How far does this go? With new rules dealing with interpretative rules, the agencies continue to make decisions. Mr. Grossman, as you had mentioned, the search for ambiguity in statute to try to pass things in policy through agency action that could not have passed through Con-

gress, it seems to be an ongoing push to happen with agencies, and now the challenge is, does this continue to go this way?

My opening question to you is do you see that pattern where the agencies are seeing more of the gaps than they are seeing what to actually do with an existing statute?

Mr. GROSSMAN. Mr. Chairman, once the genie is out of the bottle, I think it is very difficult to put it back in, and what we have seen of late is agencies, to varying extents, abandoning the traditional understandings that served as a restraint on agency power.

It was always the view that big policy decisions, and there is some disagreement over what necessarily constitutes big, but the big decisions were channeled through Congress, and there were political reasons for that, but there were also reasons of simple restraint and understanding. Those informal understandings were not necessarily things that were expressed in clear statutory text. They are there by implications and they reflect the inherent authority of agencies, in other words, the boundaries of their actual power that Congress has authorized them to exercise.

When those limitations, those traditional understandings, fall away and the courts are sometimes wary of enforcing them, although sometimes they do, the agencies, in many instances, have taken that as a carte blanche to undertake questions that previously would have been channeled through Congress.

So, yes, I think that we are going to see a lot more of this, and I fear that it is something that is going to occur not just in Democratic administrations, but also in Republican administrations. I do not see how you go back.

Senator LANKFORD. I do not know how to fix the predictability of law and of regulations to do business and to do investment. That is the concern, is if it is a Democrat executive and all the regulations suddenly turn this way, and then a Republican executive and everything shifts back the other way, there is no stability and predictability. You can no longer go to Congress and try to get some insight of where we are going in policy. It moves by the whims of the executive, and that, to me, is a real concern for planning and for business and for our free market system. The predictability and the boundaries of that is very significant.

Let me just bring up a "for instance." It is fairly unlikely, I would say, in 1972, that Congress contemplated the Waters of the U.S. regulation that is now coming down from EPA and from the Corps of Engineers. The administrative agencies have twice brought out a Waters of the U.S. rule, twice been knocked down by the courts. It is coming out in a new version again. It is difficult to read the Clean Water Act and to find this new version of navigable waters included into it, but yet there it is, suddenly within an agency promulgation.

Where does this continue to go in the days ahead? Mr. Levin, do you want to comment on that?

Mr. LEVIN. Yes. I have a somewhat different perception of——

Senator LANKFORD. Sure.

Mr. LEVIN [continuing]. Of the big picture from Mr. Grossman's, I think. I do not know when this earlier era was in which agencies never tested the limits of their authority. I think they always have done it and it is what an executive agency naturally would do, and

it is, therefore, the role of the courts to bring some appropriate standard of review to bear in order to provide some check on what they do.

Now, *Chevron* has emerged as one of those accepted checks in our system, and *Auer* has served for years as its regulatory counterpart. In the days when *Chevron* first came out, it was promoted primarily by Republican-appointed judges. Mr. Grossman points this out in his testimony. It was hailed as the right way to go. These days, you are getting more criticism of agencies and the assumption that *Chevron* is not up to the job, but I really suspect that if a Republican wins the Presidency and starts promoting deregulatory measures, that you are going to see a newfound appreciation for the virtues of deference. A lot has to depend——

Senator LANKFORD. Which is, by the way, my concern, is that we constantly have this back and forth, as I just mentioned. You cannot do long-term investment on a project if you really do not know what the regulations are, or if they are based on just the whims of the executive.

Originally, we are basing everything on statute, and now it becomes who is the smartest person, and the courts seem to have this new approach—and you can correct me if I am wrong here, but the approach is you know more about this subject than I do. I am going to defer to you because you have greater knowledge and insight on the subject. But, that also assumes that they have taken into account all the rest of it.

Notice and comment is not just about acquiring quantity and saying you have done your due diligence because you have a thousand different letters that you have responded to and you know more about this subject than I do. There seems to be more to it than that in the notice and comment and the interaction between, does this line up with the statute? Is this what is the least expensive, best available, I mean, all the different dynamics that we have with administrative law that you know extremely well. That is the ongoing challenge, is where does this go?

Mr. LEVIN. Right. So, I think we have the rulemaking part and we have the judicial review part. The rulemaking process does have built-in steps in it, as you describe. The judicial review part comes in as a check based on some standard of review. The *Chevron* test or *Auer* test is generally seen among administrative lawyers as the relatively predictable standard of review.

If you substituted *Skidmore* review for it, then you have what Justice Scalia calls the totality of the circumstances approach, in which you cannot predict very well at all how a court would respond to a given administrative ruling. And if you took away all deference and just left decisions up to the unfettered decision of judges, I think predictability would be impaired even more. So, we have some degree of stability in our system right now that tends toward what you are driving at.

Senator LANKFORD. I am going to defer to the Ranking Member, but I wanted to say, when we come back around, I want to get a chance to talk about agencies and the appeal process, because we also have an issue with agencies now receiving—and it has been for a while, but if someone wants to appeal a rulemaking, they appeal that rulemaking to a person literally sitting in the cubicle next

door to the person who made the previous rule and made the previous decision, and trying to get an outside opinion is becoming more and more difficult. And, so, I want us to be able to talk about that some as well as multiple areas.

But, I want to recognize Ranking Member Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

Very complicated history and a very long history and how you look at this, unfortunately, frequently, as through maybe too political of a lens than what it should be as we are kind of looking at predictability. And, one of the concerns that I have is that we are focused on, in this discussion, on judicial review. Why is judicial review necessary if, in fact, the agency makes a mistake?

Congress plays a role in correcting agency mistakes, it seems to me, and that is one thing that if you are on the court and you are trying to figure out what congressional intent was and whether, in fact, congressional intent was followed through these kind of interpretative rules or rulemaking process, you must be extraordinarily frustrated, thinking, why can Congress not cleanup their own mess? Why do we have to do it? And, I think that is one of the frustrations that I have in all of this. I think, many times, the issues that are deferred to the agency are issues that are too controversial or too difficult for Congress to decide themselves.

And, I am going to build on the Chairman's example, Waters of the United States. We recently had a hearing in the Agriculture Committee to talk about Waters of the United States and I asked a simple question. After a lot of critique about that rule and about the rulemaking process, I asked a simple question, which was, what are Waters of the United States? Not one person could offer an answer. It is incredibly complicated.

And, I am not pleased with the process that was used in the controversy around that rule, but I am sympathetic that, frequently, this body spends way too much time kicking the can down the road by taking something that is very controversial and putting it in the lap of the agency as opposed to doing our due diligence and our responsibility.

But, I want to talk a little bit about interpretative rules, because it has become the buzzword for agency overreach. And, having been involved in an earlier life in the tax world, I guess I would ask you, Mr. Grossman, do you think IRS letter rulings should be subject to rulemaking standards?

Mr. GROSSMAN. I think the answer is yes, to the extent—that they are going to be given any greater degree of deference than *Skidmore* deference. That said, I think an IRS letter ruling, given the way that the tax code is structured, is something that in most instances—not all instances, but most instances—is something that is going to hold up.

Senator HEITKAMP. Are you concerned at all—with that answer, are you concerned at all that it will, in fact, even further delay certainty to a businessman who simply says, I want to know if I do this what the long-term tax treatment will be, and I understand that you might be saying things that could be more broadly applied and representing your interpretive rule, but I need this answer today, not 3 years from now.

Mr. GROSSMAN. Yes. Senator, I certainly do take into account that concern, and it is a real and a legitimate one. I think I would have two responses to that.

One is to identify with your earlier remarks that a lot of these areas where there is uncertainty in the law is due to either complexity wrought by Congress or to vagueness or ambiguity wrought by Congress. The tax code, I think, is a capital example of that in terms of its complexity.

Second, Congress can, in some instances, affect the way, legitimately, that judicial review and deference is operational. If Congress decides that certain types of tax rulings are entitled to a greater degree of deference to promote certainty, that is fine. That is something that Congress has the authority to do. That does not necessarily mean that it needs to be the case across the board. I think that is a policy issue for Congress to decide.

Senator HEITKAMP. I think one of the concerns that I have about all this is where we have burdensome and unnecessary regulation, we also have delay in providing regulatory certainty, and that delay could be further extended if we, in fact, look at every instance of interpretation of a statute as being subject to the rulemaking process. Would you not agree that we could have the potential of actually delaying critical certainty if we expand the way you are suggesting we expand the definition of what constitutes a rule subject to rulemaking?

Mr. GROSSMAN. No, actually, I would not agree with that, and the reason is because the rules that—litigation, when a court applies a particular standard of deference or standard of review, really applies to relatively very few cases and it sets the rules and the framework that an agency works under going forward and that governs people going forward. And, so, when there are understandings of the way that statutes work and the way that courts are going to resolve them, it is actually very few interpretations and very few instances that are involved in legal controversies——

Senator HEITKAMP. Yes——

Mr. GROSSMAN. It is the tip of the iceberg.

Senator HEITKAMP. Mr. Levin, what would be your response to my question?

Mr. LEVIN. I think I would agree with what I took to be the thrust of your question, which is that people need guidance, and they have questions in their mind. They want to know where the agency stands. They do not want to wait for an agency to conduct an entire notice and comment proceeding in order to get an answer. They want an answer immediately. Agencies will respond by putting out informal statements that say, here is the position we would take. You are not bound by it, but at least you know what our position is.

If we were to say that those statements have to go through the notice and comment process, you would see many fewer of them and that would be less responsive to the public's need for an understanding of what the agency's position is and, oftentimes, they do not want to fight it, they just want an answer.

If you were to say, well, those statements can be issued, but they have no weight because the courts will not defer to them, then the

recipient of the advice would say, well, this does not do anything for me because I have not gotten anything——

Senator HEITKAMP. It is kind of worthless.

Mr. LEVIN. Right. So, if I can only trust what comes out through the notice and comment process, it is saying I cannot trust what the agency told me. If you are hostile to the agency, you would say that is great because they will not get deference, but if you just want an answer, you want to know, how can I conduct my business in a way that the agency will not challenge, then it is not good news.

Senator HEITKAMP. And, not to delay it, but controversial opinions or controversial decisions from agencies can always be reviewed by Congress. We know what they are. But, there is a reason why controversy exists, and frequently, this body is the most at fault for not providing certainty in terms of direction to agencies.

Mr. LEVIN. I agree.

Senator LANKFORD. Senator Portman.

Senator PORTMAN. Thanks, Chairman Lankford, for holding this hearing, and thank you, gentlemen, for giving us your wisdom here this morning.

The Code of Federal Regulations (CFR) is now about 180,000 pages long. It is increasingly complicated. We deal with complicated issues in Congress, understandably. A lot of those go to the agency for decision. Congressional oversight is rare, let us be frank, and so the agencies have taken on more and more responsibility and power and, by the way, have created, as Ranking Member Heitkamp said, a lot of uncertainty out there. I just had a meeting yesterday on some of this uncertainty as it affects my State of Ohio and our economy.

So, for better or worse, in my view, the most effective line of defense against executive overreach is often the courts, and the question is, what should the courts' rule be, and you all have differed this morning on what you see as appropriate. I feel strongly that Congress should do more in terms of writing legislation that is clear. That would be good. Often, by the way, even when we try to do that, as in the case of the Affordable Care Act, the Administration tends to come up with its own, not just interpretation, but changes in statute by executive action. But, that is what this debate is all about.

There are regulatory guidelines already in place and I think the public, rightly, expects agencies to make decisions based on an informed and objective manner. Executive Order (EO) 12866 is the famous one. It requires agencies adopt a regulation only upon reasonable determination that the benefits of the intended regulation justify its costs, and that agencies design regulations in the most cost effective manner to achieve the regulatory outcome, and that they tailor its regulations to impose the least burden on society.

And, having been Director of the Office of Management and Budget (OMB) at a time when the Office of Information and Regulatory Affairs (OIRA) struggled with some of these issues, this is incredibly important that we have some guidelines for the agencies.

I will say that there is a lot of research out there, including some research that you all have done, indicating that some of this regulatory analysis is completed, some of it is not. Often, the agencies

just fail to use the robust economic analysis, particularly independent agencies, of course, who are not subject to it because they are not within the ambit of the executive.

So, that is what we are focused on here, or at least I am, and the Regulatory Accountability Act (RAA), as you know, is bipartisan. It is something we worked on the last few years that attempts to put some more balance in here and to provide more judicial review in an effective way to be sure that 12866 and other standards are actually met. The idea of the Regulatory Accountability Act is to, frankly, get the courts more involved in ensuring that these standards are met.

And I know in your comments, Professor Levin, you said that the proposals that, quote, "would empower the courts to invalidate a rule based on the basis that an agency did not sufficiently comply with the procedural requirements," such as those I just mentioned, you have concerns about that. Your reason seems to be, I think, that courts are generalists and they do not have the ability or the expertise to be able to evaluate questions like—did the agency conduct an analysis? Was the analysis adequate given the circumstances and information available? Has the agency provided a factual basis for its conclusions or has it simply stated a summary conclusion unsupported by facts?

I guess my opinion is that we do need the courts to do that, and I know you also say that the courts should be able to review Regulatory Impact Analyses, which are sometimes extremely long and technical documents, as you know. If the courts can review those, I guess my question for you would be—and you say they should be able to review them to determine whether there is a rational basis for the court action. If courts have the competence to do that, I guess, why do you not think they can do the kind of analysis on the technical side that would be involved with an approach that I support, the RAA-type approach? Will not the adversarial process, aided by experts, if necessary, help distill some of these issues for judicial review? And, I guess, the final question is, do the courts not already conduct similar analyses under these statutes—the Regulatory Flexibility Act, the National Environmental Policy Act (NEPA), NEPA has this. If not, how does that task differ, in your opinion?

Mr. LEVIN. Thank you for that question, Senator Portman. As I mentioned in my statement, I have publicly supported a bill that you have offered to extend the OIRA process to the——

Senator PORTMAN. Independent agencies.

Mr. LEVIN [continuing]. Independent agencies.

Senator PORTMAN. Yes. Thank you for that.

Mr. LEVIN. At the same time, I have also participated in comments, along with the American Bar Association (ABA) Administrative Law Section, on various versions of the Regulatory Accountability Act. Some points we made there—and this was primarily directed at the House bill, but had some overlaps with your bill from last session, S. 1029—a concern is that if you add new procedural requirements across the board on agency rulemaking, you will be adding unwarranted complexity to the administrative process because of all the additional mandates that agencies would need to perform.

What we have today is a process in which the court can look at the analysis documents that were generated through the executive oversight process; and also, those documents go into the record and the stakeholders from all sides can critique them, can add their own evaluation. Those comments are also part of the rulemaking record, and so the court has quite a bit of input from multiple directions on the issues raised as to the regulatory analysis process.

So, I do not think there is any lack of input to the courts as to things they could look at, but if you add on top of all that additional mandates to the agencies to conduct the following studies, make the following findings, and you do it in the across-the-board way that much of the RAA did, I think that adds unwarranted complexity to the process.

Senator PORTMAN. I guess what I would ask you is, do you think that under statutes where the court does have that ability to actually enforce its opinion as to the Regulatory Impact Analysis, do you think that the Toxic Substances Control Act (TSCA), for instance, or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or Safe Drinking Water Act, do you think that in those areas where the courts already have the ability to review the regulatory costs and so on, do you think those are not working? Do you think the court does not have the ability to carry that out? And, if you do not believe that, then why would it not apply to other regulations?

Mr. LEVIN. What I am saying—excuse me, what the ABA Ad Law Section said, and I was a part of it, I am not speaking for them today, but I am reviewing what was said in the document——

Senator PORTMAN. Yes.

Mr. LEVIN [continuing]. Is that in those particular contexts, Congress itself made a judgment that there is a specific need for a certain set of criteria to be applied, certain evidentiary standards to be used, and the like. And, I do not actually mean to argue that in those situations where Congress found that need, that it is a bad piece of legislation, and it is a fact that the courts have enforced it. I have, on the other hand, thought that to apply this across the board to the entire regulatory apparatus is an unwarranted extension, because now you would be adding more layers of analysis without regard to a specific finding that that agency has problems that justify that treatment.

Senator PORTMAN. Thank you. My time has expired. Thank you, Mr. Chairman, for the deference, and again, I thank you both for your testimony and thanks for working with us on this. We want to get this right, and the notion is to have cost-benefit analysis, but also have it be enforceable through some kind of judicial review, and I think it is urgent that we find that. Thank you.

Senator LANKFORD. Senator Ernst.

Senator ERNST. Thank you, Mr. Chairman. Thank you, gentlemen, for appearing before us today. I do appreciate your testimony.

You may be aware of the case in front of the U.S. Court of Appeals for the D.C. Circuit on EPA's clean power plant that Attorneys General (AG) many States are challenging, and I had recently read an article that mentioned a letter sent by the State of West Virginia to the D.C. Circuit and they were concerned about comments from the EPA Administrator Gina McCarthy, and the com-

ments that she made basically were insinuating that the administration has thought for quite some time that they do have the authority to force States to implement these energy plans and that it is only a matter of time before the EPA's proposed rule becomes final. So, she seems to believe that she can go ahead and force States to do this, even before the proposed rule is final.

And, then, this is really concerning to a number of folks who have written, they have entered their comments, they have submitted those public comments, and they are hopeful that the agency is actually reviewing those comments and will take them into consideration before the final revised rule. And, in this case, a number of States contend that the EPA altogether lacks the authority to issue the regulation at issue.

So, I would just like to get your perspective on this issue. I know Senator Lankford had already addressed the fact that—and I believe that agencies are really exploiting the alleged ambiguity and relevant laws, really, to get to their point. But, particularly in instances where the head of an agency forecasts the content of a final rule, do you think it is appropriate for courts to wait on a final rule, then, before addressing the merits of the rule if the agency is already stating they are going to implement it?

Mr. GROSSMAN. Senator, first of all, the example that you put forward, EPA's clean power plant, is truly an exceptional example and I think it exemplifies the problem with the mood of deference and how that has affected agency operations.

The court case you are talking about, Murray Energy, before the D.C. Circuit, the Department of Justice (DOJ) on behalf of the Environmental Protection Agency has adopted, or has put forward four or five separate rationales as to why it is they believe that the statute is ambiguous, some of which defy commonly understood notions of grammar and meaning. And, the interpretive mission that the agency has embarked on there, in other words, to search out ambiguity in any possible way they can find it, under a rock, behind a tree, is something that really ought to be of concern.

Now, what makes this an extraordinary case, and I think possibly a very rare exception from the ordinary rule of finality, is the fact that the agency is actually acting right now. Although EPA has only put forward a proposal, the agency's Administrator, has said that they do plan to go forward with the final rule, but not only that, the agency has outlined deadlines for States and for regulated parties that force them to begin taking major and expensive action at this time before a final rule is released. This is a very unusual circumstance.

And, when I say it requires them to, I want to put emphasis on the word "requires." It is not possible to comply with the rule as EPA has proposed it and as EPA has indicated it intends to finalize it, without taking substantial action concerning billions of dollars' worth of investment right now at this time.

So, in these very unique and very strange circumstances, I think there is a case for judicial review prior to finalization of a rule. In general, that would be a far-fetched proposition, but this may be the one instance that proves the rule.

Senator ERNST. Thank you.

Yes.

Mr. LEVIN. Your comment about the letter from the Attorneys General made me think of a case I teach every year in Administrative Law called the *Association of National Advertisers* v. *FTC,* decided by the D.C. Circuit back in 1979, which essentially said that there is virtually no such thing in the rulemaking context as prejudgment of the kind that we would talk about in the context of adjudication. Agency heads always have opinions. They are expected to have opinions. They could not function without a policy direction about where they want to go. It would be an abuse of discretion to launch a rulemaking proceeding if you did not have some context of where you wanted to go.

So, the courts simply will not say the agency head expressed a strong opinion, therefore, it is an impropriety. Rather, they say, go ahead, take the position that you are going to take, but remember there will ultimately be judicial review of whether it stands up on the merits.

So, I do not think it was improper for the Administrator to make the comments. There is a separate question, whether the plan itself is legal, which will ultimately be sorted out and judicial remedy will be available.

Mr. Grossman is right that it is not commonplace to bring a case before the courts while it is simply a proposal, and I guess the case remains to be decided as to whether it is soon enough. All I know is the press reports in which judges appointed by Republicans were incredulous that a case could be filed like this while it was just a proposed rule. But, maybe they will change their mind during the deliberative process and agree with Mr. Grossman. The signals did not sound that way.

Senator ERNST. Well, it is an extreme case, I understand, but it really goes back to something that I have hit on many times in this Committee, the fact that we have entities out there, we have a public that is out there that is responding to public comment. They are entering what they believe is to be the proper course of action, of course, anything that might be detrimental to their businesses, to their individual lives, and we have many agencies that are not, I believe, taking those into consideration as they move forward, and this is exactly one of those examples.

Mr. LEVIN. Right. So, in the Mortgage Bankers case decided last month, the Supreme Court reaffirmed what had been common law and administrative law for many years, which is that an agency in a rulemaking process has a duty to respond to comments from the public. So, that will be part of the ultimate decision of whether they are acting lawfully.

Senator ERNST. Absolutely. Thank you, gentlemen, for your time today.

Thank you, Mr. Chairman.

Senator LANKFORD. Senator Peters.

Senator PETERS. Thank you, Chairman Lankford and Ranking Member Heitkamp, for this hearing, and thank you to our witnesses. We certainly appreciate your testimony here today.

The one issue that I want to raise, and something that I am particularly concerned about, is the impact of judicial vacancies on our capacity for the judicial reviews being discussed today. There are currently 54 vacancies in the Federal courts and only 14 have

nominees pending at this time. There are another 26 future vacancies that we know are coming within a year and only three of those have nominees pending. If the courts are asked to increasingly review agency issued regulations, this will obviously quite substantially increase the workload of an already overloaded Federal bench.

Until 2 weeks ago, this Senate had not confirmed a Federal judge. There are currently 17 judicial nominations that the Senate needs to act on, and even more vacancies without nominees. I think an important first step is for the Senate to address these vacancies on these pending nominations, but even if all these vacancies were filled, the nonpartisan Judicial Conference of the United States has recommended that Congress create 82 new Federal judgeships to properly address the current caseload.

Earlier this month, the Wall Street Journal reported that pending cases are up 20 percent since 2004, with over 330,000 cases pending before Federal courts. Of those, over 30,000 have been pending for 3 or more years.

So, given this backdrop, Mr. Levin, do the courts have the resources to provide adequate review of all cost-benefit analyses that are now being produced by agencies, and what is this going to do to this already pretty extensive backlog?

Mr. LEVIN. I entirely agree that there is a problem of undue vacancies on the courts. I would hope that both the nomination process and confirmation process could be expedited to allow that to happen.

There is a mismatch many times between what the laws require judges to do and the resources made available for them to do it. I think that is a generic problem. Adding to the obligation to work through cost-benefit analyses to a greater extent than they do now would aggravate it, but it would aggravate it in the same way as many other things could aggravate it.

So, my critique is not so much that they would not have time, but that it is not the task for which they are best suited. And, given all the pressures on the courts these days to make time for the cases they do have, you want to be very cautious about passing any legislation that would materially increase it.

Senator PETERS. Well, it is clear, given this law, putting in a number of cost-benefit analysis requirements for the courts would be a heavy burden for them when already we are looking at delays of 3 or more years for 30,000 cases and 330,000 cases pending. Certainly, there are other things that can add to the backlog, but this would add a significant burden that would continue to slow down the system and allow judges to deal with important areas of justice that they have to deal with each and every day——

Mr. LEVIN. So, I am agreeing with that and then saying, and it is more than that.

Senator PETERS. It is more than that, and let us go to that. Where they may have the time and the resources and the necessary expertise, as you have alluded to, it seems that many times that they are being asked to review some pretty highly technical regulations, including things that are based on significant scientific expertise, how can the courts deal with that? How best can they deal with those kinds of issues?

Mr. LEVIN. Well, it takes a lot of time to study those records, to write those opinions, to reach agreement on a panel. I would suggest that, to some degree, the answer is to give a reasonable amount of deference to the agency that has the specialized expertise in the area, so they do owe a hard look, as it is called, to see if the agency acted reasonably. But, I think they need to draw the line short of making all those decisions again on their own.

And, so, putting some confidence in the agency and the political process in which the agency operates can be desirable, because I share Senator Heitkamp's point that it is important to remember that the agency answers to Congress and they answer to the public so that is a source of constraint that suggests that a court should not try to do everything in the review process. They should look to see if it is reasonable, but they should not try to decide themselves all the scientific questions.

Senator PETERS. So, in addition to the delays that occur because of the already overloaded courts and also the need to get some very sophisticated information in order to make well-reasoned decisions, I am also concerned that because of all of that, which would slow down the process, that would likely mean significant delays in the rulemaking process because of these increased procedural requirements that some folks are talking about.

So, would mandating additional judicial review have a major chilling effect on the rulemaking process, do you believe?

Mr. LEVIN. I think so, but in the sense that if you give the agencies more tasks to do and no more resources to do them, that will strain their resources. So, your point about adequate funding for the courts should be paired with adequate funding for the agencies because their budgets have been cut. The discretionary spending has been reduced at the same time that Congress continues to add more expectations for them. And, so, there is a mismatch there, as well.

Senator PETERS. And, as that has slowed down and as rulemaking has a chilling effect, although companies and industries are going to be expecting some rulemaking, as you know, uncertainty has an incredibly detrimental impact on economic activity on businesses. So, now you have the uncertainty as to what is going to happen with rules, and those are going to take much longer with some of these proposals. I suppose you could also see there could be an increase in litigation. Would you expect that this might increase litigation, if we have more proposals and more procedural requirements for rulemaking?

Mr. LEVIN. If you add new requirements and make them judicially reviewable, that is more or less by definition an invitation to more litigation to test whether the agency measured up under those standards.

Senator PETERS. So, in a sense, we have an overburdened court without the resources to deal with the issue that is going to delay rulemaking, which will cause uncertainty, which will have a negative impact on the economy as well as increasing litigation in the courts. If I can summarize what you are saying.

Mr. LEVIN. Yes.

Senator PETERS. Great. Thank you.

Senator LANKFORD. For the Committee and those of you all here at the dais and for you, the second round, it is the tradition of this Committee—what I mean by tradition is we have done it once, so—— [Laughter.]

So now we are just going to keep doing it. [Laughter.]

The second round of questioning is open, and so every microphone is open and we are open to have open colloquy here and with you, and so it is a less formal round of questioning on that.

The challenge that I see on this is how to continue to give Congress its legislative powers that are required by the Constitution, which I think all of us want to see the clear separation of powers in Congress to the part that says all legislative powers shall reside in Congress actually has meaning, as well, and to continue to be able to practice that.

So, my question is, where there is ambiguity in the law now, deference is given to the Executive Branch rather than deference to the Legislative Branch, meaning if it is unclear, if there is ambiguity, the courts would look at it and say, I am going to trust the people in the agencies because Congress did not complete this, rather than saying, this has to be on hold until Congress brings clarity. So, the assumption is Congress will not clarify, so the agencies must clarify, rather than this is unclear in the statute, Congress needs to go back and bring clarity. Until then, it is on hold, or no, you cannot move this. Why is the deference given to an agency from the Judicial Branch rather than the deference given to the Legislative Branch?

Mr. GROSSMAN. If I could, it is a very good question. The idea, I think, is, to begin with, there is this background assumption underlying the deference canons that the Congress has intended to delegate to the agencies interpretative authority to fill up the details of statutes where Congress has not specified particular details. That assumption may or may not prove correct with respect to different statutes, but that really is the core idea underlying both *Chevron* as well as *Auer* deference, that is what Congress's intent is.

Second, in terms of why the Legislative Branch itself is not deferred to, I think the way to look at that is, obviously, the Legislative Branch itself cannot participate in an official basis in litigation and express its views other than by enacting laws. And, certainly, enacting laws is, by far, the best way to clarify and resolve ambiguities in statutes.

But, where that does not happen and where it is not possible and where you have ambiguities or vagueness, the question is, to what extent are those questions of statutory interpretation going to be decided by courts who may be looking at, trying to wring from a particular statutory scheme every ounce of meaning they possibly can from it. In other words, when you have something that appears to be an ambiguity, if you apply all the traditional tools of statutory interpretation, the ambiguity might be substantially narrowed so that an agency has at its disposal several possible choices, but perhaps not a wide range of choices.

And, I think that is really where the disagreement is in this particular debate. There are always going to be ambiguities, and when there are genuine policy decisions to be made, it probably makes

sense, in general, for those to be made by the agencies. But, the real question is the scope of their authority to do so.

Senator ERNST. Can I jump into that, please?

Senator LANKFORD. Yes.

Senator ERNST. Something that I did not have the time to address, and I think it fits well here as we talk about constitutional authority, whether it is the Judicial Branch, Executive Branch, Legislative Branch, but if both of you could just take a moment and visit a little bit about sue and settle, when the agencies maybe decide not to defend themselves, or someone sues and they decide to settle out of court. It is done behind closed doors. It really takes away the transparency, I think. Decisions are made behind closed doors but do not involve a lot of the different members that we have spoken about. So, rules and regulations are made behind closed doors and the public is not aware of what is going on behind those closed doors.

Mr. LEVIN. I wanted to respond to Senator Lankford, and maybe I can also respond to you, Senator Ernst. On Senator Lankford's point, I really do not think that there is a lack of deference to the Legislative Branch because the legislature can intervene and make a decision through legislation when it chooses. I think the problem is that it too infrequently uses that authority, I think is the point Senator Heitkamp made earlier——

Senator LANKFORD. Let me just jump in there. The standard to actually interrupt a rule is as high or higher than it is to making a law in that sense. So, if you have, let us say, a divided Congress or Congress and the White House, and the White House through their agencies have put in a policy, have found a vagueness in a rule, have put out a rule, Congress wants to respond to that. They now have to get 67 votes in the Senate to be able to overthrow that, when at the beginning they would only have to get 60 for cloture or 51 for passage. So, now, you have this very high standard because you assume the White House is going to veto any kind of change in their policy that they put in place. If you have a politically divided House and Senate, then the agencies can basically move at whatever will they want, knowing that one area is not going to check them.

So, the unusual standard here, as I understand the legislature has a responsibility in that and has the ability to be able to do that, but it is the capacity to be able to get that done where there is a vagueness and the agencies have more leeway. Does that make sense?

Mr. LEVIN. It does, but I think what you are saying is it is too bad that we have bicameralism and——

Senator LANKFORD. No, sir, I am not saying that. [Laughter.]

Most definitely not saying that.

Mr. LEVIN. I misunderstood.

Senator LANKFORD. What I am saying is it is too bad that the executive now makes a rule, enforces the rule, and interprets the rule. What I am saying is, it is too bad that we are now creating a system where only one branch runs everything and the judicial branch gives deference to them and the legislative, when they have differences in political opinions, which the American people do,

does not get to speak to that. That is what I am saying is the problem.

Senator HEITKAMP. And, if I can just jump in here, but taken that is kind of the problem, that politically, and let us at least acknowledge that the President is politically accountable for decisions that he makes, maybe not in his second term, but——

Senator LANKFORD. Right.

Senator HEITKAMP [continuing]. He is politically accountable and has an obligation to listen to what people believe and we all go there. But, the solution of turfing this or making the court the ultimate arbitrator of these decisions has its own limitations.

And, I think it is interesting that the two cases we are talking about today, direct regulations that we have referenced, which is Waters of the United States and clean coal, the EPA CO2 regulation, both of those situations are presented because of Supreme Court decisions. So, you already had a review process that may not necessarily have dealt with deference, especially on CO2, because the question was EPA had decided not to regulate CO2 and the court reversed that decision and said, yes, you have jurisdiction to regulate CO2, and that began this process that we are in.

When you look at the opinions in Waters of the United States you have four deciding that EPA is wrong, you have four deciding EPA is right, and you have a decider in the middle who said, well, I am going to side with the four that said EPA is wrong, but I think you ought to maybe think about doing it this way. And, so, there is huge uncertainty that is created, and ironically in those two cases, created because of Supreme Court decisions.

And, so, I understand and appreciate the concern. I am as vehement about Waters of the United States and CO2 regulation as anyone on this panel. But, I think that we are asking to put a really heavy burden on the courts when, as Senator Peters was talking, courts are ill equipped at this point, just in terms of resources, to play that role, and is that—what role does the court have in all of this?

And, we are really talking about a standard, because, should it be *Chevron* deference or *Auer* deference or whatever it is, at the end of the day, what capacity does the court have, I think is the question, either in terms of resources or ability, especially given the two examples we are having here where the Court did not provide additional clarity, in fact, may have made it even more difficult to find clarity.

Senator ERNST. And, again, I would like to jump back in. And what happens when it is not the court, but behind closed doors when settlements are made——

Senator HEITKAMP. Yes.

Senator ERNST [continuing]. Where does that fit into this?

Senator HEITKAMP. And that is a problem, Senator, regardless of who is—it could be corporate America could be behind the closed door——

Senator ERNST. Exactly.

Senator HEITKAMP [continuing]. It could be the environmentalist behind the closed door. I am always concerned about friendly lawsuits that make a policy decision and say, now we are enforcing a consent decree and not interpreting a statute. And, I guess, Mr.

Levin, it would be interesting to hear your perspective on the friendly lawsuit possibility.

Mr. LEVIN. The question has been kicking around for a long time, and one of the problems is a lack of clear factual information about the extent of any abuse, and it is often the subject of heated charges in both directions. But, I would say that Congress should be careful in this area and develop clear factual basis for any action it might take.

Senator HEITKAMP. But, do you share our concern that this, in fact, could happen and maybe has happened in the past?

Mr. LEVIN. It could. But, I think the number of accusations exceeds the number of ones that can be substantiated.

Senator HEITKAMP. Verified.

Mr. LEVIN. So, I do not want to dismiss it——

Senator LANKFORD. But, are affected parties brought to the table? So, if a consent decree is made within a group and then suddenly that new regulation was imposed, was appropriate comment given to the affected parties or do they suddenly have the imposition of a new regulation?

Mr. LEVIN. Oh, I think that is a fair question to ask and parties should have the opportunity——

Senator LANKFORD. That is the prime concern. It is not just the transparency. It is that affected parties are not given the opportunity for comment.

Mr. LEVIN. In concept, I do agree.

Senator HEITKAMP. Correct.

Mr. GROSSMAN. Senator, if I may, I actually testified on this particular issue before the Senate Judiciary Committee in the last Congress, and my testimony recounts in substantial detail a number of instances of abuse of the settlement process with regulatory agencies. I agree that it does not happen all the time, but there are instances where it has happened.

In response to that testimony as well as other policy interests, there was introduced, I think it is called the Sunshine and Settlements Act, which does not alter any substantive rulemaking standards or anything of that sort but simply provides a procedure so that parties who are interested can become aware of these circumstances and can participate in ways such that their views are taken into consideration.

Senator LANKFORD. Going back to consent decrees and Senator Ernst, is it inappropriate to ask any agency not to be able to make a consent decree if you are changing a discretionary authority to a mandatory authority? Is there a problem with that, to just limit—you cannot make a consent decree that changes substantively something that was discretionary to mandatory?

Mr. GROSSMAN. Well, I think there are two ways to look at it. On the one hand, when an agency has the discretionary duty, it could just say, fine, we are going to go ahead and carry out that particular duty, whether it is to regulate a particular pollutant or undertake some other regulatory action.

The one issue that really arises in terms of transferring these things from discretionary duties to mandatory duties is the power to basically bind future administrations——

Senator LANKFORD. Right.

Mr. GROSSMAN [continuing]. In other words, to remove their policy discretion. This is something that we saw quite a bit of during the transition from the Carter Administration to the Reagan Administration, where the Carter Administration in its final days had agreed to regulate a laundry list of particular substances and the Reagan Administration spent pretty much their entire first term trying to get out from under that and ultimately was unable to do that in a very contentious series of cases in the D.C. Circuit.

And, that led at the time Attorney General Ed Meese to put forward a Meese memorandum that actually limited agencies' authority to bind their successors. He realized that this would reduce the power of the Reagan Administration to bind whatever administration came thereafter, but his view was that it was the right thing to do.

Senator LANKFORD. OK. So, short answer. Do you agree that changing a discretionary to a mandatory is a good limitation? I know that was part of the Meese memo, as well.

Mr. GROSSMAN. Mm-hmm.

Senator LANKFORD. Is that an appropriate limitation on a consent decree, to say, yes, we can do consent decrees, but they are not unlimited in their ability. You cannot change the discretionary to a mandatory and control, basically, the actions of the next administration based on a consent decree that did not have outside input from affected parties?

Mr. GROSSMAN. I think, in general, that is correct. Look, the question is a very nuanced question——

Senator LANKFORD. Sure.

Mr. GROSSMAN [continuing]. Because of the scope of agencies' authority to carry out certain actions. But, I certainly agree with you that the power to bind a subsequent administration is——

Senator LANKFORD. What about changing line items of spending, that you could do a consent decree to change line items of spending? Obviously, that is congressional intent just got altered. Should a consent decree allow an agency to alter spending line items?

Mr. GROSSMAN. No, of course not. I think the distinction, and the only reason I am hesitant, is because many duties that agencies take as being discretionary are things that, frankly, in statutes are specified as non-discretionary. Congress may say "shall" and the agencies decide, well, we have too much on our plates, and so we are going to take the "shall" and read it as a "may." And, so, in those circumstances when an agency acknowledges that they, in fact, do have a non-discretionary duty, it is difficult to say whether their decision to recognize what is in the statutory text is necessarily a mistake. So, it varies from case to case.

That said, there are plenty of cases where that is not actually what has happened, and so for those cases, I think the thrust of your questioning is exactly right.

Senator LANKFORD. OK.

Senator HEITKAMP. When you look at this, I think we all know that things are controversial. I mean, we could talk about the fiduciary rule now coming out of the Department of Labor (DOL). I mean, I could probably give you the top 10 most controversial regulations making their way through the regulatory body.

But, underneath all of that is a tremendous amount of regulation that goes on that is—you can argue whether it is necessary or not, but it is critical that we have agencies that are able to do that work in a timely fashion to give the certainty to the constituency stakeholders that they need in order to function.

And, one of the problems that we have is we react to things like the Waters of the United States, we react to CO2 regulation in a way that then gives broad brush strokes that may, in fact, have stopped us from moving forward and giving predictability that we would otherwise have. Do you see what I am saying? We take the controversy and we redesign the system to deal with what is controversial and that may, in fact, put way—too much onerous burden on the everyday regulation that has no controversy, and I guess I would like to hear your response to that, Mr. Levin.

Mr. LEVIN. Oh, I agree. I think that was implicit in some of what I was saying to Senator Portman, that one can look at particular areas and say there is a special need, but if you extrapolate it governmentwide, you will be affecting functions that were not really that controversial but that Congress has said should go on, and adding procedures on such a broad basis can weigh down the process in that way.

Senator HEITKAMP. Mr. Grossman.

Mr. GROSSMAN. I agree with you. I would also add that, a lot of uncertainty comes in areas that can be resolved by agencies. You noted, for example, the Waters of the United States rule. If EPA and the Army Corps of Engineers wanted to, they could write a rule tomorrow that would win nine votes on the Supreme Court and it would be, relatively speaking, a pretty easy thing to do.

What happens is that they have policy interests that are not necessarily compatible with the different views that have been expressed on the Supreme Court and that is why you have the uncertainty and the complexity in that area. I think in some cases where agencies are really trying to test the very limits of their statutory authority, and in some cases while disregarding traditionally understood limits on that authority, that is when you wind up with a lot of uncertainty in major areas.

Senator HEITKAMP. Right. And, it goes to my argument, which is Congress needs to take responsibility for clarifying ambiguity in things that are as controversial, I think, as CO2, as controversial as Waters of the United States, maybe the fiduciary rule that is coming out of the Department of Labor right now. And, when we do not do that, that just becomes an invitation for further expansion of agency authority. When we do not act effectively, we are basically writing a blank check.

And, so, the only entity, in my opinion, that can fix a legislative problem from the agency is Congress. And, by putting too much responsibility on the courts because maybe we think the political solution is too tough, we are abrogating our legislative responsibility not just to the agencies, but also to the judiciary.

And, you made a great point, I think, Mr. Grossman, when you started out, because you talked about judicial activism, which for years was a buzzword, saying they have too much authority, they are being too interpretive. Now, we are talking about executive

agency activism and the real problem is legislative inactivism in helping resolve a lot of these controversies, it seems to me.

Mr. GROSSMAN. I do not disagree, really, with any of that. Congress really should be the first mover in pretty much every instance, particularly when you are dealing with major questions.

That said, one point that may get overlooked in this discussion is something that economists refer to as the endowment effect. It matters who has a right to begin with. So, when we are starting now where we are, where we have a large body of laws, many of which contain very capacious language of delegation and authorization, under our current systems of deference, the agencies view themselves as being the ones with that first mover ability because they operate under this very broad, unbounded language that is only limited by sort of traditional and settled understandings rather than necessarily clear statutory barriers. And when those understandings fall away, the agencies view themselves as having a great deal of authority that Congress may well never have intended. So, that is the endowment they have.

And, yes, you are right. Congress certainly can, in some instances—technically speaking, constitutionally in every instance—reverse those decisions. But, the problem is, there are enormous hurdles and veto gates that make it very difficult to do that when agencies start with that endowment. I mean, it matters who has what at step zero.

Senator LANKFORD. May I ask you, what happens if Congress passes some sort of mandate, which I know you have affirmed before you do not think is a good idea, say we are not going to do *Skidmore*—or, I am sorry, we are not going to do *Chevron* deference. We are going to do something more like *Skidmore* deference. That is going to be the policy and we will try to push it back there. Obviously, Congress has the authority to do that. What happens if that occurs?

Mr. GROSSMAN. Well, as I discussed in my testimony, my general answer is I do not know. There is some reason to believe, based on empirical research, that the difference in judicial outcomes would not be very large. My hope would be, and it is my hope and it may be an idle hope, would be that it would change the mood that currently affects agency rulemaking and that agencies would recognize that they may well be subject to greater checks and that deference is not necessarily something they can count on at every instance.

Do I know that would be the case? No, I do not. As I discuss in my testimony, it seems to me the best answer is really rigorous application of *Chevron* step one, but that is something, I think, that it would be very difficult for Congress to legislate.

Senator LANKFORD. So, where is the check, as I have mentioned before, for an agency or an independent agency that they both create the rule, they interpret the rule, they enforce the rule, and if you want to appeal the rule, you are appealing the rule to the person sitting next door to the previous person that gave you the previous decision. There is no place to go outside.

Banking is a good example of that. There is really no place to go to be able to get another opinion outside of this particular group of regulators, and so you may disagree with this opinion of this regulator, you may appeal it, but that same regulator is now going to

come back and is going to bring more things on you in the days ahead. Where do we build in a structure where there is not a due process outside of that entity?

Mr. GROSSMAN. Two responses. First of all, talking about an agency's interpretation of their own rules, that is something that, I agree with the thrust of the questioning. That is something, I think, is worth considering, and I think could have some effect, and probably a positive effect.

With respect to areas where judicial review is sometimes difficult to obtain and certain types of decisions are left within the agencies, it is a difficult question. There are some areas where, due to the statutory schemes that Congress has enacted, you effectively have procedural dead ends where it is difficult to get a final definitive judicial interpretation of the extent of an agency's authority.

It seems to me that where those exist, and there are fewer than they were in the past, those are ripe areas for Congress to consider what the proper procedure is.

Senator LANKFORD. OK. Mr. Levin, do you have any comments on that?

Mr. LEVIN. Well, I think that if you were to change the Administrative Procedure Act to provide that all agencies' interpretations of law will be decided under *Skidmore,* I think you could be confident that it would cause enormous confusion, not just because Congress had enacted something new, and not just because the phrasing may be difficult to work out, as, I believe, has actually been the case with the recent bills, but also because the *Skidmore* test itself is considered to be one of the most indeterminate in all of American law.

Senator LANKFORD. Is *Chevron* applied consistently?

Mr. LEVIN. I would say in relative terms, *Chevron* is widely viewed as the more determinant and predictable standard.

Senator LANKFORD. But, is it consistent?

Mr. LEVIN. I do not think any standard is applied completely consistently I also think that there are judgment calls to be made and judges will bring other considerations to bear no matter what standard you provide. But, I would still say *Chevron* is considered a relatively determinate, *Skidmore* a relatively vague and indeterminate one.

Senator LANKFORD. OK, so the challenge I still come back to is when there is the difficulty that sits before a judge, and there are moments, clearly, there are many moments where something is big, significant, and however you are going to determine significant, it is sitting before a judge to determine whether this agency is going to get deference to be able to make this rulemaking and to be able to finish this out with whatever the rule was, when it is vague, why is the assumption not given to Congress to say, the agency cannot act on this. Congress has to provide clarity.

Why is the decision, yes, the agency is smart, they have done the research, they have done this, they are creating new ground. They are moving out into a new area that Congress may or may not have intended in the past. But instead of waiting on Congress to act, the agency is given forward motion and Congress has basically said, if you want to change the forward motion of this agency, Congress can then go back, pass a law, override a veto of the President, but

until they can get a Presidential override, this agency gets deference to keep moving as far as they want.

Mr. LEVIN. I could be mistaken, but it sounds as though you are proposing a judicial revival of the so-called non-delegation doctrine, which is a theory that an agency cannot act until Congress provides specificity. That is a theory that has gotten some support in 1935 and never since because the courts simply find themselves unable to deal with that.

Senator LANKFORD. There are a lot of small areas of that.

Senator HEITKAMP. Yes.

Senator LANKFORD. I am talking about major areas. There are major issues that have significant changes that now it is the battle to go take something back rather than to try to pass it.

Senator HEITKAMP. But, let us stick with the Waters of the United States example. So, now you have this controversy. The regulation is moving forward. It is at OIRA, I believe, and so we are waiting. I do not think Congress should wait. I think Congress should play a role in making this determination.

But, when you say, so, now let us say the court, instead of issuing the opinion that they issued, said, OK, hold off. We are not going to—you cannot do anything. You cannot interpret this until Congress interprets it. In the meantime, I have a farmer who wants to title their land and they have applied for a permit, or they need to know if they have to apply for a permit. And, so, in the real world—I am saying, in a theoretical world, that is fine, but these regulations have practical effect every day. And to say, we are simply going to stop—and, I think, the court would say that. We cannot just stop and say, put everything on pause, because we have real practical applications.

Let us take *King* v. *Burwell*. So, what happens if the court says, we are going to stop until Congress acts. That creates a tremendous amount of uncertainty to the folks who have gone to the exchange, that is the Federal exchange, and have relied on the tax incentives on that exchange.

And, so, I guess, my point in this is that, theoretically, where I have been arguing Congress needs to act, it also is probably not a path forward for what I would call a stay of any executive action pending the Congress doing its due diligence and fulfilling its responsibilities has huge impact in the real world.

Mr. LEVIN. And, I do not want this comment to sound overly critical, but it is a fact that Congress has been much less productive over the past several years——

Senator HEITKAMP. That is OK, if you are overly critical. We are, too.

Mr. LEVIN. Very well. But, it does not need to be, because I could just make the descriptive point that when you have the last two Congresses at historic levels of non-activity, the most—passing fewer laws than any other Congress in recorded history—it puts a great deal of pressure, in effect, on both the Executive Branch and the Judicial Branch to see if they can find ways for the government to go on and do what it needs to do and fill gaps.

Senator LANKFORD. So, the question really is does it put pressure on the Executive Branch or does it give the Executive Branch opportunity?

Mr. LEVIN. Both. That is another way of putting it.

Senator LANKFORD. But, that is the issue and that is the challenge, is that when we have—and there will be moments again, multiple moments, but under the trend that we are heading in the judicial deference, when we have divided government, which will happen a lot in America in the days ahead, does that create opportunities from here on out for the Executive Branch and all agencies to move through the vagaries of every rule that they can find, create as many policies as they can to have that deference, because they are smarter and they have done comments, whether they have acted on those comments or not, and to be able to move unchecked.

Mr. LEVIN. Well, they have the authority that they have, and so there will be arguments about whether they have exceeded that authority. Courts will review those questions. The point I was making was that in the absence of legislative input, for better or worse, there will be impetus on both of those branches to make it possible for functions to be performed, and——

Mr. GROSSMAN. Oh, sorry. If I could, I mean, I agree with Professor Levin regarding the incentives, but I would note that the incentives actually work both ways. To the extent that the Executive Branch can take actions that reduce pressure on Congress to act, the result, understandably, will be inaction, and I think a paramount example of that is the numerous executive fixes that have been made to the Obamacare, the Patient Protection and Affordable Care Act. And, I am not talking about controversial things like the exchange credits. I am talking about deadlines, mandatory deadlines that were set in law, and taxes that were set at certain rates and things of that nature, where—numbers and "shall" and things like that were altered.

Senator HEITKAMP. Where the first analysis probably was, who is going to sue us if we do it, right?

Mr. GROSSMAN. Well, I think in many cases, the analysis that the executive agencies undertook was that nobody would have standing to sue them. And, so, you might have had an opportunity for Congress to come together, potentially, to make some number of fixes to this type of statute. But as it was, since the Executive Branch was making those fixes, there was absolutely no pressure at all on Congress to do that.

Mr. LEVIN. I would not say there was no pressure on Congress to do it. I would say that it was not heeded. But, the upshot was that the agency had and has a program that it has been told to implement.

Senator HEITKAMP. Well, I mean, if you take my example of *King* v. *Burwell*, if the judiciary decides we are tired of patching this together, what happens?

Mr. GROSSMAN. Well, I think *King* v. *Burwell* is really a very troubling case. I mean, it is troubling, first of all, in its implications, and I think everyone should acknowledge that, that if people who do depend on exchange subsidies lose them, that is, if that happened suddenly, that can have real consequences.

But, it is also troubling because the way we got into this area was that the agency, by interpreting the law in a very implausible manner, changed the facts on the ground. In other words, it acted aggressively and the result was to put us in this bind, where if the

court decides in a certain way that is probably the most natural reading of the text, there will be dislocation and consequences. And, I think that is really an example of where we wind up when you have excessive deference——

Senator HEITKAMP. Right——

Mr. GROSSMAN [continuing]. That agencies feel that they are able to do that.

Senator HEITKAMP. And the court does not live in a vacuum. I mean, the court understands real world implications of their decisionmaking. They are not going to not consider the actual consequences. But, I think it is going to be a very interesting decision.

Mr. LEVIN. Well, I think it is, but could I also add that I do not agree with the proposition that the position the government took was implausible. I think they took the position that they believed with great conviction was intended by Congress all along. If it is the case that for the Supreme Court to adopt Mr. Grossman's reading would cause great disruption, that seems like a good reason to believe that the IRS got it right because it would be disruptive to have the world the way the challengers are urging.

Senator HEITKAMP. And, we should acknowledge that there is a split in the circuit on the actual interpretation of that statute, not just agency interpretation of it.

Mr. LEVIN. Right.

Senator LANKFORD. Versus the plain text reading, which is——

Senator HEITKAMP. Yes.

Senator LANKFORD. The discussion now is over, was that the intent and was the intent actually put into the statute. When you read the statute in its plain reading, and we can have a great discussion about this, but when you read the plain text, it reads one way, and when you hear speeches, you hear something different. To say the speed of how the law was written and done, did that line up with it, that is a whole different issue for a different day and for a different hearing, but we will—— [Laughter.]

Mr. LEVIN. We could go on in that vein indefinitely if we wanted to.

Senator LANKFORD. We could. This will be settled somewhere around June 25, there will be a decision up here one morning on the website and try to find some sort of resolution of what happens next from there.

I appreciate your testimony and your preparation for this. As promised, we did not resolve all of this. What I hope we did is be able to gather some ideas. We do need to find some resolution.

I am very concerned about the direction this continues to go in the back-and-forth nature of regulations unchecked on it without some consistency to business and individuals and families and cities and States trying to figure out where we are really going. So, literally, policies and regulations change at the whim of the executive rather than have some ongoing consistency. It is the nature of our great republic, that you have predictability in law. And, if we no longer have predictability in law and regulations, where things are going, it is a problem to us long term.

So, I appreciate very much. I do believe that other individuals that were not on the dias will have 15 days to be able to submit

any kind of questions or opening statement they might want to put on the record.

I appreciate you being here and being part of this conversation. With that, this hearing is adjourned.

[Whereupon, at 11:31 a.m., the Subcommittee was adjourned.]

APPENDIX

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
United States Senate
Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

Hearing on "Examining the Proper Role of Judicial Review in the Federal Regulatory Process"

April 28, 2015

Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee, thank you for the opportunity to appear today. It is a privilege to be able to participate in this hearing on the proper role of judicial review in the federal regulatory process. In this statement I will concentrate specifically on review of rulemaking.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. Much of my scholarship is devoted to studying judicial review as well as legislative revision of the administrative process. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. Today I am testifying solely in my individual capacity and not on behalf of any organization. However, I will refer to various positions taken by ACUS, the ABA, and the Section where those positions are relevant.

My starting point is a premise that I expect all of us share: that the institution of judicial review of administrative action is a cornerstone of our legal system and an indispensable safeguard of the interests and rights of the American people. This notion was well expressed years ago by a jurist who now serves as a member of the United States Senate. In an opinion for the Supreme Court of Texas, Justice John Cornyn wrote as follows:

> Judicial review of administrative rulemaking is especially important because, although the executive and legislative branches may serve as political checks on the consequences of administrative rulemaking, the judiciary is assigned the task of policing the *process* of rulemaking. Given the vast power allocated to governmental agencies in the modern administrative state, and the broad discretion ordinarily afforded those agencies, judicial oversight of the rulemaking process represents an important check on government power that might otherwise exist without meaningful limits.[1]

The premise that judicial review is vital does not, however, lead automatically to the

---

[1] Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667, 670 (Tex. 1996).

conclusion that the process by which it operates is in need of legislative revision. On the whole, the theme of my remarks today will be that the system is not particularly broken and does not need significant fixes. The ABA Administrative Law Section made this point a few years ago in its comments on the House version of the proposed Regulatory Accountability Act (RAA):

> Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron* and *State Farm* (and, of course, for decades prior to their issuance), courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.[2]

More specifically, in this statement I will recommend against two specific proposals that have recently been under discussion. One is to provide for broad judicial review of regulatory analyses; the other is to modify or abolish the deference that courts display when reviewing an agency's interpretation of its regulations.

I. Legislative reform of judicial review

The law of judicial review has largely been developed by courts themselves, but Congress has also played a significant role in its evolution. First, and most obviously, Congress codified fundamental elements of the system in chapter 10 of the Administrative Procedure Act (APA) in 1946.[3] These provisions largely reflected existing case law doctrines, but their presence in the statute books has provided a focus for debate and decisionmaking ever since.

Moreover, in subsequent years Congress has occasionally stepped in to update the system, sometimes with reforms that could only have been accomplished through legislation. In 1976, Congress adopted several measures that widened access to the courts. It largely eliminated sovereign immunity as a defense to review of government action (except in suits seeking money damages) and dispensed with the need for a litigant to name the United States as an indispensable party in APA litigation.[4] The same legislation also eliminated the then-prevailing requirement of a jurisdictional amount in challenges to federal government action (a few years before Congress eliminated the amount requirement in federal question cases generally).

Later, in 1982, Congress adopted a useful measure providing that when a person files for judicial review in a federal court that does not have subject matter jurisdiction, that court may transfer the action directly to a court that does have jurisdiction.[5] This provision can apply

---

[2] ABA Sec. of Admin. L. & Reg. Prac., *Comments on H.R.3010, the Regulatory Accountability Act of 2011*, 64 Admin. L. Rev. 619, 667 (2012). In the current Congress, the House has passed an almost identical version of the RAA on January 13 of this year (six days after the bill was introduced), and it is now pending before your committee. H.R. 185, 114th Cong. (2015).

[3] 5 U.S.C. §§ 701-706 (2012).

[4] *Id.* § 702, added in relevant part by Pub. L. No. 94-574, § 1 (1976).

[5] 28 U.S.C. § 1631 (2012), added by the Federal Courts Improvement Act of 1982, § 301, Pub. L. 97-164, 96 Stat. 55.

when, for example, the plaintiff files in district court instead of a court of appeals, or vice versa. In 1988, Congress enacted legislation to ameliorate the "race to the courthouse" problem that can arise when more than one court of appeals has venue to entertain a petition for review of an agency decision. Prior to that year, the first court to receive a petition would acquire jurisdiction, and this rule induced competing parties to "race" to file in a court that they expected would favor their respective interests. The 1988 legislation instituted a random selection method to determine which court will hear the case (subject to a change of venue motion).[6] Another bill enacted in 1988 removed barriers to judicial review of legal issues (but not factual issues) in veterans' benefits cases.[7]

All of these measures have been generally well received and have improved our system of judicial review. They confirm the intuition that congressional reform can potentially play a valuable role in shaping the law of judicial review. On the other hand, in part because of these successful innovations, the system has matured to a point at which there does not appear to be widespread support among administrative lawyers for new legislation that would further revamp the system in major ways.[8] This does not necessarily mean that nothing should be done, but at the very least, proposals for substantial changes in the extant law of judicial review should be evaluated critically, not impulsively embraced.

II. Judicial review of regulatory analysis procedures

In testimony before the Homeland Security and Governmental Affairs Committee earlier this year, Dr. Jerry Ellig of the Mercatus Center at George Mason University proposed a "statutory requirement that all regulatory agencies conduct regulatory impact analysis and explain how it informed their decisions, combined with judicial review to ensure that the analysis and explanation meet minimum quality standards."[9]

I am, in general, a supporter of regulatory analysis of the kind prescribed for major rules by Executive Order 12,866,[10] as amplified by President Obama's Executive Order 13,563.[11] In fact, I am on record[12] as endorsing, in principle, the proposed Independent Agency Regulatory Analysis Act, which Senators Portman, Warner, and Collins introduced in the 112th and 113th

---

[6] 28 U.S.C. § 2112(a) (2012), as amended by Pub. L. 100-236 (1988).

[7] 38 U.S.C. § 7292 (2012), added by the Veterans' Judicial Review Act, Pub.L. 100-687 (1988).

[8] Professor Michael Herz has recently taken note of a shift among administrative law specialists away from proposals to increase the availability of judicial review. He observes: "Presumably, this shift reflects (a) the fact that ... the availability of judicial review *has* been expanded since the 1960s and (b) some loss of enthusiasm for the benefits of judicial review for the administrative process from the pre-*Vermont Yankee* days of an extremely muscular judicial role, particularly in the D.C. Circuit." Michael Herz, *ACUS – and Administrative Law – Then and Now*, forthcoming in 83 Geo. Wash. L. Rev. (2015) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562721) (draft at 25).

[9] *Toward a 21st-Century Regulatory System: Hearing Before the Senate Comm. on Homeland Security and Gov'tal Affairs*, 114th Cong. (Feb. 25, 2015) (statement of Jerry Ellig, Ph. D.).

[10] 58 Fed. Reg. 51,735 (1993).

[11] 76 Fed. Reg. 3821 (2011).

[12] Letter to Senators Lieberman and Collins from twelve legal scholars, http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=3f7b2523-c274-438e-9892-5d8dcbcc0345.

Congresses.[13] This measure would affirm the President's authority to extend executive oversight to independent regulatory agencies, which are currently exempted from such oversight. However, I do not support Dr. Ellig's proposal insofar as it would empower the courts to invalidate a rule on the basis that the agency did not sufficiently comply with procedural requirements such as those prescribed in the executive orders.

That plan would be a sharp departure from longstanding practice. At present, executive orders of this kind expressly disavow any intention to create judicial review rights,[14] and the courts have respected this disavowal.[15] At the same time, regulatory analysis documents are routinely added to the administrative record for judicial review and considered by the court in its decision as to whether the rule is arbitrary and capricious.[16] This accommodation of competing interests is a stable part of contemporary regulatory practice and has met with wide acceptance. Both the ABA and ACUS have taken the position that the process of executive oversight should not be reviewable in court.[17]

The design issue that Dr. Ellig raises is not new. The same questions were at issue in the debate over regulatory reform bills in the middle to late 1990s. These bills would have imposed broad requirements for cost-benefit analysis and risk analysis upon federal agency rulemaking, and the role of the courts in such potential legislation was vigorously debated. In 1995, the predecessor of this committee – the Committee on Governmental Affairs – endorsed language that approximately embodied the same intermediate position that I have just mentioned. Under this language, the agency's compliance or lack of compliance with procedural obligations in the bill would not itself be reviewable (unless the agency did not perform the analysis at all), but the documents created through such analysis would become part of the record and considered by the court in an appeal from the issuance of the rule.[18]

Defending this approach at the time, I argued that the procedures of regulatory analysis are not well suited to judicial enforcement. Dr. Ellig maintains that such a judicial task would not be particularly difficult,[19] but I took a more pessimistic view:

---

[13] S. 1173, 113th Cong. (2013); S. 3468, 112th Cong. (2012).

[14] *See, e.g.*, Exec. Order 12,866, § 10.

[15] Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Alliance for Natural Health US v. Sebelius, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011).

[16] Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1031, 1040 (D.C. Cir. 2012); *Michigan v. Thomas*, 805 F.2d at 188-89.

[17] ABA Recommendation 302, 115-3 ABA Ann. Rep. 40 (Aug. 1990) ("the presidential review process should not be judicially reviewable"); ACUS Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (1989) ("The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.").

[18] The bill reported by the committee in 1995 would have allowed a court to vacate a rulemaking in which a required regulatory analysis was "wholly omitted"; but if the analysis were performed, "the court shall not review to determine whether the analysis or assessment conformed to the particular requirements of this chapter." S. 291, 104th Cong., § 623(d) (1995), as reported in S. Rep. 104-88, 104th Cong., at 78 (1995). At the same time, "any regulatory analysis for such agency action shall constitute part of the whole administrative record ... and shall, to the extent relevant, be considered by a court in determining the legality of the agency action." *Id.* § 623(e).

[19] "To enforce the law, judges ... would merely need to check that an agency's analysis covered the topics specified in the law (such as analysis of the systemic problem, development of alternatives, and assessment of benefits and

> [I]ssues of whether the agency complied with the bill's exacting and detailed instructions would raise intricate questions about policy analysis methods and risk assessment techniques. Those questions could test the outer limits of the competence of the reviewing courts, staffed as those courts are by generalist judges, most of whom deal only infrequently with those subjects. Even if those encounters are not so rare in the D.C. Circuit, they surely are in the regional circuits.
>
> It's true that the courts would be applying a statutory framework, which may not seem very difficult. However, ... even if a court were convinced that the agency had not complied with one of the regulatory analysis requirements, it would then need to decide whether this error had infected the final rule (making it arbitrary and capricious). That determination could call for a quite sophisticated analysis of the overall development of the proceeding – a real challenge for the reviewing court.
>
> By shifting the focus of attention toward compliance with regulatory analysis requirements, perhaps at the expense of other issues, reviewability ... might make judicial review of major rules less reliable and credible than it is today. Remember also that if one of the reviewing courts misconstrues the provisions spelling out the new procedures, that interpretation would have precedential effect (even if the specific rule were upheld) and could haunt many subsequent rulemaking proceedings.
>
> I am concerned about costs and delays stemming directly from the reviewability of the new regulatory analysis requirements. ... I am thinking of all the issues that counsel would have to study in deciding what grounds they have for appeal. This would add up to a lot of associates' billable time. Then, depending on what issues the parties chose to raise, courts would need to spend time composing opinions responding to those issues. They might affirm in the end, but they would still need time to think their way carefully through these complex arguments.
>
> Finally, there is the impact of judicial review on workload at the agency level. ... [T]he result [of reviewability] could be more satellite litigation during the rulemaking proceeding – not so much on the question of what the rule should say, but on whether the agency complied with the precise requirements of ... the new APA.[20]

At the same time, I noted that the addition of regulatory analysis studies to the rulemaking record necessarily opens up opportunities for significant judicial control of policymaking.[21] The agency must defend the rule in an explanatory statement that takes account of the record, including the results of its impact analysis. As experience in our own era makes abundantly clear, the courts' scrutiny of such agency explanations can at times become quite probing.[22]

Indeed, one of the major current debates in administrative law is over whether modern

---

costs of alternatives), ensure that the analysis included the quality of evidence required by the legislation, and ensure that the agency explained how the results of the analysis affected its decisions." Ellig statement, *supra* note 9, at 7.

[20] Ronald M. Levin, *Judicial Review of Procedural Compliance*, 48 Admin. L. Rev. 359, 361-62 (1996).

[21] *Id.* at 361.

[22] See, e.g., Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014); Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

"hard look" review induces judges to intrude excessively into complex regulatory matters as they consider whether an agency rule is arbitrary and capricious.[23] I do not propose to delve into that debate here, except to note that Congress can do a great deal to influence the extent of this judicial scrutiny by defining the tasks it instructs agencies to perform in individual organic statutes, or by adjusting those mandates over time. That type of legislative control is, in my judgment, a sounder approach than the transformative, and probably disruptive, solution advanced by Dr. Ellig.

As I have mentioned, the Governmental Affairs Committee's position on judicial review in the mid-1990s was broadly similar to current practice. The same premises underlie the proposed Independent Agency Regulatory Analysis Act. The bill states that "[t]he compliance or noncompliance of an independent regulatory agency with the requirements of an Executive order issued under this Act shall not be subject to judicial review." At the same time, "any determination, analysis, or explanation produced by the agency [or the Office of Information and Regulatory Affairs] pursuant to an Executive Order issued under this Act, shall constitute part of the whole record of agency action in connection with [judicial] review."[24] In short, the intermediate approach that I have been discussing is largely a consensus view today, and I see no good reason to depart from it.

III. Judicial review of agencies' interpretations of regulations

The second topic that I have been asked to address is judicial deference on issues of law. A specific area of concern is what is commonly known as "*Seminole Rock* deference"[25] or "*Auer* deference"[26] – the doctrine that when the meaning of a regulation is in doubt, the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." This is a remarkably complex and subtle area of administrative law, and I cannot do justice to all of its nuances in this presentation. I will, however, attempt to address the main issues that have arisen in recent discussions of the topic.

In the past few years, several members of the Supreme Court have expressed interest in reassessing this old principle.[27] Last month's decision in *Perez v. Mortgage Bankers Ass'n*[28] has fueled additional discussion of this point. In *Mortgage Bankers* the Court held that an agency need not engage in notice and comment rulemaking when it replaces one interpretive rule with

---

[23] *Compare, e.g.*, Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J. on Reg. 289 (2013) (criticizing *Business Roundtable* and kindred decisions), *and* Thomas O. McGarity, *Some Thoughts on "De-Ossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1412 (1992) (lamenting the propensity of hard look review to impede rulemaking process by making agencies overly cautious), *with* Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Revaluation*, 49 Admin. L. Rev. 599, 632-34 (1997) (supporting hard look review).

[24] S. 1173, §§ 4(a)-(b).

[25] *See* Bowles v. Seminole Rock & Sand Co., 325 U. S. 410 (1945).

[26] *See* Auer v. Robbins, 519 U. S. 452 (1997).

[27] *See* Decker v. Northwest Envtl. Law Ctr., 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part); *id.* at 1339 (Roberts, J., joined by Alito, J., concurring); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

[28] 135 S. Ct. 1199 (2015).

another. The Court was unanimous, but in separate opinions Justices Scalia and Thomas contended that their concurrence in that ruling amplified the need to abandon *Auer* (and Justice Alito expressed continuing interest in the topic, although he did not stake out a specific position).[29] Thus, the status of *Auer* is now very much up for grabs. In the abstract, it is a legitimate subject for congressional inquiry – but I will urge caution today.

That suggestion derives in part from my longtime skepticism about legislation to adjust standards of review. In 1995, I wrote an article analyzing a scope of review provision in a then-recent regulatory reform bill. I concluded that it would have posed considerable risks of mixed messages, ambiguity, and unintended consequences.[30] Generalizing, I wrote:

> [A] legislature may simply be the wrong forum for the drafting of standards of judicial review of agency action. I do not make this suggestion because of any overall antipathy to statutory reform of the administrative process. Scope of review doctrine, however, is different from most other administrative law topics. It is an unusually confusing subject--abstract, difficult, and constantly evolving. Moreover, [a] court can easily revise case law tests when their weaknesses become apparent, but statutory provisions tend to be more enduring; the inevitable inertia of the legislative process argues for caution in the design of administrative procedure codes.
>
> Such caution is especially warranted in regard to the ground rules for review of agencies' legal interpretations. Courts and commentators simply have no consensus about the extent, if any, to which courts should defer to agencies on issues of law. ... [A] legislative formula purporting to define in detail the manner in which courts should take account of agencies' views on issues of law runs a considerable risk of proving to be too procrustean. Confusing as the case law may be, the experience of 1995 suggests that this is one area in which Congress should recognize the virtues of benign neglect.[31]

The drafting committee for the 2010 Model State Administrative Procedure Act relied on those comments when it adopted a bare-bones scope-of-review provision that closely resembles section 706 of the federal APA, instead of a more detailed text that was also under consideration. As the official comment to that provision remarked, "scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, Section 508(3) follows the shorter, skeletal formulations of the scope of review, similar to . . . the Federal APA."[32]

A. Overview of the scope of judicial review of agencies' interpretations of law

As a foundation for the discussion that is to come, I will offer a brief overview of deference doctrines that courts use in their review of agency rules. This will be a drastically simplified survey, with many complexities and nuances omitted. I will, however, try to supply enough of an introduction to these doctrines to enable you to make sense of my critiques of

---

[29] *Id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

[30] Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 Wake Forest L. Rev. 647, 653-64 (1996).

[31] *Id.* at 665-66.

[32] Revised Model State Administrative Procedure Act § 508 cmt (2010) (citing the article just mentioned).

current proposals.

Judicial deference to administrative agencies' interpretations of the statutes they administer has a long lineage in the American legal tradition, traceable back to the time of Chief Justice John Marshall.[33] Over time, however, courts have revised and refined the manner in which they articulate and implement that practice. For the past thirty years, the law on judicial deference has been dominated by *Chevron U.S.A. Inc. v. NRDC*,[34] which sets forth a two-step inquiry: a reviewing court should ask "whether Congress has directly spoken to the precise question at issue" and "whether the agency's answer is based on a permissible construction of the statute."[35] In simpler terms, this means that the agency interpretation should prevail if the statute is ambiguous in relation to the issue presented, and the agency's interpretation is reasonable.

The justification for *Chevron* deference rests in part on respect for congressional delegation. 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. That aspect of the test is straightforward.[36] What is more controversial about *Chevron* is its further assumption that an ambiguity in the relevant regulatory statute should, in effect, be *presumed* to fall within the scope of the delegation to the executive.[37] As virtually everyone agrees, this presumption is a legal fiction and is not intended as a descriptively accurate model of congressional expectations. Rather, it is a judicially created principle of statutory interpretation, analogous to other canons of statutory construction. The Court created it (and has subsequently, at various times, expanded or contracted it) to serve purposes that it considers important for our legal system. The opinion itself identifies some of them: agencies tend to have expertise and experience in their respective fields of specialization and are politically accountable in ways that courts are not.[38] More generally, it promotes predictability and space for agencies to work out problems that arise in the court of administering their programs.

It is important to recognize, however, that the manner in which courts apply the two step *Chevron* test is a far cry from a policy of indiscriminate deference. The case does provide a structure for analysis of agency statutory interpretation, but the underlying reality is that courts exercise significant control over agencies as they apply both steps. Judicial opinions declaring that a statute "directly addresses the precise question at issue" (and thus is not ambiguous) are commonplace – sometimes when it does not seem at all obvious to external observers that the

---

[33] United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809).

[34] 467 U.S. 837 (1984).

[35] *Id.* at 842-43.

[36] For explanations of why such deference is consistent with our constitutional tradition, see Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 20-22 (1985).

[37] *Chevron*, 476 U.S. at 865.

[38] *Id.* at 865-66.

statute was actually unambiguous.[39] Moreover, the second *Chevron* step -- whether the agency's decision was reasonable – is often treated as an inquiry into whether it was *reasoned*.[40] This revised inquiry leads to an overlap with the hard look doctrine;[41] as such, it can lead to reversal even where the court is not prepared to claim the statute is clear.

Adding to the complexity of this subject is the fact that, under current doctrine, review of some agency statutory interpretations is not governed by *Chevron* at all. The threshold inquiry into whether a given interpretation falls within the "domain" of the *Chevron* test has come to be informally known as "*Chevron* step zero." The scope of this exception is evolving and somewhat indeterminate. For present purposes, one specific example is particularly relevant: the Court has held that agency statutory interpretations that appear in agency guidance documents should usually not be evaluated under the *Chevron* rubric.[42]

That a particular administrative interpretation of a statute falls outside the *Chevron* domain does not normally mean that courts will display no deference whatsoever toward it. In other words, even where courts do not find (and will not presume) that Congress itself entrusted interpretive authority to an agency, they may decide to give weight to the agency's interpretation for prudential reasons of their own devising. This mode of reasoning had taken hold long before *Chevron* entered the picture in 1984 and was most famously expressed by Justice Robert Jackson in his 1944 opinion in *Skidmore v. Swift & Co.*:[43]

> [T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. … 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.[44]

Thus, "*Skidmore* deference" usually comes into play when *Chevron* deference does not. Analysts sometimes say that *Chevron* stands for "strong deference" and *Skidmore* for "weak deference," although, as I will explain, that distinction does not always hold up in practice.

The meaning of *Skidmore* deference, where it does apply, is elusive, because courts implement it in a variety of ways. Some understand it to mean that an agency interpretation need

---

[39] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

[40] ABA Sec. of Admin. L. & Reg. Prac., A Blackletter Statement of Federal Administrative Law 34-35 (2d ed. 2013).

[41] *See, e.g.*, Judulang v. Holder, 132 S. Ct. 476, 4484 n.7 (2011); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 527 n.27 (2002); Shays v. FEC, 414 F.3d 76, 96–97 (D.C. Cir. 2005).

[42] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[43] 323 U.S. 134 (1944).

[44] *Id.* at 139-40.

not have significance unless the judge personally finds the agency's arguments persuasive in the exercise of independent judgment. Much more common, however, is an understanding according to which *Skidmore* does express an expectation that individual judges are to display some deference, but the weight of a particular interpretation should depend on factors such as those mentioned in the Jackson quotation just above.[45] As a result of this flexible approach, "[i]n various circumstances, the rigor of a court's scrutiny when it applies *Skidmore* sometimes appears to resemble *Chevron* deference, but at other times it appears significantly more intrusive. No clear pattern emerges from the cases."[46] The wide variety of decisions in this area poses a challenge for those who advocate use of *Skidmore* as a solution to perceived problems.

In a handful of situations, courts will afford no deference of any kind to an administrative determination of an issue of law. Constitutional questions are a good illustration. Another is the manner in which the courts construe framework statutes such as the APA. Those laws apply to the government as a whole and have been enacted for the very purpose of restraining agency power, so courts do not treat any one agency's interpretation of them as authoritative.[47] When an agency is acting within its particular sphere of responsibility, however, the availability of some degree of judicial deference is all but universal, at least under current doctrine.

Finally, we come to the question of judicial deference to agencies' interpretations of regulations (as I will call them[48]). The roots of such deference also go far back in our history.[49] In the modern era the dominant cases are *Seminole Rock* and *Auer v. Robbins*. The canonical verbal formula derived from these cases is that the agency's interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Most authorities understand this formula to prescribe a level of deference comparable to that of *Chevron* ("strong deference"). However, as in the case of statutory interpretation, *Auer* deference does not apply across-the-board. In particular circumstances, the courts may resort to *Skidmore* review rather than *Auer* in evaluating a given interpretation. Thus, in *Christopher*, the Court found reasons to measure a Department of Labor interpretation of a regulation on the basis of *Skidmore*. Thus, the scope of the "domain" of *Auer* in the Court's opinions is still very unsettled, even apart from the advent of calls by individual Justices for reappraisal of this whole area.

Various writers articulate the rationale for *Auer* deference in differing ways, but to my

---

[45] *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1271 (2007) (finding, in a study of numerous court of appeals cases, that the latter approach is three times as common as the former).

[46] ABA Blackletter Statement, *supra* note 40, at 36-37.

[47] Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003).

[48] Unlike the word "rule," the word "regulation" is not an APA term. It is, however, most commonly used to mean a "legislative rule" adopted under statutory authority, as distinguished from an interpretive rule that might construe it. For clarity of exposition, I will use it that way here.

[49] "The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them is entitled to the greatest weight, and we see no reason in this case to doubt its correctness." United States v. Eaton, 169 U.S. 331, 343 (1898) (sustaining the plaintiff's appointment as acting vice-consul-general to Siam, following its approval by the Department of State and Secretary of State).

mind the strongest justifications run parallel to the justifications for *Chevron*. The Court has said, for example, that such deference is important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"[50] Indeed, another case says, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[51]

The ABA Administrative Law Section was mindful of this reasoning when, in 2011, it opposed a provision in the House version of the Regulatory Accountability Act (RAA)[52] that would (in effect) have abolished all deference to agencies' interpretations of regulations.[53] As the Section argued, "many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it."[54]

I recognize that this survey of case law on scope of review has presented a complex, perhaps even bewildering, array of doctrines. How much difference does the choice among them make? The answer seems to be: "probably less than one would at first think." Empirical studies indicate that the government wins on appeal around seventy percent of the time regardless of whether the court relies on *Chevron* or *Skidmore*.[55] The same is true of cases applying *Auer*, at least in the lower courts.[56] (In the Supreme Court, the affirmance rate when *Auer* is applied is much higher — around 91 percent.[57] I tend to think, however, that the figure for lower courts is the more meaningful of the two results, because the Supreme Court *chooses* what cases it will hear. Its behavior in rule-interpretation cases probably says more about its substantive priorities than about the influence of the nominal standard of review.) On the whole, although litigants may feel compelled to battle over the choice of a standard of review because of a fear that the court's choice *might* make a difference, the reality seems to be that so many other factors influence judicial review that the effect of the prescribed standard of review can be quite elusive.

---

[50] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[51] Martin v. OSHRC, 499 U.S. 144, 151 (1991).

[52] *See* H.R. 3010, 112th Cong. (2011). The provision under discussion here is § 7 (proposing to add § 706(b)(1) to the APA).

[53] Strictly speaking, the clause in question would have provided that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures to adopt the interpretation. As the Section's comment letter explained, however, this would mean that the agency could never receive any deference for its interpretation of the regulation, because if it did resort to the notice and comment process, "the agency would actually be issuing a new regulation – it would not be interpreting the old one." ABA Section Comments on H.R. 3010, *supra* note 2, at 668.

[54] *Id.*

[55] *See* Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 515 (2011).

[56] Id. at 520.

[57] Id. at 516.

With this groundwork laid, I will turn to the question of where the future of *Auer* deference may lie.

B. Justice Thomas's opinion in *Mortgage Bankers*

Both Justice Scalia and Justice Thomas wrote bold concurring opinions in the *Mortgage Bankers* case, but the Thomas opinion is the more daring of the two. It appears to be a wholesale attack on any kind of judicial deference to agencies on issues of law. It is nominally directed at the *Auer* doctrine alone, but his constitutional arguments could just as easily apply to *Chevron* deference, as he occasionally does suggest.[58] As such, the implications of his opinion strike me as quite radical. His concept of separation of powers is sweeping, but it is a far cry from the way the Constitution has been interpreted in our legal tradition.

After a lengthy historical discussion, Justice Thomas homes in what he says are "two related constitutional concerns [regarding the *Auer* doctrine]. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches."[59] As to the first concern, his point seems to be that, under Article III of the Constitution, "the Judiciary . . . is duty bound to exercise independent judgment in applying the law," and the courts' practice of giving "controlling weight" to agency interpretations of regulations is incompatible with that duty.[60] I agree with Justice Thomas about the importance of judicial independence, but not with his conclusion that *Auer* deference is incompatible with it. The phrase "controlling weight" in *Seminole Rock* and *Auer* should not be read in isolation from the qualifying language that accompanies it: deference is due only to interpretations that are not "plainly erroneous or inconsistent with the regulation." Whatever meaning one might ascribe to these phrases in the abstract, they are hardly self-defining. They leave room for the courts to impose significant control over agencies' interpretations of regulations, and, as I have noted, the courts actually do make use of that latitude. In this sense, the majority in *Mortgage Bankers* is on sound ground when it responds that "[e]ven in cases where an agency interpretation receives *Auer* deference ... it is the court that ultimately decides whether a given regulation means what the agency says."[61]

It may be true that the *Auer* doctrine, in practical operation, calls for more deference to executive authority than Justice Thomas would individually choose to give. Surely, however, it is not unconstitutional for the Court to adopt principles of interpretation and to prescribe a framework for applying those principles. Judges are expected to adhere to that framework, but it is the Court that originated it and can modify it over time (as it indeed does). The wisdom of these principles is of course up for debate; but, because the judiciary itself is the source of the principles, I do not see their existence as an illegitimate intrusion on judicial independence. In other words, "independent judgment" does not have to mean "independent of the Court's jurisprudence on scope of review."

---

[58] *See Mortgage Bankers,* 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment) ("Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.").

[59] *Id.* at 1217.

[60] *Id.* at 1217-20.

[61] *Id.* at 1208 n.4 (opinion of the Court).

Justice Thomas's second argument – that *Auer* undermines the judicial "check" on the political branches – also seems reasonable in the abstract.[62] However, it is too onesided. The Court has developed a sophisticated, though always evolving, body of precedents in order to calibrate the complex relationship between courts and agencies. These precedents do provide for a check on executive abuses, but they also reflect a wise recognition that judges do not have a monopoly on wisdom, especially in regard to the specialized problems that arise in the interpretation of regulations. In short, there are two sides to the question of how much of a "check" is needed, and Justice Thomas's broad generalities about separation of powers do not seem helpful in determining where the line should be drawn.

C. Justice Scalia's separation of powers critique of *Auer*

In his concurring opinion in *Mortgage Bankers*, Justice Scalia makes a variety of debating points criticizing *Auer* (a decision that he himself wrote but obviously no longer supports). For present purposes, however, probably the best way to understand his opinion is as a renewal of the analysis that he has been advancing in other recent opinions – especially his separate opinion in *Decker v. Northwest Environmental Defense Center*,[63] in which he offered an extended argument as to why *Auer* deference should be abandoned. That opinion, which drew on the scholarship of Professor John Manning (Justice Scalia's former law clerk),[64] rests on considerations that are targeted specifically at deference to agency interpretations of regulations and do not pose a direct challenge to *Chevron* deference. More specifically, Justice Scalia argued in *Decker* that the proposition

> that the agency can resolve ambiguities in its own regulations … would violate a fundamental principle of separation of powers — that the power to write a law and the power to interpret it cannot rest in the same hands. …
>
> [w]hen an agency interprets its *own* rules … the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power."[65]

I will discuss the separation of powers aspect of this analysis first, and then I will turn to its policy-oriented aspect.

The idea that *Auer* offends the constitutional separation of powers is far from self-evident. After all, any interpretation that would be a candidate for *Auer* deference must relate to a matter that the court finds or assumes is within the authority that Congress delegated to the agency (otherwise the agency's position would fail *Chevron* deference). Moreover, the field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a delicate balance of power among the branches of government. When an agency

---

[62] *Id.* at 1220-21 (Thomas, J., concurring in the judgment).

[63] 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part).

[64] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1998).

[65] 133 S. Ct. at 1341.

action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms would apply in the same way as they usually do in the case of other administrative actions.

Despite these background factors, Justice Scalia and Professor Manning argue that a separation of powers problem *comes into existence* when law-writing and law-applying are entrusted to the same hands – even though administrative agencies (and other bodies such as city councils) have routinely performed both functions for countless years. They support this contention by referring to a variety of ways in which the framers of the Constitution (and the theorists on whose work the framers relied, such as Montesquieu and Blackstone) decided to divide up the powers of government so that each branch could check the others. Of course, nobody questions that the structure of the Constitution contains a number of such divisions of responsibility. Yet none of the antecedents that furnish the support for this argument is directly comparable to the relationship between an administrative agency and a reviewing court. Analogies to the lines of separation between the legislative and executive branches, or between the legislative and judicial branches, furnish only imperfect comparisons. A salient distinction is that an agency's interpretation of its regulation is not nearly as insulated from a judicial check as the many other relationships that, according to Justice Scalia's argument, are subject to "separation" under the Constitution. As I pointed out above, the agency interpretation is "controlling" under *Auer* only if it is not "plainly erroneous or inconsistent with the regulation," and reviewing courts have more than a little freedom to determine whether those predicate conditions are met.

My reservation about the separation of powers critique, then, is not that it is necessarily mistaken, but rather that it is indeterminate. Since none of the restrictions specifically written into the constitutional structure is directly applicable, the argument has to depend heavily on what one takes to be the spirit of the Constitution's separation of powers model. And, as Justice Anthony Kennedy once wrote in a different context, "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[66]

In this connection it is important to recognize that when Professor Manning relies on the constitutional policy of separating law-writing and law-executing, the conclusion he draws is that agency interpretations of their own regulations should be subject to the *Skidmore* standard;[67] but Justice Scalia uses that policy to support a much more drastic step, namely the elimination of all judicial deference in reviewing such interpretations. That extension may raise countervailing separation of powers concerns of its own. It brings to mind the reasoning of the *Chevron* opinion, in which Justice Stevens cautioned the courts against being too quick to substitute their judgments for those of politically accountable administrators:

> Judges … are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is

[66] Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in judgment).

[67] Manning, 96 Colum. L. Rev. at 686-90.

> entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.[68]

On the basis of this language, Professor Manning views *Chevron* as a "constitutionally inspired canon of construction."[69] If he is right, the separation of powers implications of Justice Scalia's quite transformative proposal would seem to cut two ways.

In short, although I would be reluctant to say that the separation of powers theme in Justice Scalia's recent opinions on this subject is untenable, it does strike me as inconclusive. To my mind, therefore, a more fruitful approach is to consider the concrete, practical objections to *Auer* deference on their own terms, without unnecessarily clothing them in the rhetorical frame of constitutional law. I now turn to that level of the discussion.

D. The incentives argument

The main policy argument that underlies the current challenge to *Auer* deference is the thesis that the deference prescribed in the case gives agencies an incentive to write regulations vaguely, so that they will then be able to adopt interpretations that have not undergone the rigors of the notice and comment process but will nevertheless receive the benefit of strong judicial deference. Justice Alito alluded to this possibility in his opinion for the Court in *Christopher*,[70] and I have met many administrative lawyers who take it seriously, even if they find little appeal in the constitutional arguments that Justice Scalia has used in promoting it.

A problem with the incentives argument, however, is that there is no good evidence showing that this incentive often has the effect that the theorists ascribe to it – if it ever has. In a speech delivered in 2009, Justice Scalia himself noted the uncertainty that surrounds an assessment of this kind:

> [In my dissent in *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001),] I … predicted that the Court's decision would create a perverse incentive for agencies to adopt bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation. The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality. The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer* deference. …

---

[68] *Chevron*, 467 U.S. at 865-66.

[69] Manning, 96 Colum. L. Rev. at 623-27.

[70] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

> Well, it's hard to confirm or to refute this particular prediction. I really don't know if agency rules have in fact become less detailed and more ambiguous since the Court's decision in *Mead*. I'm not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation's clarity.[71]

Justice Scalia wrote these words before he announced a change of heart about *Auer*, but he has not distanced himself from this particular observation. Nor has he claimed, in any of his separate opinions in the line of decisions running from *TalkAmerica* through *Mortgage Bankers*, that the specific regulations underlying those cases were, in fact, examples of rules in which the incentive to be vague had played any part. Indeed, I have never seen, in the judicial or academic literature, *any* good evidence of a situation in which an agency has actually yielded to the incentive about which Justice Scalia has been warning.[72]

I do not mean to suggest that the incentive does not exist at all. It presumably does – but it surely does not exist in a vacuum. A myriad of factors may influence agencies in their decisions about how broadly or narrowly to write a given regulation. Some of those factors can militate toward specificity rather than vagueness. A good reason to be specific, for example, is to nail down a concrete application of the regulation, instead of leaving the question to be resolved through all the contingencies and delays that may accompany the implementation and enforcement process.[73] One can only conjecture about how these influences net out in the regulatory process.

As a practical matter, a court would have no good way to decide in a given case whether the agency had or had not yielded to the incentive that *Auer* deference is said to create. In the abstract, virtually any regulation could be written to be more specific than it actually was, but agencies often have very good reasons to refrain from trying to settle too much by regulation. It is largely for this reason that the federal courts have essentially abandoned any effort to force agencies to engage in rulemaking as opposed to adjudication.[74] The potential variables are far

---

[71] Remarks by the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC* (April 2009), *in* 66 Admin. L. Rev. 243, 245 (2014).

[72] An arguable exception is the Medicare regulation at issue in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). Justice Thomas, in dissent, charged that "the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Id.* at 525 (Thomas, J., dissenting). The difficulty with the example, however, is that the majority opinion (written by Justice Kennedy and joined by Justice Scalia, among others) read the regulation differently: "[T]he language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available. Whatever vagueness may be found in the community support language that precedes it, the anti-redistribution clause lays down a bright line. ..." *Id.* at 517 (opinion of the Court). Thus, the example is at best contested rather than clear-cut.

[73] According to one agency lawyer, "agencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations [as well as APA procedural challenges]." Aditi Prabhu, *How Does Auer Deference Influence Agency Practices?*, Admin. & Reg. L. News, Winter 2015, at 11, 12-13.

[74] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that choice between rulemaking and adjudication lies within agency discretion). Exceptions to this principle are all but nonexistent in federal court case law.

too elusive for a court to weigh knowledgeably.[75]

Thus, if the courts are going to overrule or modify *Auer* in order to counteract the incentive to write vague regulations that the doctrine is said to create, they will presumably have to do so on an across-the-board, or at least very broad, basis. The inevitable result would be to remove or at least diminish judicial deference in numerous situations in which the incentive to be vague played no actual role in the agency's calculus.

An obvious objection to this development would be that, in order to solve a supposed problem that is speculative at best, the doctrinal change would lead courts to give short shrift to the affirmative benefits of *Auer* deference – especially the value to the interpretive process of the agency's experience and responsibility for making the regulatory scheme work. Judge Richard Posner, commenting on the Scalia analysis, has reached a similar conclusion. He argues that the incentives point

> is a valid concern, but it doesn't justify a blanket refusal to grant some deference, some leeway, to agency interpretations of their own regulations. The regulation may deal with a highly technical matter that the agency understands better than a court would; its interpretation may be in the nature of explanation and clarification rather than alteration. Scalia proposes that in all cases in which an agency's interpretation of its own regulation is challenged, the reviewing court should resolve the challenge "by using the familiar tools of textual interpretation." Those tools are notably unreliable, especially when dealing with a technical regulation. In *Decker*, the regulation concerned storm water runoff from logging roads.[76]

E. Potential for changes in *Auer* deference by the courts

Even if one thinks that the case for abandoning *Auer* is strong, administrative lawyers do not seem to have developed anything close to a consensus about what should take its place. The critics of *Auer* on the Court itself seem to have deep divisions on this point. Justices Scalia and Thomas favor a regime with *no* deference; it seems unlikely that the other Justices would accept so drastic a departure from the status quo. On the other hand, Justice Scalia has repeatedly expressed his dislike for the openended, unstructured *Skidmore* standard.[77] He did join Justice Alito's opinion for the Court in *Christopher*, which applied *Skidmore* to its review of the Department of Labor's interpretation of a Fair Labor Standards Act regulation.[78] However, that holding reads as though it was limited to the circumstances at hand, and one can doubt that Justice Scalia would be prepared to embrace *Skidmore* review for any broad category of cases.

On the other hand, scholars who have criticized *Auer* do seem to coalesce around

---

[75] SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 909-13 (2004) ("courts can make rough judgments about how precise a statute or regulation *is*; they have no basis for determining how precise it *should be* in order to satisfy some abstract duty to make policy through a prescribed method.").

[76] Richard A. Posner, *Can't Justice Scalia learn a little science?*, Slate, June 24, 2013.

[77] United States v. Mead Corp., 533 U.S. 209, 239-61 (2001) (Scalia, J., dissenting); Scalia 2009 speech, *supra* note 71.

[78] *Christopher*, 132 S. Ct. at 2168-69.

Skidmore as their preferred alternative. One can wonder, in light of the empirical studies discussed above, whether this development would bring about much change in substantive outcomes. It might, however, stimulate an increase in litigation, because the wide-open and therefore unpredictable nature of the *Skidmore* formula could induce at least some litigants to think that they might prevail on a challenge that they might have foregone if the courts had remained committed to *Auer* deference.

F. Possible congressional action

Even if one believes that there is a good case for substantial changes in the *Auer* regime, I doubt that Congress should undertake to impose such change by passing a statute. I mentioned above my general reservations about scope of review legislation, and those reservations appear to be fully applicable to this situation. I am not aware of any scholarly article that recommends that Congress should act in this area.

Judicial fine-tuning of the *Auer* doctrine over time is a defensible project. The Court has been taking cautious steps in that direction (although perhaps it has been not quite cautious enough[79]). Development of doctrine through a case-by-case process lends itself well to experimentation, because the courts can correct overstatements and dubious statements relatively easily. With a statute, however, imprecise language is much harder to overcome.

A good example can be found in S. 1029, the Senate version of the Regulatory Accountability Act in the last Congress. In opposing the proposal in that bill to replace the *Auer* standard, the ABA Administrative Law Section drew attention to an overbreadth problem.[80] It noted that, even if some applications of the proposed statute could be defended on the basis of the argument that *Auer* deference gives agencies an incentive to draft rules that circumvent the discipline of the notice-and-comment process, other applications could not: "Presumably, [the bill's revised scope of review provision] would also apply to regulatory interpretations that agencies develop in the course of formal adjudication, which does entail a decision making process that induces rigorous deliberation."

Another illustration would be a situation involving a regulation that was properly adopted without notice and comment because the APA exempts it from that obligation. For example, regulations relating to a military or foreign affairs function of the United States may validly be

[79] In *Christopher* the Court declined to give *Auer* deference to the Fair Labor Standards Act regulation at issue, primarily because employers had reasonably relied on the Labor Department's longstanding failure to enforce the interpretation that it was now seeking to establish. *Id.* at 2167-68. In my view, defendants who have reasonably relied on an existing regime should be shielded from retroactive liability, and the courts have developed remedial doctrines that serve this purpose. *See, e.g.*, FCC v. Fox T.V. Stations, Inc., 132 S. Ct. 2307 (2012) (due process); GE v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) (due process); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (abuse of discretion); *see also Mortgage Bankers*, 135 S. Ct. at 1209 & n.5. However, reliance interests should have little if anything to do with *interpretation* of a regulation, because judicial narrowing on that basis would even prevent the agency from applying a new interpretation to a future defendant who did have adequate notice of it.

[80] Letter from Anna Shavers, Chair, ABA Section of Administrative Law and Regulatory Practice, to Senators Carper and Coburn on S. 1029, the Regulatory Accountability Act of 2013, at 17, http://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf.

issued without APA procedure.[81] It would seem that an agency that drafts such a regulation could not possibly have an incentive to write it vaguely in order to escape the burdens of notice and comment.[82] Arguably, therefore, an interpretive rule that construes such a regulation should in any event remain subject to *Auer* deference. If deference remains a case law doctrine, a court could easily carve out a special decisional principle for situations of this kind, but a statutory provision that supersedes *Auer* would presumably leave less room to make such exceptions.

Finally, the draftsmanship of a suitable standard of review to replace *Auer* could prove difficult, as the example of S. 1029 demonstrates. The relevant subsection of that bill would have provided that "[t]he weight that a court shall give an interpretation by an agency of its own rule shall depend on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." That phrasing would have omitted additional language that is part of the classical *Skidmore* formula: "... and all those factors which give it power to persuade, if lacking power to control."[83] In a way, the drafters' omission of this language was understandable. They may have felt that it was too vague and elastic to fit comfortably into an APA. Yet the Section was critical of that deletion: "We believe the adoption of multiple incarnations of the *Skidmore* test may prompt confusion as to whether they have independent meanings or the same meaning as the evolving interpretations of *Skidmore*. Surely the world does not need a 'rule interpretation *Skidmore*' that is different from the 'statutory interpretation *Skidmore*.'"[84]

In short, even if one agrees with the general thrust of Justice Scalia's critique of *Auer* deference, the inherent difficulty of trying to specify all the considerations that should be taken into account suggests that Congress should leave this quite narrow and specialized dialogue to the litigation process, in which the Court gradually works out answers in response to litigants' briefs and commentators' scholarship.

IV. Some constructive ideas for the future

I said at the beginning of this statement that the institutional structures by which federal courts review agency rulemaking are generally working well and are not in need of major overhaul. I have also explained why I do not endorse the two specific proposals that I was asked to address today. It may well be that regulatory reformers in Congress should, for the most part, turn their attention to aspects of administrative law practice other than judicial review. However, I do have some ideas about a few judicial review topics that, in my judgment, call for action, or at least sustained attention, from the legislative branch.

First, Congress should pass legislation to reform 28 U.S.C. § 1500. This Civil War-era statute provides that if a plaintiff files an action in the Court of Federal Claims when a suit arising out of the same set of facts is already pending in another court, the Court of Federal

---

[81] 5 U.S.C. § 553(a)(1).

[82] *Cf.* City of New York v. Permanent Mission of India, 618 F.3d 172 (2d Cir. 2010) (upholding, under *Chevron*, State Department rule protecting foreign missions to the United Nations from local property taxes, although the rule was validly issued without notice and comment).

[83] *Skidmore*, 323 U.S. at 140.

[84] Section letter on S. 1029, at 18.

Claims suit must be dismissed. This statutory requirement can lead to injustice, especially when jurisdictional limitations prevent plaintiffs from filing all of their related claims in a single court. For example, the litigant might have a tort claim against the United States in a local district court and a factually related contract claim in the Court of Federal Claims. There is no good reason why procedural restrictions should force a litigant to choose one cause of action and one remedy to the exclusion of another.

In 2012, the Administrative Conference recommended that Congress enact a substitute for section 1500.[85] The proposed legislation would provide that if two factually related claims are pending at the same time in the Court of Federal Claims and another court, the second action to be filed should presumptively be stayed pending resolution of the first-filed suit. The presumptive stay reduces the likelihood of parallel, duplicative litigation that could waste judicial and litigant resources. However, the proposal also contemplates that the court in the second-filed case should be able to overcome the presumption and proceed more expeditiously if the stay is not or ceases to be in the interest of justice. This aspect of the proposal gives judges the latitude they may need to protect the rights of claimants. In 2013, the American Bar Association endorsed the ACUS recommendation.[86]

Bills to implement the recommendation were introduced in both the House and Senate during the 113th Congress.[87] The House Judiciary Committee reported its bill favorably,[88] but no further action was taken. In my view, enactment of the bill to replace section 1500 should be a priority for the present Congress.

I also want to mention two other projects relating to judicial review that are currently working their way through the Administrative Conference. One will examine "Agency Publicity in the Internet Era."[89] Citizens who believe they have been injured by, for example, an unfavorable press release generally have no right to judicial relief.[90] One question the Conference will consider is whether that situation should be changed, a possibility that might require congressional action. The other project grows out of a request by the Social Security Administration to the Office of the Chairman of ACUS to examine ways in which that agency might reduce the number of cases remanded to it by courts and might address disparities among district courts in the procedures to which appeals in disability cases are subject.[91] Work on both of these projects is at early stages, so I am not in a position right now to make concrete suggestions for action or even to report research findings. However, I do believe the subcommittee should be cognizant of these efforts, which could well lead to more tangible proposals to Congress later.

Finally, as an alternative to altering the standard of review by which the courts examine

---

[85] ACUS Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*, 78 Fed. Reg. 2939 (2012).

[86] ABA Resolution 300 (Feb. 11, 2013).

[87] S. 2769, 113th Cong. (2014); H.R. 5683, 113th Cong. (2014)

[88] H.R. Rep. 113-650 (2014).

[89] ACUS, *Agency Publicity in the Internet Era*, https://www.acus.gov/research-projects/agency-publicity-internet-era.

[90] Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).

[91] ACUS, SSA Federal Courts Analysis, https://www.acus.gov/research-projects/ssa-federal-courts-analysis.

agency interpretations, the legislative branch could improve its own ability to react to those interpretations after they have been drawn into question on judicial review. Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit has long been an enthusiastic promoter of this idea, and the Governance Institute, with which Judge Katzmann was affiliated prior to his appointment to the bench, has done much to translate it into practice.[92]

Under the system devised by the Governance Institute, judges of the courts of appeals, as well as their court clerks and staff, can notify the House and Senate leadership about judicial opinions that raise issues of potential interest to the legislative branch. In a recent article, Judge Katzmann explains:

> Statutory opinions that are appropriate for transmission include those where the court has identified possible grammatical problems that affect meaning and where the statute requires courts to fill in a gap (for example, whether Congress intended the statute to be retroactive). They also include statutes that may present ambiguities in language or ambiguities arising from having to interpret related statutes, or statutes with a perceived problem, about which a judicial opinion suggests the possibility of legislative action.[93]

He adds, however, that "[f]rom the outset … the project's creators cautioned that its principal purpose was not to produce legislative change, but rather to inform busy legislators and their staffs of possible technical problems in statutes."[94]

The system has grown up without the need for implementing legislation, but it depends for its success on informal support – which has been forthcoming. The Judicial Conference has recommended that all circuits participate, and legislative counsels and members of the House and Senate have spoken highly of it.[95] Of perhaps greatest interest for today's hearing is Judge Katzmann's observation in his article that "it may well be worth considering whether it might be useful to develop a parallel transmission process between the executive branch and Congress, whereby agency general counsels sifting through judicial opinions identify issues of relevance to Congress, perhaps with suggestions for Congress to consider. The Administrative Conference of the United States might play a useful role in examining the feasibility of this idea and its implementation."[96] I agree that this idea is worth considering and would suggest that the subcommittee take it under advisement as an idea that it might wish to endorse.

This concludes my prepared statement, and I will be happy to respond to any questions you may have. Thank you again for the invitation to testify.

---

[92] *See* Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. Rev. 637, 684-93 (2012).

[93] *Id.* at 689.

[94] *Id.* at 692.

[95] *Id.* at 691 & n.267 (citing to letters from past and present leaders of the House and Senate Judiciary Committees, including current Senators Hatch, Leahy, and Sessions).

[96] *Id.* at 693.

Congressional Testimony

Examining the Proper Role of Judicial Review in the Regulatory Process

Testimony before the Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Governmental Affairs, United States Senate

April 28, 2015

Andrew M. Grossman
Adjunct Scholar, Cato Institute
Associate, Baker & Hostetler LLP

> When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing a mood rather than a message. By design or default, Congress often fails to speak to the precise question before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it exceeds the bounds of the permissible. It 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 v. Federal Communications Commission*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)

My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

This hearing could not be more timely or its subject matter more important. We may be at the cusp of a period of rapid transition in the law governing the administrative state. As the Supreme Court works through the implications and consequences of original meaning, it must consider the place of the administrative state in our constitutional system. Recent terms have seen the justices increasingly question the now-expansive role of nontraditional actors in making, enforcing, and adjudicating law and the judiciary's role in checking them. More and more cases are grappling with fundamental questions of separation of powers and the rights of citizens against the state. And it is a sign of the times that one of the most discussed books of the past year—at least among those who pay attention to these things—was Philip Hamburger's *Is Administrative Law Unlawful?*, which may have set the speed record for earning a citation in a Supreme Court opinion.

Interest in these issues is not confined to the legal profession. The use, abuse, and limits of executive power have been overriding issues of public concern in the current and previous administration. Many members of the public, as well as members of this body, question the legitimacy of numerous actions taken by the current administration, from circumventing Congress to "enact" immigration reform, to circumventing Congress to regulate greenhouse gas emissions and ban new coal-fired power plants, to circumventing Congress to "rewrite" problematic provisions of the Patient Protection and Affordable Care Act.

There may be a pattern here.

The Constitution provides for separation of powers to protect individual liberty[1] and for checks and balances to confine each branch of government to its proper place and thereby enforce the separation of powers. Judicial review is one of the most important checks on executive action. But it is also crucial for safeguarding the interests of the Legislative Branch, because it is the judiciary that measures the execution of the law against what Congress has actually legislated. It is therefore appropriate that this body should consider the effectiveness of judicial review and opportunities for improvement and reform.

It is also pragmatic. Many policies that we associate with the judicial process—including doctrines providing deference to administrative agencies—are in fact subject to legislative control. My testimony today addresses three: judicial deference to agencies' interpretations of their own rules (also known as *Seminole Rock* or *Auer* deference); judicial deference to agencies statutory interpretations (also known as *Chevron* deference); and the APA's exemption of interpretative rules—which often serve to impose legal obligations on the public—from ordinary rulemaking procedures. Each presents the potential opportunity for reforms that make our administrative state more accountable to the public, to Congress, and to the law.

I. The Status Quo: Judicial Deference To Agency Interpretations

Among the most famous statements in American law is Chief Justice John Marshall's declaration that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."[2]

If only it were that simple. The "law" is not what it was in Marshall's day. The law today consists not only of the Constitution and the statutes enacted by Congress, but also a vast body of regulation promulgated by the agencies of the Executive Branch, which also make "law" by issuing guidelines, litigating, and conducting adjudications.[3] In many instances, the legal authority to carry out these tasks—in effect, to make law—has been expressly and specifically delegated to an agency by statute. For example, the Clean Air Act directs the Administrator of the Environmental Protection Agency to

---

[1] *See Bond v. United States*, 131 S. Ct. 2355, 2365 (2011).

[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[3] In recent years, federal agencies have published between 2,500 and 4,500 final rules annually, of which between 79 and 100 were classified as "major" due to their effect on the economy. Maeve Carey, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register, Cong. Research Serv. Report No. R43056, at 1, 8 (Nov. 26, 2014).

publish a list of "each air pollutant" "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and for which he intends to "issue air quality criteria."[4]

Carrying out such directives entails two different tasks. The more apparent one is to apply the law to the facts at hand and exercise judgment. But before an agency may apply the law, it must ascertain what the law is, particularly when a statute contains vague or ambiguous terms, such as "pollutant." That's the other task. So, in theory, an agency will first settle on the interpretation of the law that best furthers Congress's intentions as manifest in the statute itself and that (in the agency's view) best serves the public interest as manifest in its own policy choices and then apply that interpretation to the facts at hand. An agency theoretically goes through the same steps when it applies or enforces a vague or ambiguous regulation.

Although both steps involve making "law" in a very real sense, the two are different in kind. The courts have long recognized the legitimacy of Congress's delegation of factual determinations to executive agencies, on the view that it may "frequently [be] necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation."[5] In such cases, "a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[6] Thus, federal courts, being ill-equipped to second-guess such things as the EPA Administrator's "judgment" in determining whether to list a particular pollutant based on its characteristics, instead review the procedural regularity and rationality of factual determinations underlying regulatory actions.[7]

By contrast, determining "what the law is"—that is, the legal import of a statute or regulation—is well within the courts' traditional role and competence. This is the inquiry at issue when courts discuss the degree of deference afforded agency interpretations.

The first decades of judicial review under the Administrative Procedure Act more or less tracked this distinction, as Judge Henry Friendly described:

---

[4] 42 U.S.C. § 7408(a)(1). Listing, in turn, triggers a vast array of obligations for states and regulated parties.

[5] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

[6] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

[7] *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983).

> We think it is time to recognize...that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis.... However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.[8]

The case law, as Judge Friendly implied, was not altogether consistent, with some cases according agencies substantial deference for interpretations of statutes they had been charged to administer, while others considered interpretative questions in identical circumstances *de novo*—that is, without much or any deference to the agency's views.[9] In many cases, the courts sought to choose between the two on the basis of whether Congress had expressly or implicitly meant to leave the resolution of a particular ambiguity in a statute to the agency.[10] Other cases are more difficult to explain. Indeed, in

---

[8] *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom.*, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

[9] *See Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984) ("[T]he case law under the Administrative Procedure Act has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law."). *Compare Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Pub. Serv. Comm'n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 339 (1983) ("Of course, the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.") (quotation marks omitted), *with F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965) ("[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction."); *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31–32 (1981) ("The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction.").

[10] *See* Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516; *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (calling for deference where "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term").

the freewheeling spirit of the era, the Supreme Court routinely conducted open-ended "totality of the circumstances" inquiries before deciding to go with its own view of a statute's "most natural or logical" meaning,[11] and the lower courts considered themselves empowered to invent novel legal prerequisites to agency action[12] and to order executive agencies to create new regulatory programs out of whole cloth.[13] Often, these decisions applied, or at least recited, the multi-factor deference standard of *Skidmore v. Swift & Co.*, which (in the end) directs a court to consider "all those factors which give [an agency interpretation] power to persuade."[14]

Chevron changed all that. It set forth a straightforward two-step approach to judicial review of agency statutory interpretations that replaced the prior era's judicial ad-hocery:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[15]

---

[11] *E.g., Securities and Exchange Comm'n v. Sloan*, 436 U.S. 103 (1978).

[12] *E.g., Aeschliman v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)

[13] *E.g., Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 ERC 1815 (D.C. Cir.), *aff'd by equally divided court sub nom., Fri v. Sierra Club*, 412 U.S. 541 (1973) (ordering EPA to create the Prevention of Significant Deterioration Program (PSD) based on a statutory purpose provision and some cherry-picked excerpts of legislative history). For background, *see generally* Jack L. Landau, Alabama Power Co. v. Costle: An End to a Decade of Controversy Over the Prevention of Significant Deterioration of Air Quality?, 10 Env. L. 585, 589–92 (1980).

[14] 323 U.S. 134, 140 (1944). *See also United States v. Mead*, 533 U.S. 218, 227–28 (2001) (listing and discussing factors).

[15] 467 U.S. 837, 842–43 (1984) (footnotes omitted).

Chevron's "equation of gaps and ambiguities with express delegations turned the doctrine of mandatory deference...into a ubiquitous formula," effecting "a fundamental transformation in the relationship between courts and agencies under administrative law."[16] This was not by design—*Chevron* was an accidental landmark, and its author, Justice John Paul Stevens, believed that he was doing nothing more than restating the law as it stood at the time.[17]

But the timing was right: *Chevron's* rise coincided with a sea change in the politics and policies of judging. The doctrine quickly gained currency on the D.C. Circuit, particularly among Reagan appointees like then-judges Antonin Scalia and Kenneth Starr, who recognized it as a "landmark"[18] and a "watershed," respectively, for deregulation.[19] Under *Chevron*, no longer would courts impose artificial "obstacles" "when an agency that has been a classic regulator decides to go in the other direction" or when it "simply sits on its hands and does not choose to do additional things that could be done."[20] Instead, it "embraces the assumption that if a silent or ambiguous statute leaves an interpreter room to choose among reasonable alternative understandings, the interpretive choice entails the exercise of substantial policymaking discretion" that ought to be left to the agency unless clearly assigned to the courts.[21] In this view, judges are not the ones who ought to be exercising policymaking discretion—or, as they had been too frequently, making law—and *Chevron* serves to cabin their ability to do so.[22]

---

[16] Thomas W. Merrill and Kristin E. Hickman, Chevron's Domain, 89 George. L.J. 833, 834 (2001).

[17] *See generally* Thomas W. Merrill, The Story of Chevron: The Making of an Accidental Precedent, in Administrative Law Stories 398 (Peter L. Strauss ed., 2006).

[18] Antonin Scalia, The Role of the Judiciary in Deregulation, 55 Antitrust L.J. 191, 193 (1986).

[19] Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. REG. 283, 283 (1986).

[20] Scalia, The Role of the Judiciary, *supra* n.18, at 191.

[21] John Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 625 (1996).

[22] *See* Scalia, Judicial Deference, *supra* n.10, at 516–17; Thomas Miles and Cass Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761, 781 (2008) ("An evident aspiration of the *Chevron* approach is to limit the role of judicial judgments in the domain of policy."); *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 440 (3d Cir. 2004).

It would be several more years before the lower courts' view of *Chevron* bubbled up to the High Court, pushed along by the elevation of Justice Scalia in 1986. This delay was also a reflection, perhaps, of the Reagan and George H.W. Bush Administrations' efforts to tread lightly for fear that the Supreme Court would undermine the gains it had made in the courts of appeals.[23] Notwithstanding that diligence, *Chevron's* rise has not been without challenges. There are arguably multiple *Chevron* doctrines, each supplying different content to the "Step 1" inquiry. The "Step 2" inquiry is still under-theorized and underdetermined. In many cases where *Chevron* would seem to apply, it goes unmentioned entirely or is rejected on seemingly arbitrary grounds. And, as a factual matter, *Chevron* does not appear to have had its intended effect of increasing deference to agencies and thereby cabining judicial discretion.[24]

Nonetheless, *Chevron's* impact cannot be overstated—at least, its impact on the Executive Branch. It has fundamentally changed the way that agencies go about their business of interpreting governing statutes. The search for meaning in Congress's commands has been replaced with a hunt for ambiguities that might allow the agency to escape its statutory confines.[25] In other words, whatever its effect in court cases—which is hotly disputed—*Chevron* has transformed the way that the Executive Branch pursues its policy objectives.

As to agency interpretations of regulations, *Chevron* finds its analogue in *Seminole Rock*[26] or *Auer*[27] deference. The Court in *Seminole Rock* observed that, in construing an ambiguous regulation, it "must necessarily look to the

---

[23] William N. Eskridge, Jr., and Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 George. L.J. 1083, 1087 (2008). On the federal government's "win rate" in the lower courts post-*Chevron*, *see* Peter H. Schuck and E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1031 (1990). As for the Supreme Court, *see* Eskridge & Baer, *supra*, at 1121–22.

[24] *See generally* Jack M. Beerman, End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled, 42 Conn. L. Rev. 779 (2010).

[25] *See, e.g.*, Jonathan Adler and Michael Cannon, Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA, 23 Health Matrix 119, 195 (2013) (describing the "frantic, last-ditch search for ambiguity by supporters who belatedly recognize the PPACA threatens health insurance markets with collapse, which in turn threatens the PPACA").

[26] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[27] *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

administrative construction of the regulation if the meaning of the words used is in doubt." It concluded, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight *unless it is plainly erroneous or inconsistent with the regulation.*"[28] That phrase has become the "most common articulation" of the *Seminole Rock* standard.[29] And the Court has made clear that this form of deference applies even where the agency's interpretation is not "the best or most natural one by grammatical or other standards."[30] If anything, *Seminole Rock* deference is more deferential than *Chevron*.[31]

Prof. John Manning has identified three bases cited by the Supreme Court for according deference to agencies' interpretations of their own regulations:

> First, the Court has displayed the same concern with political accountability that underlay its decision in *Chevron*. The Court has explained that an agency's interpretation of a regulation may "entail the exercise of judgment grounded in policy concerns." As is true of statutory construction, interpreting regulations may involve "interstitial lawmaking." Hence, *Seminole Rock* reflects the same "sensitivity to the proper roles of the political and judicial branches" in our system of government. Second, as with *Chevron*, the Court has explained that the relative expertise of agencies and courts favors the availability of binding judicial deference to agency interpretations of regulations. Third...when an agency interprets a regulation that it has promulgated (the usual situation), the Court has found the presumption of binding deference particularly justified because of

[28] 325 U.S. at 414 (emphasis added).

[29] Manning, *supra* n.21, at 627–28 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

[30] *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

[31] *See* Eskridge & Baer, *supra* n.23, at 1098 (reporting results of empirical analysis); Stephen Johnson, Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and Chenery in the Supreme Court's 2006 Term, 57 Cath. U. L. Rev. 1, 31 (2007) (observing *Auer* deference is "even more deferential than *Chevron* deference"); Manning, *supra* n.21, at 627 n.80 ("In practice, a two-step formula should make deference less likely."). Or not. According to Justice Scalia, "In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

> the agency's superior competence to understand and explain its own regulatory text.[32]

In general, the Supreme Court has approved deference to agency interpretations that "reflect the agency's fair and considered judgment on the matter in question," regardless of their form, so long as they do not appear to be post hoc rationalizations of previous agency action[33] and "create no unfair surprise."[34] In *Auer*, for example, the Court deferred to an amicus brief filed by the Secretary of Labor.[35] That decision has been described as the "high-water mark for *Seminole Rock* deference."[36]

II. Growing Concerns Over Excessive Deference

Despite what appears to be a long-term trend converging on broad deference to agency interpretations, *Chevron* and *Seminole Rock* have faced increasing criticism in recent years, as aggressive executive action has pushed their latent defects to the surface. The virtue and the danger of judicial deference is that it empowers agencies to make policy decisions subject to minimal judicial scrutiny. The virtue is that agencies may have a democratic legitimacy that the courts lack, may be more accountable in their decisionmaking, and surely possess subject-matter expertise that judges do not.[37] The risk is that, so empowered, agencies may pursue their own policy agendas that are at odds with congressional intent; that agencies may take actions that were previously assumed to require legislation; that agencies may act in ways that compromise individual rights and that undermine the rule of law; and that agencies

---

[32] Manning, *supra* n.21, at 630–31 (footnotes omitted).

[33] *Auer*, 519 U.S. at 462.

[34] *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007). *See also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) ("To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.") (quotation marks omitted).

[35] *Id.*

[36] Elbert Lin and Brendan Morrissey, Christopher v. SmithKline Beecham: Will the Supreme Court Limit The Deference Afforded to an Agency's Interpretation of Its Own Regulations?, U.S. Law Week, Mar. 20, 2012.

[37] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991).

may arrogate sufficient power to themselves to be free of essential checks like congressional oversight.[38]

In short, judicial deference, when not coinciding with the Executive Branch's good faith in carrying out the laws that Congress has enacted and by settled understandings as to the limits of executive power, threatens to upset the equilibrium of the constitutional separation of powers.

A. Rethinking *Seminole Rock* Deference

Judging by a recent spate of separate opinions in the Supreme Court, *Seminole Rock* deference may be on its last legs, or nearly so. Good riddance.

Any discussion of *Seminole Rock* must begin with Prof. Manning's well-known 1996 article.[39] Manning argues that the apparent congruence of *Seminole Rock* and *Chevron* is a false one. By according "the agency lawmaker...effective control of the exposition of the legal text that it has created," *Seminole Rock* deference, unlike *Chevron*, "leaves in place no independent interpretive check on lawmaking by an administrative agency."[40] This is problematic for the reason identified by Montesquieu and embraced by the Framers: "[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[41]

As Manning explains, allocating legislative and executive power to the same entity has serious consequences for individual liberty. First, it encourages an agency to issue imprecise or vague regulations, "secure in the knowledge that it can insist upon an unobvious interpretation, so long as its choice is not 'plainly erroneous.'"[42] Second, it undermines accountability, by removing an independent check on the application of law that is ill-considered or unwise. Third, it "reduces the efficacy of notice-and-comment rulemaking" by permitting the agency "to promulgate imprecise or vague rules and to settle upon or reveal their actual meaning only when the agency implements its rule through adjudication."[43] Fourth, "*Seminole Rock* deference disserves the due

---

[38] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217–22 (Thomas, J., concurring in the judgment).

[39] Manning, *supra* n.21.

[40] *Id.* at 639.

[41] *Id.* at 645 (quoting Montesquieu, The Spirit of the Laws bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768)).

[42] *Id.* at 657.

[43] *Id.* at 662.

process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it."[44] Finally, *Seminole Rock* may distort the political constraints on agency action by making it "more vulnerable to the influence of narrow interest groups" who are able "to use "ambiguous or vague language to conceal regulatory outcomes that benefit [themselves] at the expense of the public at large."[45]

Manning's article has found a ready audience on the Court, beginning with Justice Scalia's concurring opinion in *Talk America, Inc. v. Michigan Bell Telephone Co.* (2011). Scalia, who authored *Auer*, explains that he has "become increasingly doubtful of its validity."[46] Quoting Montesquieu, he observes that it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[47] He continues:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.[48]

The Court was offered an opportunity the next term to rein in *Seminole Rock* in *Christopher v. SmithKline Beecham Corp.*, which concerned the Department of Labor's interpretation (announced in an amicus brief) of a regulatory definition that controlled an exception to mandatory overtime wages.[49] Without overruling *Seminole Rock* or *Auer*, the Court withheld deference on the ground that applying the agency's interpretation would "impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced" and thereby "undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires."[50] The industry at issue had treated its tens of thousands of "detailers" as exempt outside salesmen for decades, and the Department

---

[44] *Id.* at 669.

[45] *Id.* at 676.

[46] 131 S. Ct. 2254, 3366 (2011) (Scalia, J., concurring).

[47] *Id.*

[48] *Id.*

[49] 132 S. Ct. 2156, 2162–63 (2012).

[50] *Id.* at 2167 (quotation marks omitted).

had never initiated any enforcement actions or suggested that it thought the industry was acting unlawfully.[51] The Court explained that these circumstances exemplified the problems identified by Prof. Manning, particularly the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking."[52] The Court devoted all of a halfhearted footnote (drawn from, of all places, Justice Scalia's *Talk America* concurrence) to *Seminole* Rock deference's "important advantages": "it 'makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process.'"[53] Justice Alito's majority opinion drew the support of Chief Justice John Roberts and Justices Scalia, Anthony Kennedy, and Clarence Thomas.

For all its favorable language, *Christopher* suggests that the Court—or at least the majority in that case—was not yet prepared to overrule *Seminole Rock*, which it clearly could have done. But two more recent cases may reflect growing support for doing so.

In an opinion by Justice Kennedy, the majority in *Decker v. Northwest Environmental Defense Center* accorded deference to EPA's interpretation of its Industrial Stormwater Rule, finding it to be "permissible" and consistent with the agency's longstanding position.[54] The Chief Justice, joined by Justice Alito, concurred, stating that they would reconsider *Seminole Rock* and *Auer* in the appropriate case, but that this one, where the issue had not been briefed, was not it.[55] Justice Scalia dissented from the relevant portion of the majority opinion, expanding on the points raised in his *Talk America* concurrence. There is "no good reason," he argued, to give agencies the authority to say what their rules mean.[56]

The most recent case to raise the issue is *Perez v. Mortgage Bankers Association*, which rejected the D.C. Circuit's *Paralyzed Veterans* doctrine holding that an agency must use the APA's notice and comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly

---

[51] *Id.* at 2168.

[52] *Id.* (quotation marks and alteration omitted).

[53] *Id.* at 2168 n.17 (quoting *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring)).

[54] 133 S. Ct. 1326, 1337–38 (2013).

[55] *Id.* at 1338 (Roberts, C.J., concurring).

[56] *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

from a previously adopted interpretation.[57] The APA requiring no such thing, the Court had little difficulty overruling the lower court precedent. Justice Scalia concurred in the judgment, arguing that that result, although correct, allows agencies to promulgate interpretative rules, without having to conduct notice and comment, that have the force of law due to *Chevron* and *Seminole Rock* deference.[58] This is another reason, he said, to overrule *Seminole Rock*.[59]

Justice Thomas also concurred in the judgment, publicly adding himself to the list of justices critical of *Seminole Rock*. The doctrine, he explained, "raises serious separation-of-powers concerns" by placing aspects of the judicial power in the executive's hands and undermining the judicial "check" on the political branches.[60] "The Constitution does not empower Congress to issue a judicially binding interpretation of the Constitution or its laws. Lacking the power itself, it cannot delegate that power to an agency."[61]

After *Perez*, four justices—the Chief, Justice Scalia, Justice Thomas, and Justice Alito—have called for reconsideration of *Seminole Rock* and *Auer*. The only Republican appointee on the Court not to take a position on the matter is Justice Kennedy, whose majority opinion in *Decker* may suggest that he doesn't see the matter as the other four do. On the other hand, the issue arguably wasn't before the Court in *Decker* or *Perez*. It should also be noted that Justice Elena Kagan has expressed uneasiness with *Auer's* informality, but not necessarily with *Seminole Rock in toto*, in oral argument.[62]

The growing number of separate opinions, combined with the passage of time without the Court agreeing to hear a case that squarely raises the issue, indicates that, while there are four votes necessary to grant certiorari, there are probably not five votes at this time to dispatch *Seminole Rock*. But the frequent writing on this topic may signal that a fifth justice—perhaps Justice Kennedy—is at least open to the idea but still undecided. As for *Auer*—and its

---

[57] 135 S. Ct. 1199 (2015).

[58] *Id.* at 1211 (Scalia, J., concurring in the judgment).

[59] *Id.* at 1212–13.

[60] *Id.* at 1220 (Thomas, J., concurring in the judgment).

[61] *Id.* at 1224.

[62] Transcript, at 3, *Chase Bank USA NA v. McCoy*, No. 09-329 (argued Dec. 8, 2010) ("I'm wondering whether *Auer* continues to remain good law after *Christensen* and *Mead*."). In 1994, Justice Ruth Bader Ginsburg joined a dissent by Justice Thomas raising several of the points later elaborated upon in Prof. Manning's article, but it would probably be a stretch to read much into that. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

doctrine according deference to interpretations in things like legal briefs that lack much formality—there may already be five votes to overrule it, counting Justice Kagan. But it makes sense that, strategically, those who are aiming at *Seminole Rock* would be reluctant to address its most problematic application while leaving the broader doctrine in place.

Yet the Supreme Court does not have the final word on these things; Congress does. Giving agencies the authority to interpret their rules is not a constitutional command, but (like *Chevron*) a matter of congressional delegation or authorization. The Court "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[63] Thus, when considering which of several competing actors should be entitled to such deference, the Court has asked "to which...did Congress delegate this 'interpretive' lawmaking power."[64] There is no reason to believe that the presumption of delegated or conferred authority is inviolable; any power that Congress may confer on an agency, it can also rescind. Nor is there any reason to believe that the power to interpret regulations—to say what the law is, without deferring—is one that the Constitution forbids assigning to the courts, consistent with the requirements of Article III.[65] Indeed, the courts routinely exercise that power today, in cases where agencies have not addressed a particular interpretative question or have been denied deference.[66] Accordingly, through legislation, Congress could abrogate *Seminole Rock* deference, leaving courts to interpret agency rules *de novo* or according to their "power to persuade."

The risks of so doing are few. Whatever hypothetical barrier there may be to agencies' ability to advance the public interest as they see it would be minimal. "For as soon as an interpretation uncongenial to the agency is pronounced by a district court, the agency can begin the process of amending the regulation to make its meaning entirely clear."[67] The risk of confusion when parties cannot absolutely depend on agency interpretations should also not be overstated for the same reason and two in addition. First is the overriding incentive for agencies to make clearer rules to achieve the results they seek in

---

[63] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). *See also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

[64] *Martin*, 499 U.S. at 151.

[65] Congress has, in fact, codified *Skidmore*-style deference in certain cases. *See* 12 U.S.C. § 25b(b)(5)(A).

[66] *E.g., Christopher*, 132 S. Ct. 2156, 2168–69 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[67] *Decker*, 133 S. Ct. at 1341–42 (Scalia, J., concurring in part and dissenting in part).

the courts, resulting in improved notice of the law to the benefit of all those subject to regulation. The second is that the notion that application of *Seminole Rock* deference actually promotes consistency in adjudication is mistaken; it doesn't. As persuasively shown in recent research, decisions applying *Seminole Rock* in the lower courts are plagued by "confusion, inconsistency, and outright conflict."[68] And the risk of a possible shift from rulemaking to adjudication is unlikely, due to the advantages of using rules—efficiency, binding effect across administrations, consistency, etc.—and the costly, repetitive, and burdensome nature of case-by-case adjudication.[69] Finally, this isn't a case of choosing between the devil we know and the one we don't[70]—whatever its merits or demerits, *Skidmore*-style deference is hardly an unknown at this point.

All this shows that overruling *Seminole Rock* and *Auer*—whether by judgment or by legislation—would hardly be an avulsive change in the law. And it would have the benefits of fortifying the constitutional separation of powers, improving notice of the law, and ultimately advancing individual liberty. It is a reform worthy of serious consideration.

B. Rethinking the Treatment of Interpretative Rules Under the Administrative Procedure Act

Another problem worthy of Congress's consideration—and one that cannot be rectified by the courts—is the APA's exemption of interpretative rules from ordinary rulemaking procedures.[71]

Interpretative rules are those "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[72] By contrast, legislative rules are "issued by an agency pursuant to statutory authority and...have the force and effect of law," no less than if their terms

---

[68] Kevin Leske, Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals, 66 Admin L. Rev. 787, 801 (2014) (surveying the case law).

[69] Manning, *supra* n.21, at 665–66.

[70] *See* Conor Clarke, The Uneasy Case Against Auer and Seminole Rock, 33 Yale L. & Pol'y Rev. 175, 178 (2014).

[71] *See* 5 U.S.C. § 553(b)(A) ("Except when notice or hearing is required by statute, this subsection does not apply (A) to interpretative rules....").

[72] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quotation marks omitted). *See also* United States Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

were wrought in statutory language.[73] That is the conceptual distinction. The legal distinction is procedural: "Unless another exemption applies, a valid legislative rule can be adopted only through use of the APA rulemaking procedure.... By contrast, an agency can issue an interpretative rule without following any procedure."[74]

The practical distinction, however, is less clear. Courts have struggled to distinguish between the two types of rules, describing the dividing line as "fuzzy," "tenuous," "blurred," "baffling," and "enshrouded in considerable smog."[75] After all, in most instances, an agency may impose duties on regulated parties through its interpretation of statutory or regulatory language.[76] The difference in effect has also diminished in recent decades. Historically, it was the view that only "[v]alid legislative rules have about the same effect as valid statutes and are therefore binding on courts."[77] But not so for interpretative rules: "a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise."[78]

Today, however, interpretative rules are routinely given legal effect just like legislative rules—to the point of binding the public. This is a consequence of the doctrines of judicial deference. As described above, a court applying *Chevron* deference will typically defer to an agency's reasonable construction of a statute, even if that construction was not stated in a legislative

---

[73] *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). *See also* Attorney General's Manual, *supra* n.72, at 30 n.3 ("rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers").

[74] Richard Pierce, Distinguishing Legislative Rules from Interpretative Rules, 52 Admin. L. Rev. 547, 549 (2000).

[75] *Id.* at 547–48 (footnotes omitted) (citing respective cases).

[76] Although this is not the case in every instance. *See id.* at 551–52 (observing that some "agency-administered statutes are drafted in ways that render issuance of a legislative rule an indispensable predicate to the agency's ability to use any other mechanism to implement the statute").

[77] Kevin W. Saunders, Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Pubic Participation, 1986 Duke L.J. 346, 350 (1986) (quoting 5 K. Davis, Administrative Law Treatise § 29:20, at 421 (2d ed. 1979 & Supp. 1982).

[78] *Batterson*, 432 U.S. at 425 n.9.

rule that was subject to notice and comment.[79] Likewise, a court applying *Seminole Rock* or *Auer* deference will defer to an agency's interpretation of its own regulation so long as it is not "plainly erroneous or inconsistent with the regulation."[80] Thus, as a practical matter, the often subtle distinction between legislative and interpretative rules has become narrower than ever and, in some circumstances, nonexistent.

This suggests that the basis for exempting interpretative rules from the APA's notice and comment requirements—that such rules have no legal force—no longer justifies the exception:

> The Act...contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations. In such a regime, the exemption for interpretive rules does not add much to agency power. An agency may use interpretive rules to *advise* the public by explaining its interpretation of the law. But an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means.[81]

---

[79] According to the Supreme Court's decision in *Mead*, *Chevron* deference applies in instances of "administrative implementation of a particular statutory provision...when it appears that Congress delegated authority to 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." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Thus, "the construction of the statute need not be found in a formal regulation adopted after notice and comment to receive deference." *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015). *See also Barnhart v. Walton,* 535 U.S. 212, 222 (2002) (recognizing that "*Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) ("The agency's pronouncement need not even come in a notice-and-comment rule. All kinds of administrative documents, ranging from manuals to opinion letters, sometimes receive *Chevron* deference.").

[80] *See, e.g., Barnhart*, 535 U.S. at 222. This is hardly unusual, given that an agency's interpretation of its regulation is unlikely to come in the form of *yet another* regulation. *Perez* suggests that deference *may* apply with less force to interpretative rules that do not appear to "reflect the agency's fair and considered judgment" or that "conflict[] with a prior interpretation," 135 S. Ct. at 1208 n.4, although the courts' application of these factors has been inconsistent, to say the least.

[81] *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

But "[b]y supplementing the APA with judge-made doctrines of deference," the Court has "revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them."[82]

This has consequences. To begin with, it allows agencies to circumvent time-consuming and burdensome notice and comment by using interpretative rules to carry out their policy objectives.[83] In so doing, they skip past the deliberative process otherwise required by the APA, forsaking its substantial benefits:

> [The APA rulemaking procedure] enhances the quality of rules by allowing the agency to obtain a better understanding of a proposed rule's potential effects in various circumstances and by allowing the agency to consider alternative rules that might be more effective in furthering the agency's goals or that might have fewer unintended adverse effects. Second, it enhances fairness by providing all potentially affected members of the public an opportunity to participate in the process of shaping the rules that will govern their conduct or protect their interests. Finally, it enhances political accountability by providing the President and members of Congress a better opportunity to influence the rules that agencies issue.[84]

These are, of course, no small things. There is a reason, after all, that Congress requires agencies to bear the "high price" of the rulemaking process in order to bind the public.[85]

One way to close this loophole would be to adopt the D.C. Circuit's *Paralyzed Veterans* doctrine that the Supreme Court overruled in *Perez*. The doctrine required "that an agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."[86] The lower court justified this approach out of concern that agencies could abuse the interpretative rule exception to make fundamental changes in the law, to which the courts would generally defer, without carrying out standard APA

---

[82] *Id.* at 1211–12.

[83] *See id.* at 1209 (acknowledging the obvious).

[84] Pierce, *supra* n.74, at 550 (citing Kenneth Davis & Richard Pierce, Administrative Law Treatise 233 (3d ed. 1994))

[85] *Id.*

[86] *Perez*, 135 S. Ct. at 1203 (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (1997)).

rulemaking procedures.[87] The Supreme Court did not necessarily disagree, but instead held (correctly) that the doctrine was flatly inconsistent with the APA's text.[88] Whether or not this was a good policy outcome is a question on which the Court appropriately passed, instead trusting that Congress had "weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules."[89]

Congress is free to reconsider that decision. One virtue of the *Paralyzed Veterans* doctrine is that it focuses on interpretative *changes*, requiring notice and comment for the kinds of interpretative rules that may be most likely to upset settled expectations. But this limitation does come at a cost. The doctrine does not apply to *new* interpretative rules, no matter their impact. It is also in tension with *Auer* and perhaps *Chevron*, potentially denying full deference to only certain agency interpretations, while allowing others to have the usual binding effect. In sum, the doctrine increase complexity, draws practically arbitrary distinctions, and does not amount to a complete solution to the problems arising from the use of interpretative rules.

Another option is to eliminate the exception for interpretative rules, thereby subjecting them all to the APA's notice and comment requirements. This would surely be a mistake. Agency interpretations are numerous, often informal, and useful to regulated entities, who might not otherwise be informed of an agency's approach to enforcement or have the benefit of its expertise. A blanket notice and comment requirement would be unworkable, due both to the difficulty of determining when a statement, litigating position, or other action rises to the level of an interpretative rule[90] and to the burden of observing APA rulemaking procedures for all such actions.[91]

---

[87] 117 F.3d at 586.

[88] 135 S. Ct. at 1206.

[89] *Id.* at 1207.

[90] *See, e.g.*, *Hicks v. Cantrell,* 803 F.2d 789 (4th Cir. 1986) (deferring to a letter by a regional administrator of the Department of Labor); *Am. Med. Ass'n v. Heckler*, 606 F. Supp. 1422, 1440–41 (S.D. Ind. 1985) (treating a "Dear Doctor" letter as an interpretative rule). The article from which these examples are drawn contains more. *See* Robert Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1 (1990). *Cf.* 5 U.S.C. § 551(3) (defining "rule" to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

[91] *See* Pierce, *supra* n.74, at 550–51.

A third and more promising option is to deprive agency interpretations promulgated without notice and comment of any legal force beyond the power to persuade. This approach cuts to the heart of the problem, which is not that agencies are expounding on the laws they administer without following rulemaking procedures, but that they are doing so in actions that bind the public. It is similar to Justice Scalia's proposal in his *Perez* concurrence to "restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations...by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct."[92] Scalia's proposal would go further than that discussed here, in that it would end *Seminole Rock* deference altogether—an option discussed above in Section II.A. Although he does not discuss the fate of *Chevron*—that doctrine not being at issue in *Perez*—he recognizes that the problem of interpretative rules is "perhaps insoluble if *Chevron* is not to be uprooted."[93] The option discussed here would not uproot *Chevron*, but only deny its presumption of deference to regulations promulgated without notice and comment.

This approach is not subject to the shortcomings of the others. It avoids the underbreadth of the *Paralyzed Veterans* doctrine (because it would reach all interpretations carrying the force of law, not just those that supersede prior interpretations) and the overbreadth of a blanket requirement (because it would not reach all manner of informal agency action). It would also be minimally disruptive: agencies would remain as free as they are today to go about their business and provide guidance to regulated parties, while retaining the power to adopt interpretations that potentially bind the public, so long as they choose to exercise it by undertaking a proper rulemaking.

Finally, this approach would bring much-needed clarity to the law, ending once and for all the unworkable and unmanageable distinction between legislative and interpretative rules. Instead, the line would be perfectly clear—has the agency conducted notice and comment?—and would track the distinction that Congress sought to draw when it enacted the APA, between rules that bind the public and those that do not.[94]

---

[92] *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment).

[93] *Id.*

[94] Saunders, *supra* n.77, at 352 ("Since the interpretative rule had no binding authority...there would be little cause for controversy.").

C. Rethinking *Chevron*

One aspect of Justice Scalia's *Perez* concurrence that has attracted considerable attention is his suggestion that fixing the pathologies of administrative law may require reconsideration of *Chevron* deference.[95] His remark speaks to a broader dissatisfaction—on the Court, among regulated parties and the public, and in the academy—with the current state of administrative authority. Where agencies once were viewed as delegates of Congress, simply "fill[ing] up the details" of congressional enactments,[96] the Executive Branch has become a primary, if not *the* primary, mover in making federal law, supplanting Congress.[97] Scalia's criticism is notable because he is often seen as the leading exponent of judicial deference to agencies, in general, and of *Chevron*, in particular. But his writings and opinions over the years have identified a tension between judicial deference and executive fidelity to the law that has become more prominent of late. That tension, in turn, provides a sound organizing principle for thinking about *Chevron's* continued vitality.

The point of *Chevron* was to quell what many viewed as judicial activism. Requiring deference to either clear statutory language or, barring that, agency policy choices cabins judges' ability to make law. Political choices would therefore be channeled to the political branches, which (unlike the courts) may easily reverse or change course as circumstances require. This would prevent ossification of the law and promote political and democratic accountability, the Courts being the only branch to lack a constituency.[98]

But, as Scalia presciently explained on the occasion of *Chevron's* fifth anniversary, judicial deference to agency actions must be matched by fidelity to statutory law. And this, he presciently predicted, would drive future debate on the application of *Chevron* and could perhaps even be its undoing:

> What does it take to satisfy the first step of *Chevron*—that is, when is a statute ambiguous? *Chevron* becomes virtually meaningless, it seems to me, if ambiguity exists only when the argu-

---

[95] *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment). But should it really have been such a surprise? *See Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) ("...*Chevron* (take it or leave it)..."); *Mead*, 533 U.S. at 241–42 ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.").

[96] *See supra* n.6 & accompanying text.

[97] *See, e.g.*, Tim Devaney, Obama's 'pen and phone' barrage, The Hill, Dec. 28, 2014, http://thehill.com/regulation/pending-regs/228093-obamas-pen-and-phone-barrage.

[98] *See generally* Scalia, Judicial Deference, *supra* n.10.

> ments for and against the various possible interpretations are in absolute equipoise. If nature knows of such equipoise in legal arguments, the courts at least do not. The judicial task, every day, consists of finding the *right* answer, no matter how closely balanced the question may *seem* to be. In appellate opinions, there is no such thing as a tie. If the judicial mentality that is developed by such a system were set to answering the question, "When are the arguments for and against a particular statutory interpretation in equipoise?," I am certain that the response would be "almost never." If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist. This is indeed intimated by the opinion in *Chevron*—which suggests that the opposite of "ambiguity" is not "resolvability" but rather "clarity." Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions (though still a better one than what it supplanted). How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.[99]

It may well be that those battles have been lost, particularly with respect to how the Executive Branch uses *Chevron* to achieve its policy goals. As described above, the task of statutory interpretation by agencies has been turned on its head, with the search for meaning and intention being supplanted by the search for ambiguities that will allow the agency to follow its preferred course. A few examples illustrate the point:

- **The "Clean Power Plan."** After unsuccessfully pressing Congress to pass legislation limiting greenhouse gas emission from power plants, the Obama Administration has recently moved to regulate those emissions directly under an all-but-forgotten provision of the Clean Air Act, with the end goal of substantially reducing the use of coal in electricity generation. EPA's proposal relies on two notable statutory leaps.

  The first concerns the availability of the program at issue—known as Section 111(d) or "Existing Source Performance Standards"— when a catego-

[99] *Id.* at 520–21. This roughly corresponds to what has been called the "interpretative model" of *Chevron*, recognizing that the doctrine's application may vary among judges based on their methods of statutory interpretation. *See generally* Orin Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 Yale J. Reg. 1, 13–17 (1998).

ry of sources has already been regulated under Section 112 of the Act. Section 111(d), as codified in the U.S. Code, authorizes EPA to issue performance standards "for any existing source for any air pollutant...which is not...emitted from a source category which is regulated under section [112]."[100] The agency has a laundry list of reasons why this provision is ambiguous: the Act contains a conforming amendment that arose in the Senate that somehow confuses things enough to authorize EPA to do what it wants; the codified statutory text can be read as requiring EPA to regulate sources that are also subject to Section 112, despite that this interpretation makes no sense and violates basic rules of grammar; the word "regulated" could mean just about anything, or nothing; and "any air pollutant" does not necessarily mean "any air pollutant," but can be given a "context-appropriate meaning."[101] For all these reasons, EPA believes it "need not" give the exclusion language its most natural reading and can do what it likes, so long as that natural reading is not "clearly and indisputably the only possible way to interpret that provision."[102] For that questionable proposition, it cites *Chevron*.

The second leap is EPA's interpretation of the term "system of emissions reduction"—which plainly refers to source-level controls and other modifications to sources—to encompass states' entire electric systems.[103] Thus, EPA claims the authority—based on its statutory authority to require states to submit "standards of performance for [an] existing source"—not only to regulate power plant emissions, but also to compel states to replace coal-fired generation with natural gas; to replace coal-fired capacity with "zero-carbon generation" like wind and solar; and to reduce electricity demand.[104] Whether or not this interpretation survives judicial review, EPA has set sufficiently tight deadlines that states are already being forced to undertake implementation measures, even before the agency has released a final rule.

- **The Mercury Rule**. EPA's Section 112 regulation, known as the "Mercury Rule," is currently under review by the Supreme Court.[105] The Clean

[100] 42 U.S.C. § 7411(d)(1)(A)(i).

[101] Final Brief for Respondents, at 35–40, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. filed March 9, 2015).

[102] *Id.* at 34.

[103] 79 Fed. Reg. 34,830, 34,836 (June 18, 2014).

[104] *Id.*

[105] *Michigan v. EPA*, No. 14-46.

Air Act directs the agency, before subjecting power plants to onerous Section 112 regulation, to make a finding that "such regulation is appropriate and necessary."[106] EPA claims discretion under *Chevron* to interpret the word "appropriate" to exclude the consideration of costs, despite that it's difficult to conceive of what that word could refer to if it doesn't at least encompass costs.[107] The agency's logic is that the word is defined "in broad terms," such that the agency has discretion to give it more or less any meaning it chooses.[108]

- **EPA's Greenhouse Gas Regulations**. EPA's first attempt to regulate greenhouse gas emissions was under the "Prevention of Significant Deterioration" program, which requires any "major" facility with the potential to emit 250 tons per year of "any air pollutant" (or 100 tons per year for certain types of sources) to comply with emissions limitations that reflect the "best available control technology."[109] Despite that applying those triggers to greenhouse gases would ensnare an enormous number of sources, EPA claimed authority under *Chevron* to (1) recognize greenhouse gases as an "air pollutant" subject to PSD requirements but (2) to "tailor" the statute by replacing those triggers with "a new threshold of 100,000 tons per year for greenhouse gases."[110] The Supreme Court rejected that gambit, recognizing that it "is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD...permitting."[111] But because the rule had already gone into effect, nearly all states had already adopted rules consistent with EPA's approach.
- **FERC's "Demand Response" Authority**. The Federal Power Act charges the Federal Energy Regulatory Commission with regulating "the sale of electric energy at wholesale in interstate commerce" and ensuring that rules "affecting" wholesale rates are just and reasonable[112] Relying on *Chevron*, the Commission claimed authority under that provision to incentivize retail customers to reduce electricity consumption, on the ground

---

[106] 42 U.S.C. § 7412(n)(1)(A).

[107] Brief for the Federal Respondents, at 21–22, *Michigan v. EPA*, No. 14-46 (filed Feb. 25, 2015).

[108] *Id.* at 23.

[109] *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014).

[110] *Id.* at 2444–45.

[111] *Id.* at 2445.

[112] *Elec. Power Supply Ass'n v. F.E.R.C.*, 753 F.3d 216, 219 (D.C. Cir. 2014).

that it reductions would affect wholesale rates.[113] The D.C. Circuit disagreed, recognizing that the agency's interpretative approach "had no limiting principle" and would authorize it "to regulate any number of areas, including the steel, fuel, and labor markets."[114] The agency's wholesale regulatory authority, it concluded, does not allow it to meddle in retail markets.

- **Health Exchange Tax Credits**. The Patient Protection and Affordable Care Act established health insurance "Exchanges" that are operated by either by individual states or by the federal government and provides subsidies for persons "enrolled through an Exchange established by the State under [Section] 1311," which is the provision concerning Exchanges established by states.[115] Exchanges established by the federal government are addressed in a later provision, Section 1321. The Internal Revenue Service, relying on *Chevron*, interpreted the language quoted above to encompass an Exchange established by the Federal Government under Section 1321, on the ground that it read "Exchange established by the State under [Section] 1311" to be a "term of art that includes a federally-facilitated Exchange."[116] This action is currently under review by the Supreme Court.[117]

There are, unfortunately, many more examples.[118] No matter *Chevron's* specifics in judicial proceedings, executive agencies have come to see it as a license for improvisation and lawmaking, so long as an escape-hatch of ambiguity can be found—and it always can.[119] Whether or not *Chevron* has reduced judicial discretion, it has unleashed the Executive Branch and upset the balance of power between it and Congress. This is the "mood" of *Chevron* deference.[120]

---

[113] *Id.* at 220.

[114] *Id.* at 221.

[115] 26 U.S.C. § 36B(b)(2)(A); 42 U.S.C. § 18031.

[116] Brief for the Respondents, at 20–25, *King v. Burwell*, No. 14-114.

[117] *See id.*

[118] One of particular note was vacated in *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

[119] *Cf.* Timothy Noah, Bill Clinton and the Meaning of "Is," Slate, Sep. 13, 1998, http://www.slate.com/articles/news_and_politics/chatterbox/1998/09/bill_clinton_and_the_meaning_of_is.html.

[120] *See* Kent Barnett, Codifying Chevmore, 90 N.Y.U. L. Rev. 1, 54 n.275 (2015).

Chevron's path in the courts has also not been as its early adherents intended. As an initial matter, the inquiry as to whether to apply *Chevron* deference has become, in many cases, a morass. According to *Mead*, "[d]elegation of such [interpretative] authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[121] This formulation is "woefully imprecise," requiring courts to consider a "grab bag" of factors and not even allowing that expressly conferred rulemaking authority will suffice to trigger *Chevron*.[122] This confusion in doctrine has led to substantial confusion, including the frequent phenomenon of courts expressly avoiding the *Chevron* question on the asserted (and often debatable) ground that they would reach the same result either way.[123]

Still, that's an improvement over the many decisions concerning agency interpretations that fail to mention *Chevron* at all. One empirical study found that the Supreme Court "applied no deference regime at all" in over 53 percent of its agency-interpretation cases from the mid-1980s through 2005.[124]

That the courts are sometimes reluctant to apply *Chevron* may reflect the difficulty of doing so. Jack Beerman has observed that there are multiple *Chevron* doctrines, ranging from the highly deferential original (defer unless "Congress has directly spoken to the precise question at issue"[125]) to the occasional laudable attempt to wring every drop of meaning from traditional sources and inferences, including those that speak to the extent of the agency's statutory authority, before considering the agency's views.[126] There is no obvious way to reconcile the relatively pinched "Step 1" inquiry in *Chevron* itself with the Court's more thoughtful explications of statutory meaning and agency power in cases like *Utility Air Regulatory Group*,[127] *Brown and William-*

---

[121] 533 U.S. at 227.

[122] *Id.* at 245 (Scalia, J., dissenting).

[123] Another complication is that the Court's recent decision in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), may have limited *Mead*. See Andrew M. Grossman, City of Arlington v. FCC: Justice Scalia's Triumph, 2013 Cato Sup. Ct. Rev. 331 (2013).

[124] Eskridge & Baer, *supra* n.23, at 1121.

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

[126] Beerman, *supra* n.24, at 817–20.

[127] *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014). But for Part II.B.2 of the majority opinion.

son,[128] *Gonzales v. Oregon*,[129] and *MCI Telecommunications*.[130] So even if a court recognizes that *Chevron* should apply and actually decides to apply it, the outcome still hinges on how exactly the court does so.

All this may explain why *Chevron* has arguably failed at its primary purposes of cabining judicial discretion and increasing deference to agencies' policy determinations. Empirical studies "show that immediately after the *Chevron* decision, the rate of affirmance of agency interpretations rose substantially, especially at the court of appeals level, but then in subsequent years it has settled back to a rate that is very close to where it was before *Chevron*."[131] One "study found that approval of an agency interpretation is *less* likely in cases in which *Chevron* is cited."[132] And another found that *Chevron* has been unsuccessful in "eliminat[ing] the role of policy judgments in judicial review of agency interpretations of law."[133] Despite *Chevron's* conceptual merits, its actual application in the courts leaves much to be desired.

So can *Chevron* be supplanted, in whole or in part? It certainly could be. As with *Seminole Rock* and *Auer* deference, no legal bar prevents Congress or the courts from choosing a different path. Congress could, for example, specify that agency interpretations would be subject only to *Skidmore* deference—that is, according to their power to persuade—just as it has done with review of certain agency action under the Dodd–Frank Wall Street Reform and Consumer Protection Act.[134] Or it could specify, as the Supreme Court actually once held post-*Chevron*, that "a pure question of statutory construc-

---

[128] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Prof. Merrill identifies *B&W* as an exercise in "boundary maintenance," but concludes that "[t]he problem with blowing up Step One or Step Two in this fashion is that it transforms *Chevron* from a deference doctrine into a form of de novo review, yet it does so episodically and without any announced basis for the circumstances that trigger such a transformation in the doctrine." Thomas Merrill, Step Zero After City of Arlington, 83 Fordham L. Rev. 753, 755 (2014). Perhaps the problem is less *B&W* than the courts' inconsistency in applying its exhaustive approach.

[129] 546 U.S. 243 (2006).

[130] *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994).

[131] Beerman, *supra* n.24, at 829 (citing studies).

[132] *Id.* (emphasis added).

[133] Thomas J. Miles and Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. Chi. L. Rev. 823, 825–27 (2006).

[134] *See* 12 U.S.C. § 25b(b)(5)(A).

tion [is] for the courts to decide."[135] In fact, Congress *already has* specified that, in the Administrative Procedure Act.[136] So it will apparently have to be more emphatic if it intends to overrule or limit *Chevron*.

Whether *Chevron* should be replaced is a more complicated question. Prof. Thomas Merrill avers that "*Chevron* has now been invoked in far too many decisions to make overruling it a feasible option for the Court."[137] It would break, at least superficially, with too much precedent. Congress, of course, doesn't face that limitation. But the costs of overruling *Chevron* are uncertain, due to the inconsistency that marks so many aspects of the doctrine. A new doctrine would presumably cause some uncertainly in the law—particularly for agency interpretations that enjoyed *Chevron* deference—but at the same time, any change isn't likely to be so great as to upset a large body of settled substantive law. Moreover, a new doctrine could potentially wipe away the complexity that surrounds *Chevron*, providing greater clarity and accountability in the law—although it may be that complexity is inevitable in our system of judicial review of administrative action. As for substantive results, it is difficult to say whether a seemingly less deferential replacement or modification would much reduce the deference to agency interpretations afforded by the courts, given the evidence that *Chevron* didn't change much. But it might well alter the mood of nearly unbridled discretion that now attends agency policymaking. Cabining *Chevron* in various respects—whether along the lines described above with respect to interpretative rules or amending certain statutes to specify a different standard of review—would be a more modest reform, with fewer risks.

---

[135] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

[136] 5 U.S.C. § 706 ("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."); § 706 ("The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... n excess of statutory jurisdiction, authority, or limitations, or short of statutory right."). One strike against *Chevron* (and *Seminole Rock* and *Auer*) is that it's flatly inconsistent with the APA. Historical evidence suggests that Congress meant what it said in 1946, but that courts ultimately adopted the more deferential views expressed in the Attorney General's Manual on the Administrative Procedure Act. *See* Beerman, *supra* n.24, at 789–90.

[137] Merrill, *supra* n.128, at 755. That said, the Chief Justice's dissent in *Arlington*, joined by Justices Kennedy and Alito, suggests that the three might be willing to revisit *Chevron*. *See* 133 S. Ct. at 1877 *et seq*. And after his recent concurrence in *Perez*, Justice Thomas can confidently be added to the list. *See* 135 S. Ct. at 1213 *et seq*.

Finally, it may be that *Chevron* is largely beside the point. There's nothing inherently wrong with its two-step framework; to the contrary, it makes good logical sense, by limiting agencies' interpretative discretion to filling up the gaps that Congress has left for them. The more important question may be whether the judges applying that framework are, in Justice Scalia's words, devoted to "finding the right answer, no matter how closely balanced the question may seem to be."[138] And it is notable that Justice Scalia, Mr. Chevron himself, is one of the most consistent votes on the Court against agencies' interpretations. In other words, it may be that *Chevron*—or any deference doctrine—does less work than the methodological orientation of the judges applying it. If that's so, then *Chevron* isn't necessary to cabin judicial discretion, and is unlikely to be effective in doing do. But that would also suggest that the benefits to replacing it may be limited, particularly compared to the benefits of appointing judges adept at the art of statutory interpretation. "The fox-in-the-henhouse syndrome is to be avoided...by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority."[139]

---

[138] Scalia, Judicial Deference, *supra* n.10, at 521.

[139] *Arlington*, 133 S. Ct. at 1874. Conceptually, there is much to recommend Prof. Merrill's proposal of a "Step Zero" that considers "whether Congress has in fact delegated authority to the agency to act with the force of law with respect to the precise question in controversy." Merrill, *supra* n. 128, at 783. This, like taking seriously statutory limits on agency authority, would theoretically "achieving a reconciliation between Chevron review and the traditional judicial function of boundary maintenance." *Id.* But it is probably asking too much of courts and agencies to add yet another step, and still more complexity, to an already complicated doctrine. The result, I fear, would be to further muddle the deference inquiry, while doing little to block agency overreaching.

III. Conclusion

Chief Justice Roberts's dissent in *Arlington* is not only stirring but correct in its view that deference must ultimately yield to the constitutional separation of powers. "[T]he obligation of the Judiciary," he writes, is "not only to confine itself to its proper role, but to ensure that the other branches do so as well."[140] Thus, the courts' "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."[141] He concludes: "We do not leave it to the agency to decide when it is in charge."[142] Nor should Congress.

I thank the subcommittee again for the opportunity to testify on these important issues.

---

[140] *Id.* at 1886 (Roberts, C.J., dissenting).

[141] *Id.*

[142] *Id.*