CHEVRON, COSTS, AND THE MAJOR QUESTION DOCTRINE

Three major issues about court review of agency rulemaking – costs, "the major question doctrine," and courts' deference to agencies' statutory interpretations – have been placed in the spotlight by Donald Trump's election, the Republican takeover of Congress, and the Supreme Court's recent decisions. The scope of administrative agency power (an important part of the President's Executive Branch power) may be significantly shaped by the outcome of disputes about these classic administrative law issues.

COSTS

Ordinarily, as all nine Justices agreed in *Michigan v. EPA*,[1] costs are highly relevant in agency rulemaking. Moreover, five Justices held that an agency should consider costs at the outset, before deciding whether to embark on a regulatory program, not later on down the line in deciding how much to regulate. Justice Scalia's majority opinion states: An agency has discretion (within reasonable limits set by the statute) to decide "how to account for cost" -- a "formal cost -benefit analysis in which each advantage and disadvantage is assigned a monetary value" is not necessarily required.[2] Other cases, like *American Textile Mfgers*, confirm that agency rulemakings need not include an extensive, full-blown cost-benefit analysis unless Congress "has clearly indicated such intent on the face of the statute."[3]

There are exceptions to these general rules, where a statute sets out different directives about cost consideration: Thus in *American Trucking*, the Court found that the Clean Air Act directed EPA's ozone rulemaking to proceed in two stages: first set standards for protection of human health, without regard for costs (technology forcing standards); and then consider costs/feasibility later.[4]

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[1] Michigan v. EPA, 576 U.S. ___, 83 USLW 4620 (June 29, 2015) (5-4) (Scalia). In the *Michigan* case, EPA argued that it need not consider cost when first deciding ***whether*** it was "appropriate and necessary" to regulate coal and oil-fired power plants under the Clean Air Act [CAA], requiring them to reduce mercury emissions and other toxic air pollutants, because the agency could consider cost later when deciding ***how much*** to regulate them. Justice Scalia's majority opinion flatly rejected this EPA claim, stating that "agencies have long treated cost as a centrally relevant factor when deciding whether to regulate." *See* 83 USLW at 4623- 4624. *And see* 83 USLW at 4726 (Kagan, J., dissenting, joined by Ginsburg, Breyer and Sotomayer, JJ.) ("cost is almost always a relevant --and usually, a highly important – factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing 'a standard-setting process that ignore[s] economic considerations.").) But the dissenters thought that EPA "acted well within its authority in declining to consider costs at the opening bell of the regulatory process given that it would do so in every round thereafter." [83 USLW at 4626].

[2] 83 USLW at 4624.

[3] *See* American Textile Mfgers v. Donovan, 452 U.S. 488, 509 (1981) (5-3) (Brennan) ("cost-benefit analysis by OSHA is not required by the statute because feasibility analysis is." "When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Id.* at 519).

[4] *See* Whitman v. American Trucking Assoc'ns, 531 U.S. 457 (2001) (9-0) (Scalia) (where the Clean Air Act (CAA) §109(b) directs EPA to set initial ozone standards based on a factor that does not include cost, and where other sections of the CAA state that cost consideration is required or permitted, the Act should not be read as allowing EPA to consider cost anyway in setting the initial standards). Justice Scalia's majority opinion in the *Michigan* case confirms that *American Trucking* holds only that: "where the Clean Act Air expressly directs EPA to regulate on the basis of a factor that on its face does not include costs, the Act normally should not be read as implicitly allowing the Agency to consider costs anyway." 83 USLW at 4623.

Trends in recent court decisions, capped by the *Michigan* case, thus require agencies to consider costs in deciding whether and how much to regulate.[5] These rulings would seem to limit agency rules to those that implement statutory goals at reasonable costs (when compared with benefits), while requiring fresh Congressional legislation to authorize other agency action.

Trump Administration plans to build a wall along the Mexican border, for example, might be difficult to justify as administrative action authorized by a statute that required consideration of cost. The New York Times reports that in 2011 the Obama Administration cancelled — as ineffective and too costly -- a multi-billion dollar contract with Boeing to construct a 2,000 mile wall along the Mexican border after spending $1 billion on just 53 miles of border in Arizona.[6] According to the Times, many of the laborers on Trump's wall might well be undocumented immigrants. Moreover, Mexico's largest cement manufacturer, Cemex, with a US-based subsidiary, might well be a major supplier. The Times concludes that "in an almost subversive inversion over who will pay for what, the United States could ultimately wind up paying Mexican citizens and Mexican-owned businesses to construct the wall."[7] Three University of Chicago Law School professors argued that President Trump's wall would flunk the cost-benefit analysis implicitly required by the Secure Fence Act of 2006.[8] It appears that a different statute applies, and that §§102(a),(b),(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides statutory authority – within the broad discretion of the Secretary of Homeland Security to "waive" or override cost/benefit concerns – for construction of President Trump's southwest border wall, subject only to the availability of Congressionally- appropriated funding.[9] Thus cost-benefit considerations about the southwest border wall appear to be left for Congress.

Over many years commentators have pointed out the limitations and shortcomings of cost-benefit analysis.[10] What quantifiable value does cost-benefit analysis place on the observance of fair procedures? Or environmental benefits, public health and life quality? Or the values that the Washington Post, in criticizing President Trump's recent Executive Order temporarily halting travel to

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5 *See* Michigan v. EPA, *supra* n.1; American Textile Mfgers v. Donovan, *supra* n.3; EPA v. EME Homer City Generation, 572 U.S.__, 82 USLW 4311 (April 29, 2014) (6-2) (Ginsburg) (Court upholds EPA's "cost-effective allocation of emission reductions among up-wind States" as a "permissible, workable and equitable interpretation" of the "Good Neighbor" Provision in the Clean Air Act. The statute gives EPA authority to select from among reasonable options, including the most efficient/least costly option); Entergy v. Riverkeeper, 556 U.S. 208 (2009) (6-3) (Scalia) (EPA may use cost-benefit approach when determining the "best technology available for minimizing adverse environmental impact" under the Clean Water Act, where statutory language was silent not only with respect to cost but with respect to all potentially relevant factors).

6 *See Trump Sees a Wall, Contractors See Windfalls*, NEW YORK TIMES, Jan. 29, 2017, at BU 1.

7 *Id.*

8 *See* Hemel, Masur and Posner, *How Antonin Scalia's Ghost Could Block Donald Trump's Wall*, NEW YORK TIMES Op-Ed, Jan. 26, 2017, at A29.

9 *See* CRS Report, *Barriers Along the U.S. Borders: Key Authorities and Requirements* (CRS Report # R43975, Jan. 27, 2017). *See also* Gilman v. Department of Homeland Security, 32 F.Supp.3d 1, 5 (D.D.C. 2014); United States v. 1.04 Acres of Land in Cameron Cty, Texas, 538 F.Supp.2d 995, 1004 (S.D. Tex 20008).

10 *See, e.g.*, Ackerman and Heinzerling, PRICELESS: ON KNOWING THE COST OF EVERYTHING AND THE VALUE OF NOTHING (The New Press 2015).

the United States from seven predominantly Muslim nations, calls the "values upon which the nation was founded and that have made it a beacon of hope around the world"?[11] Yet refined cost-benefit analysis is now generally accepted as a useful tool in shaping agency regulatory policy.[12] As Justice Scalia's opinion states in *Michigan v. EPA*: An agency has discretion in deciding "how to account for cost" consistent with any directions about cost consideration that appear in the controlling statute.[13] Where a governing statute calls for cost consideration by the administering agency, cost-benefit analysis provides a useful check against poorly-conceived or evidence-free agency action.

Trump-era agencies seeking deregulation or rescission of old regulations similarly must pass muster under the Supreme Court's cost-consideration tests, in new notice-and-comment rulemaking, if the agency itself (as opposed to Congress) seeks to make the 180-degree policy reversal entailed by deregulation. [14] This may be no easy task for some Obama-era regulations, including the Obama/EPA Clean Power Plan, which has been stayed by the Supreme Court until all court challenges to it are resolved. Targeted for rescission by the Trump Administration, the CPP appears to contain significant benefits.[15] Moreover, notwithstanding earlier industry complaints about its catastrophic costs, the CPP today apparently imposes ***incremental*** costs that are significantly lower than previously thought, because market forces (not EPA regulations) are now the major factor driving utilities to switch from oil and coal to "greener" fuels.[16] It is the incremental costs and benefits that should be assessed now.

` Theoretically, at least, cost-consideration analysis can provide a check on both ideologically-driven, weakly- supported agency regulations and ideologically-driven, weakly-supported deregulation.

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11 WASHINGTON POST Editorial, Jan.29, 2017 at A20.

12 *See, e.g.,* Executive Order 12,866, 58 Fed.Reg. 51735 (Sept.30, 1993) ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating") and the series of essays on cost-benefit analysis in the Harold Leventhal talks*:* Williams, *Cost-Benefit Analysis Colloquy: Squaring the Vicious Circle* (June 13, 2000), 53 Admin.L.Rev. 257 (Winter 2001); Adler, *Risk, Death, and Time: Risk, Death, and Time: A Comment on Judge Williams' Defense of Cost-Benefit Analysis*; Posner, *Cost-Benefit Analysis as a Solution to a Principal Agent Problem*; Sunstein, *Is Cost-Benefit Analysis for Everyone?* (all on the web: google *Harold Leventhal talks, DC Bar*).

13 83 USLW at 4624.

14 *See, e.g.,* Motor Vehicle Mfgs Ass'n v. State Farm, 463 U.S. 29, 41-42 (1983) (court rejects NHTSA's rescission of its occupant crash protection rules, holding that the same standards of court review apply to rescission and promulgation of such rules**);** Federal Communications Comm'n v. Fox Television, 556 U.S. 502 (2009) (change of agency position must be supported by good reasons and agency awareness that it is changing position); *Killing Regulations Could Take Years*, WALL ST. J., Dec. 15, 2016, at A4 ("Two Environmental Protection Agency rules are expected to be at the top of Mr. Trump's target list: One sets the first-ever federal limits on carbon emissions from power plants and another puts more bodies of water under federal jurisdiction. But conservative and liberal legal experts agree Mr. Trump's EPA will likely have to go through new rule-making processes to eliminate both the water and carbon rules. That process could take two years because a notice of public comment is required while the EPA justifies its decision from both a policy and legal perspective.")

15 *See, e.g.,* Masur & Posner, *Unquantifiable Benefits and the Problem of Regulation under Uncertainty*, 102 Cornell L.Rev. 87, 90- 91 (2015) (commenting on the significant quantifiable benefits of Obama/EPA's Clean Power Plan).

16 *See, e.g., Companies Stay Course on Emissions*, WALL ST.J., Dec. 6, 2016 at B1 ("Big utilities that burn coal, such as AEP, say they will continue their transition to cleaner energy sources—even if Mr. Trump makes good on his pledge to reverse the Clean Power Plan."); *Ruling fails to stun electricity providers*, WASHINGTON POST, Feb.12, 2016 at A2 ("Move to cleaner power is proceeding, regardless of Supreme Court's stay.")

THE MAJOR QUESTION DOCTRINE

Occasionally, the Supreme Court seems to recognize a federal major question doctrine, under which courts require a clear statement from the legislature to bring issues of great economic, social, or political consequence within the scope of an agency's regulatory authority. The major question doctrine – that some decisions are too critical to leave to agencies, at least absent clear legislative intent to delegate – has been inconsistently applied (*see* Massachusetts v. EPA, 549 U.S. 497 (2007) (EPA held to have regulatory authority over greenhouse gases, despite lack of explicit congressional authority)) but to date it has been invoked by the Court in five cases:[17] *King v. Burwell*,[18] *UARG*, [19] *Gonzales v. Oregon*,[20] *Brown & Williamson*,[21] and *MCI Telecom*.[22]

Well-settled principles of statutory construction, independent of the major question doctrine, can explain the Court's rulings in all these cases. The major question doctrine functions as an additional rationale, stated in dictum, and not essential to the decisions. (Compare the methodology of the old US

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[17] *See generally* Case Note, 128 Harv.L.Rev. 1508, 1515-17 & nn.69, 76 (March 2015) (collecting cases and commentary on the Court's major question doctrine).

[18] In King v. Burwell, 576 U.S. ___, 83 USLW 4541, 4545 (June 25, 2015) (6-3) (Roberts, C.J.), the Court ruled that the structure, context and history of the Affordable Care Act shows that statutory language referring to exchanges "established by the State" is effective to provide tax credits to people whether they sign up on Federal or State exchanges. This issue of statutory construction involves billions of dollars each year; it is a question of deep "economic and political significance" that is central to the statutory scheme; and there is no IRS expertise in crafting health insurance policy. Accordingly: "This is not a case for the IRS. It is instead our task to determine the correct reading of the Affordable Care Act."

[19] In Utility Air Regulatory Group v. EPA, 573 U.S.___, 82 USLW 4535 (June 23, 2014) (5-4) (Scalia), the Court invalidated one part of the EPA's greenhouse gas regulations, on the ground that some agency rules were unreasonable because they purported to rewrite clear statutory language setting specific numerical thresholds for regulating pollutants and "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." We are told by *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 Harv.L.Rev. 1227 (February 2017) that: "By concluding that policy consequences trump clear text, UARG more closely tracks Holy Trinity purposivism than legal process purposivism." Yet in UARG Justice Scalia's majority opinion relied upon clear statutory text, setting specific numerical triggers for EPA regulation of pollutants, to invalidate part of EPA's greenhouse gas regulations that set numerical triggers different from those in the CAA statute. What EPA's different numbers were attempting to do was to obey *Massachusetts v. EPA* (court holds that the CAA statute requires EPA to regulate greenhouse gases like CO-2 if (as EPA later found) those gases endanger human health and safety) while "adjusting" the statute's numerical triggers to make them apply more rationally to CO-2 emissions that are orders of magnitude greater than those from conventional pollutants, for which the statutorily-designated numerical triggers were written. But the Court held: "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." 573 U.S. at ___. The Court's "policy override" came earlier in *Massachusetts v. EPA*, not in *UARG*.

[20] In Gonzales v. Oregon, 546 U.S. 243, 266-267 (2006) (6-3) (Kennedy), the Court rebuffed the US Attorney General's claim of authority to regulate physician-assisted suicide, and to change his statutory interpretation, given only "oblique" legislative authorization and the "importance of the issue" which has been "the subject of an 'earnest and profound debate' across the country."

[21] In FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000) (5-4) (O'Connor), the Court rejected FDA's claim of jurisdiction to regulate tobacco products and advertising for them, in the absence of a clear Congressional statement granting that authority, given the pattern of past Congressional laws affecting the tobacco industry that did not grant FDA such authority.

[22] In MCI Telecom. Corp. v. AT&T, 512 U.S. 218, 231 (1994) (5-3) (Scalia), the Court ruled that it was "highly unlikely" that "Congress would leave the determination of whether an industry will be rate-regulated to agency discretion."

Court of Appeals for the D.C. Circuit in interpreting the APA in the 1960s and 1970s, discussed below). But these dicta have troubled commentators as unsound and biased against ambitious agency action.[23]

STATUTORY CONSTRUCTION

Traditional tools of statutory construction include examination of the statute's text, structure, context, and legislative history, as well as consideration of the statute's object and policy and the need to construe the statute to avoid absurd or bizarre results.[24] Beyond this, or even before this, there are disagreements.

A) Textualism

"We're all textualists now," Justice Kagan stated.[25] But the statutory text is not, and never has been, the be-all-and-end- all of statutory interpretation.

The starting point for interpreting a statute is the statutory text. The objectively ascertainable meaning of statutory provisions is what counts, as Justice Scalia insists, not the subjective unarticulated motivations of the authoring legislators.[26] But statutory words must be read "in their context and with a view to their place in the overall statutory scheme*."*[27] The Court has said that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[28] If "'the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters,' … the intention of the drafters, rather

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[23] *See, e.g.*, Note, *Major Question Objections*, 129 Harv.L.Rev. 2192, 2212 (June 2016); Heinzerling, *The Power Cannons*, 58 Wm & Mary L.Rev. __, __ (forthcoming 2017).

[24] *See, e.g.*, Intel Corporation v. Advanced Micro Devices, 542 U.S. 241, 72 USLW 4528, 4532 (June 21, 2004); Pilot Life Inc. v. Dedeaux, 481 U.S. 41 (1987); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991); Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976); Mov Pharmaceutical v. Shalala, 140 F.3d 1060, 1067-1068 (DC Cir 1998); *Gunther*, LEARNED HAND pp.470-473 (Knopf 1994); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 206 *(1967);* Randolph, *Dictionaries, Plain Meaning and Context in Statutory Interpretation*, 17 Harv.J.L. & Pub.Pol. 71 (1994). *See generally, The Case of the Spelunkean Explorers: A Fiftieth Anniversary Symposium*, 112 Harv.L.Rev. 1851- 1923 (1999).

[25] *See* Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:09 (November 17, 2015), http://today.law.harvard.edu/in-scalia-lecture- kagan- discusses-statutory-interpretation.

[26] *Contrast* Sunstein, *There Is Nothing that Interpretation Just Is,* 30 Const.Comment 193-194, 197, 202 (2015) (listing a variety of different interpretive methods – *e.g.*, public meaning, author's intent, Dworkinian moral reading – as possibilities and "reasonable alternatives" that judges and lawyers must choose among based on "normative judgments of their own" about what "makes our constitutional system better rather than worse.")

[27] King v. Burwell, 576 U.S.__, 83 US LW 4541 (June 25, 2015) (statutory context, history and purpose[27] of language allowing tax credits for people participating in the Affordable Care Act through exchanges "established by the State" showed that this statutory language must be interpreted to allow tax credits from both State and Federal Exchanges). *See, e.g.*, Yates v. United States, __U.S.__, 83 USLW 4120 (February 25, 2015) (statutory context of 18 USC 1519 -- outlawing the destruction of "any record, account, or tangible object" to impede a federal investigation -- shows that it applies only to records that preserve information, not across-the-board to destruction of any and all physical evidence such as undersized fish that were thrown overboard to frustrate a criminal prosecution for illegal fishing).

[28] *Pilot Life Inc. supra*, 481 U.S. at 51.

than the strict language, controls."[29] As legal scholars have long noted: "The actual words used [in a statute] are important but insufficient. The reports of congressional committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may now be looked at. Even the conduct of the litigants may be important in that the failure of the government to have acted over a period of time on what it now suggests as the proper interpretation throws light on the common meaning. But it is not easy to find the intent of the legislature."[30]

Other factors also may play a role in statutory interpretation, as they come to light in cases about specific statutes where their relevance becomes apparent. These "other factors" include, for example, both statutory and unwritten "laws of interpretation" (*e.g*., the "repeal-creates-no-revival" rule of law in 1 U.S.C. §108; the last-in-time rule that new statutes generally trump old ones where both apply by their terms; and the statutory rules of interpretation in 1 U.S.C. §§1- 8);[31] "cannons of interpretation"[32] that include both language canons (syntax, grammar), and substantive canons such as the rule of lenity, and the avoidance cannon;[33] as well as a variety of "clear statement" principles (*e.g.*, that statutes generally should not be interpreted to apply retroactively).[34] Of course, statutes should be interpreted to avoid absurd or bizarre results.[35] And to avoid constitutional infirmity, a statute may be "interpreted" to contain specific detailed safeguards that nowhere appear in the statutory text.[36] Other aids to statutory

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29 United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989).

30 Edward H. Levi, INTRODUCTION TO LEGAL REASONING 28-29 (U. Chicago Press 1949). A recent article, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 Harv.L.Rev. 1227 (February 2017), emphasizes the importance of some general jurisprudential interpretive methods that the article attributes to various Justices. This shortchanges the importance of the specific details of individual statutes (with all their individual statute-by-statute idiosyncrasies and complexities). *See* Edward H. Levi, *supra*. It also overlooks the significance of political considerations and consequences in judicial decision-making. *See, e.g.,* Massachusetts v. EPA, 549 U.S. 497 (2007) (statutory language of CAA interpreted, with political significance and consequences in mind, and contrary to the EPA's protestations that it had no CAA authority to regulate greenhouse gases like CO-2, to give EPA and the courts a say in regulating greenhouse gases and addressing climate change).

31 *See* Baude and Sachs, *The Law of Interpretation*, 130 Harv.L.Rev. 1079 (February 2017).

32 *See* Scalia and Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xvi (2012) (listing over fifty "canons of interpretation"); Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Cannons about How Statutes Are to be Construed*, 3 Vand.L.Rev. 395 (1950) (listing canons and counter canons).

33 *See* Krishnakumar, *Reconsidering Substantive Canons*, 84 U.Chi.L.Rev. 825 (2017) (cataloguing substantive canons and their use by the Roberts Court).

34 *See, e.g*., Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv.L.Rev. 2118, 2154-2156 (June 2016) (cataloguing "clear statement" rules that apply in statutory interpretation cases).

35 *See, e.g.,* Holy Trinity Church v. United States, 143 U.S. 457, 459- 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."); Dougherty, *Absurdity and the Limits of Literalism*, 44 Am.U.L.Rev.127 (1994).

36 *See, e.g.,* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 Mich.L.Rev. 1275 (2016) (commenting on the canon of constitutional avoidance, and defending splitting that canon—as the High Court appears to have done in past cases -- into an interpretative canon and a separate principle allowing courts to change the law through "remedial interpretation").

construction, in addition to the formal text of a statute, also can emerge in particular cases from considering real-world Congressional drafting practices.[37]

A classic example showing the shortcomings of statutory textualism is antitrust law. It is impossible to take the antitrust statutes (*e.g.*, the Sherman Act and the Clayton Act), to "put them under a lamp post," and then to read all of modern antitrust law come leaping out of the statutory text (*e.g.*, the new emphasis on efficiency; the Herfindahl-Hirschman index for measuring industry concentration in horizontal merger cases; the rules governing the acquisition of failing firms). Today the meaning of the antitrust laws is properly determined – everyone now agrees – by looking at the accumulated judicial interpretations of those statutes that have built up over the years.

Today discerning courts and scholars – moving beyond the so-called "textualist- purposivist divide" – ask, not whether, but when and how courts should resort to interpretative aids beyond the bare statutory text. Professor Krishnakumar's recent study finds that most of the justices on the Roberts Court refer to legislative history at higher rates than they refer to substantive canons in construing statutes, and that the canons rarely play an outcome-determinative role.[38] Moreover, "the Court's own precedents – rather than substantive canons or legislative history – seem to be the unsung gap-filling mechanism that the justices turn to when confronted with unclear statutory text."[39] This continues patterns of statutory interpretation by the courts that have been observed by scholars over many years [40]

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[37] *See, e.g.*, Gluck, *Congress, Statutory Interpretation, and the Failure of formalism: The CBO Cannon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U.Chi..Rev. 177 (2017). Professor Gluck argues that statutory interpretation is aided by "objective, formalism-compatible rules" that are "grounded in congressional practice." These include "the CBO Cannon" – "the concept that ambiguous statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office (CBO) in calculating its budgetary impact. *See id*. at 187- 198, 209-210. Other rules of statutory interpretation, reflecting "structural, objective features of the Congressional drafting process," include an "anticonsistency presumption" for different statutory sections drafted by different Congressional committees; and presumptions about the impact of different legislative vehicles (*e.g.*, omnibus bills vs. appropriations vs. emergency bills), multiple agency delegations, and special legislative history. *See id*. at 177, 199- 209. The way a statute is interpreted also may reflect whether the statute is viewed (on the one hand) as reflecting the compromise/bargain/or end-point reached where contending political forces came to rest in fighting over "spoils" unconnected to any consistent policy, or (on the other hand) as implementing consistent principles and policy objectives articulated in the statute.

[38] This "seems to accord with the preferences of congressional staffers in charge of drafting legislation, who rank substantive cannons behind legislative history and rules on agency deference when asked about the usefulness of particular aids." *See* Krishnakumar, *Reconsidering Substantive Canons*, 84 U.Chi.L.Rev. 825, 832 (2017), citing Abbie R. Glick and Lisa Schultz Bressman, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons*, 65 Stan.L.Rev. 901, 966 (2013).

[39] *See* Krishnakumar, *Reconsidering Substantive Canons*, 84 U.Chi.L.Rev. 825, 826, 901- 908 (2017). *Compare* William N. Eskridge Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand.L.Rev. 593 (1992) (arguing that, over the last eleven years of the Burger Court and the first five years of the Rehnquist Court, the substantive canons were used as after-the-fact rationalizations for statutory constructions selected for other reasons); James J. Brudney and Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand.L.Rev. 1 (2005) (arguing that the substantive canons were used by the conservative justices on the Rehnquist Court to support their preferred set of policies, ignoring legislative history in the process).

[40] *See* Edward H. Levi, INTRODUCTION TO LEGAL REASONING *supra* at 32-33, 54, 57 (over time, as early court decisions flesh out the meaning of less-than-completely-precise statutory provisions, later court rulings will assimilate those early decisions and proceed more narrowly down the path that was earlier established).

Origins of the "Textualist Resurgence": A Matter of Interpreting the APA

What explains the "Textualist Resurgence" movement in statutory interpretation championed by Justice Scalia? One explanation may be that it represents a reaction (or over-reaction) to earlier free-wheeling DC Circuit interpretations of the Administrative Procedure Act (APA) that reflected judges' strongly-felt personal policy preferences more than the statutory text. To be specific, in the 1960s and early to mid-1970s, the United States Court of Appeals for the DC Circuit developed a series of theories to justify the imposition of additional procedures – over and above those required by the statutory text of the APA or the Constitution -- upon agencies engaged in informal rulemaking under §553 of the APA. These swash-buckling D.C. Circuit opinions appeared in cases, usually in dictum or an otherwise non-reviewable ruling, that invoked an amalgam of considerations including: (1) constitutional due process; (2) the needs of judicial review, which create the need for agency procedures adequate to ensure "reasoned decision-making" and a record adequate to withstand substantial evidence review; (3) the common law power of the courts to supplement the minimum procedures of the APA; and (4) provisions about procedures in the organic statute of the agency.[41] As reviewed in Scalia, *Vermont Yankee: The APA, the DC Circuit, and the Supreme Court*,[42] these D.C. Circuit rulings were applauded by KC Davis and other administrative law professors and widely taught to law school students, but they were in profound tension with the administrative law rulings of the United States Supreme Court. They created a "continually evolving judge- made common law" for "oversight of administrative procedures," "not based upon constitutional prescriptions or rooted in the language of the APA itself."[43]

Textualism, in the sense of a greater fealty to the statutory text of the APA, was insisted upon by *Vermont Yankee.*[44] The opinion of the Court definitely rejected the notion that the APA establishes only "minimum requirements." It states that §553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[45] *Vermont Yankee* "put to rest the notion that the courts have a continuing "common-law" authority to impose procedures not required by the Constitution in the areas covered by the APA. In that sense, at least, "hybrid rulemaking" under the APA is dead. And, perhaps just as important, it has clearly established what is (for courts of appeals, at least) a new tone for the decision of administrative law cases

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41 One high water mark of these creative DC Circuit opinions was O'Donnell v. Shaffer, 491 F.2d 59 (D.C.Cir. 1974) (validity of FAA's mandatory age-60 retirement rule for commercial air line pilots upheld) where Chief Judge Bazelon wrote extensive dicta reaffirming the Court's earlier dicta requiring extra-APA procedures in some informal agency rulemakings. Oral argument for the government, which won the case, emphasized the circular reasoning and lack of analytic support for these earlier swash-buckling DC Circuit pronouncements. Yet as government counsel in the case I advised the Court that it need not reach these fundamental issues, questioning a dozen years of case law development in the DC Circuit, because the FAA had in fact followed extra procedures in this particular case. A series of written and oral communications between the author and Antonin Scalia back in the Justice Department resulted in the first versions of the article that ultimately was published as Scalia, *Vermont Yankee, the DC Circuit and the Supreme Court*, 1978 SUP.CT.REV. 345.

42 1978 SUP.CT.REV. 345, 348- 352, 363-364, 389-396 (1978).

43 *Id*. at 363.

44 Vermont Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

45 435 U.S. at 524, 542-48; 1978 SUP.CT.REV. at 390.

– a tone of judicial restraint and of great deference to the text, if not entirely to the original meaning, of the APA."[46] There remain some areas (*e.g.*, informal adjudications constituting a large percentage of agency actions) where courts may fill the vacuum left by the APA's omission of specific procedures, and the lower courts may continue to expansively interpret the language of some provisions in the APA itself that do not specify their implementing procedures (*e.g.*, the "notice and comment" provision in §553(b)(3) that courts have interpreted to require an agency to disclose the scientific data upon which a proposed rule relies, and the "statement of basis and purpose" provision in §553(c) that has been interpreted by the courts to require an agency to answer major arguments against a proposed rule).[47]

Textualism in interpreting the APA, and rejection of D.C.Circuit adventurism, was reaffirmed more recently in *Peres v. Mortgage Bankers Association*.[48] At issue was the D.C. Circuit's novel requirement that, where an agency issues an interpretive rule that represented its "definitive position," upon which regulated parties have relied, the agency could not change that position by means of a later interpretive rule, but must proceed through notice-and-comment rulemaking. The High Court reversed, holding that the statutory text of the APA clearly states that notice-and-comment procedures are not required, and that the process for revoking or modifying an interpretive rule is the same as the more informal process used for creating it in the first place. Reliance interests of regulated parties could be considered on court review of the changed agency interpretive rule under the arbitrary and capricious standard of review.

B) Legislative History

When the statutory text changes from A to B to C, even Justice Scalia recognized the relevance of legislative history. To be sure, some textualists object to the use of legislative history.[49] But as stated by eight Justices in *Wisconsin Public Intervenor v. Mortier*,[50] in rejecting Justice Scalia's general distaste for legislative history: "As for the propriety of using legislative history at all, common sense

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46 1978 SUP. CT. REV. at 395-396.

47 *See id.* at 391- 392, 394-395. Moreover, where the substantive (as opposed to procedural) rules of the APA are concerned, "a number of administrative law doctrines represent substantial judicial elaboration in tension with the APA's text." Gillian E. Metzger, *The Supreme Court 2016 Term: Forward: 1930s Redux, The Administrative State under Siege*, 131 Harv.L.Rev. 2, 38 (2017); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo.Wash.L.Rev. 1293, 1295 (2012) (supporting "administrative common law" as "administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies"); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin L.Rev. 629, 636- 638 (2017) (commenting that post-*Vermont Yankee* and *Peres v. Mortgage Bankers Association*, "extensive administrative common law remains on the books," and listing as examples *Chevron* deference, *Auer* deference, exhaustion of administrative remedies, ripeness, the presumption of reviewability, "hard look" review and judicial remedies in administrative law such as the *Chenery* principle and remand without vacatur)..

48 Peres v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015).

49 *See, e.g.*, Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U.Chi.L.Rev. 81, 90- 97 (2017) (overlooking the significance of the fact that legislators know in advance the traditional rules of the game – played out in the legislative process -- in which legislative history will count when courts interpret the statutes they enact; arguing that committee reports fail to represent "the understanding of the median legislator"; observing that legislative history is not itself legislation enacted by the legislature and signed by the President; and arguing that traditional guides to analyzing legislative history (*e.g.*, weighting committee reports and statements of the sponsors more heavily than statements of dissenters) can be unreliable – "stuff to fool interest groups, perhaps, or to take in credulous judges, but not capable of fooling other members of Congress" – if they do not reflect the views of difficult-to-identify "legislators with deal-making or deal-breaking power").

50 Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (White, J.).

suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, '[W]here the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived.' Fisher v. Blight, 2 Cranch 358, 386 (1805). Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. *See, e.g.*, Wallace v. Parker, 6 Peters 680, 686-690 (1832). We suspect that the practice will likewise reach well into the future."[51]

C) ***Chevron*** *and Its Critics*

1. ***Chevron***, ***Brand X***, and ***Home Concrete***

Traditionally, the administrative agency that administers a statute enjoys some discretion in interpreting its meaning, so that courts will defer to the agency's reasonable construction.[52] *See* Chevron v. NRDC, 467 U.S. 837 (1984).[53] In assessing the validity of the administrating agency's interpretation of a

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[51] Similarly, in his interview during the open general session at the American Law Institute's 2017 annual meeting, Mr. Justice Stevens commented that all the Justices (except Mr. Justice Scalia) rely on legislative history, although in order to avoid unnecessary conflict with Scalia, their opinions may not use it. *See* utube.com/watch?v=xiRvbKwUBWk @ 16:37 to 19:35.

[52] Even an agency's interpretation of the scope of its own statutory authority (that is, its jurisdiction) is entitled to *Chevron* deference. *See* City of Arlington, Texas v. FCC, 569 U.S. 290, 133 S.Ct. 1863 (2013). Yet the courts owe no *Chevron* deference to an agency's interpretation of a statute, where the agency's pronouncement is not issued as a formal rule with "lawmaking pretense." *See* United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (agency policy statements and enforcement guidelines, which lack the force of law, fall outside the scope of *Chevron's* analytic framework, so that *Chevron* analysis does not apply). *See generally* Sunstein, *Chevron Step Zero*, 92 Va.L.Rev. 187, 207-209 (2006). Nor does *Chevron* deference apply where more than one agency administers the statute (*e.g.*, the Freedom of Information Act), or where both the agency and private parties may sue to enforce the statute (*e.g.*, the Superfund statute) in a dual government/private enforcement scheme. *See* Adams Fruit v. Barrett, 494 U.S. 638 (1990); Kelley v. EPA, 15 F.3d 1100 (DC Cir 1994), 25 F.3d 1088 (DC Cir. 1994), cert. denied, 513 U.S.1110 (1995). *See generally* Merrill & Hickman, *Chevron's Domain*, 89 Georgetown L.J. 88 (2001).

[53] Over many years the courts also have accorded deference to an agency's interpretation of its own regulations. *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand, 325 U.S. 410 (1945). Even the agency's brief on appeal (even an *amicus* brief presented by the agency itself, as opposed to separate appellate counsel's "*post hoc* rationalizations") may supply the controlling interpretation of an ambiguous regulation or additional support for a challenged agency rule or regulatory interpretation, if it reflects the agency's "fair and considered judgment" that is not plainly erroneous or inconsistent with the regulation. *See, e.g.*, Decker v. Northwest Environment Defense Center, 133 S.Ct. 1326, 1327- 1338 (2013); Chase Bank USA v. McCoy, 562 U.S. 195, 131 S.Ct. 871, 880- 882 (2011) and *compare* Christopher v. SmithKline Beecham, 567 U.S.__, 132 S.Ct. 2156, 2166-2167 (2012) (court rejects agency interpretation that was plainly inconsistent with its own regulation). However, the Supreme Court is currently debating, and may reconsider whether, when, and how much deference is due to an agency's interpretation of its own regulations, taking into account factors such as whether the agency regulation is vague and open-ended, whether it simply "parrots" the words of a statute, whether it conflicts with a prior agency interpretation, and whether it is "nothing more than a convenient litigating position." *See* Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013) (opinion of Scalia, J., concurring and dissenting) ("[I]t is time" for the Court to reconsider *Seminole Rock*/*Auer* deference), *id.* (opinion of Roberts, C.J. and Alito, J., concurring) (it may be appropriate to reconsider the principle of *Auer* deference); Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2136 (2012); Talk America v. Michigan Bell Telephone, 131 S.Ct. 2254 (2011) (Scalia, J., concurring). *See generally* Pierce & Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin.L.Rev. 515 (Summer 2011) (comparing six different "review doctrines" – *Chevron*, *Auer*, *State Farm*, *Skidmore*, *Universal Camera*, and *de novo* review – and finding that courts in fact defer to agencies about the same percentage of the time, under any of these doctrines). *Compare* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 Mich.L.Rev.___ (2017) (forthcoming) (survey of all 2,272 US Circuit Court decisions citing *Chevron* in 2003- 2013, finding agency win rates by deference standard

statute, the courts begin by asking "whether Congress has directly spoken to the precise question at issue"; if so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, 467 U.S. at 842-843.[54] If the court finds that "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.' *Id.* at 843.

2. Judicial Critics: Gorsuch, Thomas and Kavanaugh

(a) *Brand X, Home Concrete, and Justice Gorsuch.* One part of the *Chevron* regime that has attracted harsh criticism concerns whether agencies may "overrule" a court's interpretation of a statute.[55] An agency may change its interpretation of a statute, switching among valid different options to adopt a different construction within reasonable limits allowed by the statute, so long as the courts have not earlier declared that the statute has one and only one true meaning.[56] Under *Chevron* and *Brand X* agencies ordinarily may adopt their own interpretation of a statute, different from what earlier court decisions have approved, only where the earlier court decisions left open alternative interpretations and did not declare the one-and-only "once-and-for-always" true definition of what that statute means.[57] While agencies can and occasionally do deliberately go

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ranging from 77.4% (*Chevron* deference) (n=1168) [including 91.8% (*Chevron* step two (n=818) and 38.9% (*Chevron* step one) (n=350)] to 56.0% (*Skidmore* deference) (n= 168) to 38.5% (*De Novo* review) (n=117)).

[54] "[T]raditional tools of statutory construction" should be employed, *Chevron* instructs, to ascertain whether "Congress had an intention on the precise question at issue." Chevron v. NRDC, 467 U.S. 837, 843 n.9 (1984). *Compare* Hickman & Bidnar, *Chevron's Inevitability*, 85 Geo.Wash.L.Rev.__(forthcoming 2017) ("Which Tools of Statutory Construction?"). While courts and commentators have exhaustively dissected *Chevron*, Mr. Justice Stevens has commented that his opinion for the Court in *Chevron* was simply a fair summary of well-settled principles of administrative law. Given that administrative law covers nearly the entire spectrum of human activity (*see* Henry J. Friendly, *New Trends in Administrative Law*, MdBar.J. April 1974 at 9, quoted in 1 KC Davis, ADMINISTRATIVE LAW TREATISE §1:1 at 2 (2d ed. 1978)), it is not surprising that *Chevron*'s two-step analysis would be restated, questioned, supplemented, refined and developed with the identification of exceptions ("step zero") and nuances (*Chevron* step 1.0, 1.5, and 2.0?), and a renewed recognition of older, different deference standards that apply where *Chevron* does not apply (*Skidmore/Christensen* deference) in the myriad different fact settings that are presented by the cases.

[55] "But Republicans did not just target *Chevron*, *Skidmore* and *Auer*. They similarly do not like the *Brand X* doctrine, pursuant to which agencies have some authority to "overrule" judicial interpretations of statutes." *Administrative Law Developments – Judicial Review* at 74 (ABA 2016), citing Orrin Hatch, *Release: Senate, House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review* (March 17, 2016).

[56] *See* Federal Communications Commission v. Fox Television, 556 U.S. 502, 515-516, 523, 525 (2009); National Cable & Telecom v. Brand X, 545 U.S. 967 (2005); United States v. Home Concrete & Supply, LLC, 566 U.S.__ (April 25, 2012).

[57] *Contrast* Gutierrez-Brezuela v. Lynch, 834 F.3d 1142, 1143, 1150 (10th Cir. 2016) (opinion for the Court of Appeals by Judge Gorsuch (*id.* at 1143), and his separate concurring opinion (*id.* at 1150)). There Judge Gorsuch criticizes *Chevron* and *Brand X* on the ground that those cases allow agencies to "overrule a judicial precedent in favor of the agency's preferred interpretation." 834 F.3d at 1143. To be sure, agencies can change position and adopt a different statutory interpretation, within limits permitted by the statute. But *Chevron* and *Brand X* do not allow agencies to "overrule" courts. *Contrast* Note, *Administrative Law- Chevron and Brand X-- Tenth Circuit Holds that Certain Agency Interpretations Have No Legal Effect Until Court Approves*, 130 Harv.L.Rev. 1496, 1496 (March 2017) ("In effect, then, *Brand X* permits agencies to overrule courts when the circumstances are right."). The issue of whether a new permissible agency interpretation of a statute applies "retroactively"— raised in the *Gutierrez-Brezuela* case – is a separate issue. Ordinarily, a new permissible agency statutory interpretation or policy, first announced in an individual case, applies "retroactively" in that same adjudicative case where it is first announced, as well as prospectively to other cases from the date of its announcement. *See, e.g.* Pierce, ADMINISTRATIVE LAW TREATISE §13.2 at p.1123 (5th ed. W 2013 supp). In cases where application of the new agency interpretation or policy would unfairly affect reasonable reliance interests that are based upon an earlier court interpretation or an earlier agency interpretation or policy -- which Judge Gorsuch suggested was so in the *Gutierrez-Brezuela* case -- a reviewing court may find

into conflict with the "once-and-for-always" statutory interpretations of a lower court, hoping for a more favorable ruling from a different court and (ultimately) the US Supreme Court, they are not permitted to disagree with the "once-and-for-always" statutory interpretations of the US Supreme Court. *See, e.g., Home Concrete & Supply* (court refuses to give *Chevron* deference to a Treasury regulation that was based on a statutory construction that was foreclosed by an earlier US Supreme Court decision that left no room for any different construction by the agency).[58] Under *Fox Television*, when an agency changes position it must indicate its awareness that it is changing position and that there are good reasons for the new policy. But it need not demonstrate to the satisfaction of a reviewing court that the reasons for the new policy are better than the reasons for the old one. Moreover, agency action is not subject to a "heightened" or more searching standard of court review simply because it represents a change in administrative policy.

Mr. Justice Gorsuch's central criticism of the *Chevron* regime – that it allows agencies to "overrule" courts – is unpersuasive because it overlooks the principles stated in *Home Concrete*.

(b) *Justice Thomas*. Mr. Justice Thomas' concurring opinion in the *Michigan* case states that the Court should reconsider the broader question of whether, when and why the Court should ever defer to agency interpretations of federal statutes. Under *Chevron* deference, when courts defer to an agency's interpretation of an ambiguous statute, the courts say they are deferring to any plausible agency interpretation (not "the best" interpretation), which (according to Justice Thomas) calls into question the courts' ultimate authority to "say what the law is" (*Marbury v. Madison* (1803)).[59] Moreover, "agencies interpreting ambiguous statutes typically are not engaged in acts of interpretation at all" but instead are engaged in the "formulation of policy," filling in gaps based on policy judgments made by the agency (not Congress) about which policy goals the agency wishes to pursue.[60] In Justice Thomas' view, this is a "potentially unconstitutional delegation" of Congressional power.[61]

These objections have been largely rejected by the modern Court.[62] The objections confirm, however, that the Justices are prepared to consider checks – including cost considerations (*Michigan v.*

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it arbitrary, capricious and impermissible for the agency to apply its new statutory interpretation or policy in those "reliance" cases. *See, e.g., Peres v. Mortgage Bankers Assoc'n*, *supra* (reliance interests of regulated parties can be considered on court review of a changed agency interpretive rule under the arbitrary and capricious standard of review). The Court of Appeals in *Gutierrez- Brezuela* could have found, directly and immediately, that application of the agency's new statutory interpretation was arbitrary and capricious as applied to the litigant who relied upon the court's earlier statutory interpretation. The opinion remanding to the agency strongly suggests that that is what the agency should find on remand. Well-settled principles of administrative law thus support an equitable outcome in *Gutierrez-Brezuela*, without any need to dismantle *Chevron* or *Brand X*.

58 United States v. Home Concrete & Supply, LLC, 566 U.S.__ (April 25, 2012).

59 *Contrast* Adrian Vermeule, *Bureaucracy and Distrust: Landis Jaffe, and Kagan on the Administrative State*, 130 Harv.L.Rev. 2463, 2475, 1478 (2017) (describing Louis Jaffe's views): "The judicial power to "say what the law is" is fully satisfied and exhausted by the courts' power to determine whether the law has committed interpretive authority to an agency." "As to factual questions * * * as to legal questions * * * and as to procedural questions * * * judicial review, although independent, decides that the law itself, rightly understood, is best taken to cede judicial authority to agencies."

60 83 USLW at 4625.

61 *Accord*: WALL ST.J. Editorial, "*The Mercurial Court*" (June 30, 2015) ("A future Court ought to revisit *Chevron* deference in what has become an era of presidential law-making.").

62 *See, e.g.*, Pierce, ADMINISTRATIVE LAW TREATISE (4th ed. 2002) §3.3 (surveying criticisms of *Chevron*; showing how *Chevron* is consistent with *Marbury v. Madison*; and explaining how Congressional delegation of interstitial policy making

EPA) and the major question doctrine – on sweeping Executive Branch assertions of agency power under general statutory grants of authority.

(c) *Judge Kavanaugh*. A critique of *Chevron* and current modes of statutory interpretation appears in Kavanaugh, *Book Review, Fixing Statutory Interpretation*.[63] "In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. Moreover, the question of when to apply *Chevron* has become its own separate difficulty." "The key move from step one (if clear) to step two (if ambiguous) of *Chevron* is not determinate because it depends on the threshold clarity versus ambiguity determination." Taking a "new approach," Judge Kavanaugh argues that "some ambiguity-dependent principles of interpretation should be applied as plain statement rules." These "clear statement" rules include the presumptions that statutes do not apply extraterritorially, that statutes do not effectuate implied repeal of other statutes, that statutes do not eliminate *mens rea* requirements, that statutes do not apply retroactively, and that statutes do not directly alter the federal-state balance unless Congress expressly so states.[64] Judge Kavanaugh warmly embraces the major question doctrine as a check on Executive Branch agency action that is not clearly authorized by Congressional statute.[65]

All these judicial criticisms of *Chevron*, coinciding with Republican Party objections to President Obama's expansive (or over-expansive) use of Executive Branch agency power, may or may not persist now that the White House is occupied by President Trump, a Republican.

3. Legislative Critics

Opposition to Obama-era regulations is reflected in a wide range of legislative bills and activities in Congress that aim to overrule certain agency rules and to cut back Executive Branch agency power generally. Taking a different approach, President Trump has issued executive orders that have the effect of encouraging and requiring agencies to deregulate cost-effectively.

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to agencies is consistent with political accountability, though a statute that makes wide-open, boundless delegations to an agency can continue to stir controversy), §2.6 (canvassing the history of the nondelegation doctrine); Mistretta v. United States, 488 U.S. 361, 372-374 (1989) (opinion describes current law rejecting or severely limiting the nondelegation doctrine: Congressional statutes may allow the Executive to make new rules of general applicability, so long as the legislation contains an "intelligible principle" that "clearly delineates the general policy" the agency is to apply and "the boundaries of [its] delegated authority"). *Accord*: Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP.CT.REV.41 (canvassing the spectrum of assaults now being made on the legitimacy of Executive Branch power and the administrative state). Sunstein and Vermeule find unpersuasive the separation of powers concerns stated by Mr. Justice Thomas in *Michigan v. EPA*; they question attempts to resurrect the nondelegation doctrine; and they defend the Court's ruling on agency procedures in *Peres* (courts may not impose additional procedures on agencies issuing interpretative guidance or changing their interpretative guidance). They also discuss Mr. Justice Scalia's shifting thoughts over time about the significance of section 706 of the APA, which appears to designate the courts rather than agencies as the interpreter of the laws. They generally support *Chevron* and *Auer* deference to agencies' interpretations of statutes and their own regulations. *See id.*

[63] Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv.L.Rev. 2118 (June 2016), reviewing Chief Judge Robert A. Kaufman's book, JUDGING STATUTES (2014).

[64] *See id.*, 129 Harv.L.Rev. at 2154-2156.

[65] *See* United States Telecom Assoc'n v. FCC __ F.3d __ (D.C.Cir. May 1, 2017) (rejecting challenge to FCC's net neutrality rule) (statement of Judge Kavanaugh, dissenting from denial of rehearing en banc).

(a) ***Constitutional Amendment?*** One part of the Republican Party's 2016 platform supported a constitutional amendment (the *Regulation Freedom Amendment* (RFA)) to curb over-regulation. It reads: "Whenever one quarter of the Members of the U.S. House or the U.S. Senate transmit to the President their written declaration of opposition to a proposed federal regulation, it shall require a majority of the House and Senate to adopt that regulation."[66] This proposed constitutional amendment responds to the Supreme Court's decision in *INS v. Chadha*,[67] holding one-house vetoes unconstitutional, striking down a statute allowing a single House of Congress to overturn the law embodied in an agency rule, and holding more broadly that Congress cannot act except through bicameral passage of a legislative bill that must be presented to the President.

(b) ***Congressional Legislation.*** Within the past several years, Congress has considered a large number of regulatory reform bills introduced by Members of Congress from both political parties.[68] Not surprisingly, the new 115th Congress is again considering legislative bills that would cut back federal agency power.

Foremost among them is the ***REINS Act*** ("Regulations From the Executive in Need of Scrutiny"), HR 26/S.21 (115th Cong. 2017) (passed House January 5, 2017), which would revolutionize our system of government. The central provision would require all major rules promulgated by federal agencies to receive affirmative Congressional approval by both Houses of Congress, and signature by the President, before becoming effective. This would strip rule- making power from Executive Branch agencies for major rules, defined as any regulation with an estimated annual impact of $100 million or more. House-passed HR 26 carves out, and leaves outside its scope, regulations that concern monetary policy issued by the Federal Reserve System or the Federal Open Market Committee. And it allows a major rule to take effect for "one 90-calendar-day period" if the President issues an Executive order that the regulation is necessary for national security, criminal law enforcement, compliance with international trade agreements, or "necessary because of an imminent threat to health or safety or other emergency." But in general the REINS Act would demote proposed major agency rules to simply ideas for Congressional consideration about whether or not to enact them in a statute. Congressional inaction— failure to enact a joint resolution of approval within 70 legislative days -- would kill the proposed major agency rule. Other parts of House-passed HR 26 would require each agency promulgating a new rule to identify and repeal an existing rule or rules to offset annual costs. (Taking this idea one step further, S. 56 (115th Cong. 2017) would require an agency to remove two or more regulations before it could implement a new one.) HR

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66 *See RNC Platform Pushes Regulation Freedom Amendment*, 85 USLW 81- 82 (July 21, 2016) (reporting on the status of the RFA).

67 INS v. Chadha, 462 US. 919 (1983).

68 All the regulatory reform bills introduced in the 112th, 113th 114th and 115th Congresses are listed and briefly summarized in a comprehensive memorandum (currently updated through January 30, 2017) prepared by the Administrative Conference of the United States. *See* https://acus.gov/memorandum/summary-administrative-law-reform-bills.

26 also would create a process for Congress to review all rules currently in effect over a 10-year period. With respect to nonmajor agency rules, HR 26 sets time limits for both Houses of Congress to consider a joint resolution of disapproval, which would have to be presented to the President for approval (or veto override) before it became a statutory law that would be effective to disapprove a nonmajor agency regulation. *See INS v. Chadha, supra.* Here the REINS Act rule of no-validity-until-Congressional-approval is reversed: Congressional inaction presumably would allow a nonmajor agency rule to take effect in the normal course. This part of HR 26 would extend to nonmajor agency rules, generally, a time-limited opportunity for Congress to weigh in with a joint resolution of disapproval of the sort that is currently provided for in the Congressional Review Act, 5 U.S.C. §§801 to 808, for so-called "midnight regulations" issued late in a President's term of office.

Over the many years that it has been pending before Congress, the REINS Act has been criticized as bad policy no matter which party holds the White House, since it would undercut the President's power and effectiveness. Moreover, critics say the REINS Act is "hopelessly impractical," given Congress' political contentiousness and its lack of time and expertise to micromanage the myriad issues that are now handled by agencies (as a matter of practical necessity) in our complex modern society.[69] Other critics have called the REINS Act a Trojan horse that would result in paralysis of the regulatory system. Were it to be enacted, the REINS Act might simply incentivize agencies to announce rules in piecemeal fashion through case-by-case adjudications rather than in general rules.[70] That would make regulatory compliance more difficult, not less difficult, for regulated parties. Though the scope of the REINS Act has been significantly refined, in HR 26 passed by the House in the 115th Congress, skeptics still see the bill as a potentially unconstitutional poison pill that would result in paralysis of all regulatory activity, creating an unmanageable workload for Congress and overly politicizing the rulemaking process.

President Trump has shown no inclination to destroy Executive Branch power by agreeing with the REINS Act. It likely will never become law, despite strong backing from Republicans in the House.

The ***Regulatory Accountability Act,*** HR 5 (115th Cong. 2017) (passed House January 11, 2017), would require formal rulemaking procedures for many agency rules (with evidence taken on-the-record after a hearing), as well as additional Advance Notices of Rulemaking, new evidentiary standards for assessing agency rules (best evidence/least cost/assessment of alternatives), and new opportunities for judicial review and intervention in agency proceedings. Agencies would be barred from implementing new rules until all legal challenges tto them are resolved.[71] The measure would require agencies to find

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[69] *See, e.g.*, Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U.J. Legis. & Pub.Pol'y 131 (2013).

[70] *See, e.g.*, SEC v. Chenery, 332 U.S. 194, 202-203 (1947) (to avoid "stultify[ing] the administrative process," "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the agency"); Edwin E. Huddleson, Letter to the Editor, *Restoring the Lawful Separation of Powers*, WALL ST.J., Jan. 7-8, 2017.

[71] *See* H.R. 5, §402 (115th Cong, 2017).

the lowest-cost option for new rules, and it would increase public input on the rulemaking process. These features of HR 5 would ensure careful agency deliberation. They also would ensure full employment for industry lawyers. They have been criticized as overly-burdensome to the point of stifling all agency rulemaking. Like the REINS Act, they might simply create a surge in case-by-case agency adjudications (as opposed to rulemaking) as the preferred, though less efficient, means for agencies to announce generally-applicable rules.

Title II of HR 5 and HR 76 (115th Cong. 2017), both called the "Separation of Powers Restoration Act," would overrule *Chevron* and *Auer* by eliminating judicial deference to agency interpretations of constitutional, statutory and regulatory provisions.[72] This would strip power from Trump Executive Branch agencies, giving more power to the federal courts, which now contain a majority of Obama-appointed judges. Other provisions in HR 5 would prevent billion-dollar rules from taking effect until courts resolved litigation against those agency actions. Still other provisions in HR 5 would require more detailed analysis to justify new rules impacting small business. They also would require agencies to establish processes to review and justify the continuation of old regulations affecting small business (see House-passed HR 5 §307).

Taking a somewhat narrower approach is the Portman-Heitkamp Regulatory Accountability Act (S.951, 115th Cong.), as amended by the Senate Committee on Homeland Security and Governmental Affairs (May 17, 2017). It would leave intact *Chevron* deference to an agency's statutory interpretations, while replacing *Auer* deference with weaker *Skidmore* deference to an agency's interpretation of its own regulations.[73] S.951 also incorporates (in part) seven of the nine recommendations for reforming the APA's rulemaking provisions that were recommended by the American Bar Association in 2016.[74] Yet it also would require agencies, on request by any affected party, to hold public evidentiary hearings with opportunity for cross-examination on any "specific scientific, technical, economic, or other complex factual issues that are genuinely disputed" in "high

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[72] This would appear to abolish *Skidmore* deference as well. *See* H.R. Rept 114-622 at 10 (2016) on the earlier-proposed Separation of Powers Restoration Act of 2016 (114th Cong. 2016) (passed by the House in 2016).

[73] While acknowledging that "there are reasonable arguments on both sides of the *Auer* debate," Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin.L.Rev. 629, 668- 669 (2017), supports this proposal as "an important move in the right direction to recalibrate agency use of guidance documents in lieu of notice-and-comment rulemaking." *And see* Walker, 69 Admin.L.Rev. at 669, (noting Barnett & Walker's recent survey of circuit court decisions from 2003 through 2013 (*see* n.52 *supra*) showing that "the agency won 77.4% if the time when courts applied the *Chevron* framework compared to 56% under *Skidmore* deference, and 38.5% under de novo review. In other words, agencies will likely prevail less often under *Skidmore* than *Auer*, but still much more often than under de novo review.")

[74] *See id*., discussing ABA, House of Delegates Resolution 106B (adopted Feb. 8, 2016). These recommendations originating with the ABA and reflected in S.951 address the need for agency disclosure of data, studies, and information; a complete, publicly-accessible record for proposed and final rulemaking; a minimum comment period of 60 days for regular rules and 90 days for "major" and "high-impact" rules (subject to a "good cause" exception); granting agencies the right to delay for up to 90 days, for the purpose of obtaining public comment on whether to amend or rescind "midnight rules" issued within 60-days before a change in presidential administrations; creating a public right to petition an agency for retrospective review, repeal or modification of an agency rule; requiring agencies to include a methodology for assessing and determining the effectiveness of major and high-impact rules within ten years of the rule's publication; and adding provisions allowing after-the-fact public comment on direct final rules and interim final rules, which are exceptions to the normal notice-and-comment rulemaking process. *See* Senate Committee-passed version of S.951 (115th Cong. May 17, 2017).

impact" rulemakings (those with an expected annual economic impact of $1 billion or more) and in some major rulemakings (those with an expected annual economic impact of $100 million or more).[75] These measures have been criticized as "significantly onerous and resource consuming for agencies" threatening to stop regulation in its tracks.[76]

It remains to be seen whether President Trump and the new 115th Congress, dominated by Republicans, will enact into statutory law any of these measures that would take power away from Trump-era agencies. Alternatively, Congress could take action to repeal specifically identified bad regulations by passing bicameral repeal legislation for presentment to the President. *See, e.g.*, the Republicans' controversial "to undo" list (n.65 *infra),* listing regulations that many conservative Congressmen would like to repeal. Moreover, if particular agencies are consistently producing overly burdensome regulations on some issues, Congress could take action to strip them of power on those issues, or subject their rules on those issues to a Congressional approval requirement like that in the REINS Act (*see* Siegel, *supra*, at 184), or require a particular agency to undertake more analysis before it engages in rulemaking.[77] A scalpel, not a blunderbuss, is preferable.

Taking some deregulatory action, the 115th Congress has acted under the ***Congressional Review Act*** (CRA), 5 U.S.C.§§801-808, enacted in 1996, to override more than a dozen recently-enacted Obama-era regulations. Yet the CRA has very limited scope: Only so-called "midnight regulations" issued late in a President's term-of-office (after June 13, 2016 in the case of President Obama's second term) are CRA-reviewable by the next Congress.[78] Older Obama agency rules presented to Congress before June 13, 2016 – including many regulations on the Republicans' "to-undo list"[79] -- are outside the coverage

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[75] *See* S.951 §§2- 3 (115th Cong. May 17, 2017). Under both the original and revised versions of S.951, higher evidentiary standards would be imposed for assessing high-impact agency rules.

[76] *See, e.g.,* Gillliam F. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State under Siege*, 131 Harv.L.Rev. 2, 11- 13 (2017).

[77] *See, e.g.,* H.R. 78 (115th Cong.) (requiring more rigorous cost- benefit analysis, and examination of alternatives, before SEC rulemaking).

[78] Over the early years of its 20-year history, the CRA was rarely invoked successfully to overrule an agency regulation. *See* Shapiro, *The Congressional Review Act, rarely used and (almost always) unsuccessful*, *The Hill* (April 17, 2016). To be sure, it has always been true that statutes enacted by Congress, and signed into law by the President, can overrule specific agency regulations without regard to any of the limitations in the CRA. Yet the CRA statute creates a fast track procedure for reconsidering agency regulations – requiring only 51 votes for passage in the Senate – and is therefore habitually thought of as the way for Congress to address 'midnight regulations" of an earlier Administration. The CRA has limited scope, however: By its terms as presently written, the CRA statute could be invoked by the new 115th Congress to overrule major agency regulations (with an impact of $100 million/year or more) only if the regulations were presented to Congress for CRA review relatively recently (after June 13, 2016, if the regulations were promptly presented in the ordinary course), and only if both Houses of Congress vote to rescind the regulation after devoting up to ten (10) hours of Senate floor debate to each challenged agency regulation, and then only if the President signs the legislative "resolution of disapproval." *See* 5 U.S.C. §§801- 808; Congressional Research Service, *Agency Final Rules Submitted on or After June 13, 2016, May be Subject to Disapproval by the 115th Congress* (IN10437 December 15, 2016).

[79] The Wall Street Journal reports that Republicans' "to-undo" list includes the **Volker Rule** (banning banks from "proprietary trading" or making speculative bets with their own funds), the Department of Labor's **Fiduciary Rule** (requiring brokers to act in their clients' best interest when offering retirement savings advice, as opposed to a looser standard of offering

and beyond the reach of CRA- review in the new 115th Congress. Only CRA "resolutions of disapproval" that are passed by both Houses of Congress and signed into law by the President are effective. Congress must act within 60 legislative days to invoke CRA-review of earlier midnight regulations,[80] each of which requires up to ten (10) hours of Senate floor debate. The CRA contains fast-track procedures: A CRA "resolution of disapproval" needs to be passed by the House and by only 51 Senate votes (not 60) for passage before transmission on the President. Once an agency regulation has been CRA-disapproved, with the disapproval signed by the President, the CRA statute bars an agency from creating a substantially similar regulation.[81]

To date, Obama regulations that have been terminated on the CRA chopping block include a regulation related to streams that was estimated to threaten up to one-third of the remaining jobs in the coal industry (H.J.Res.38); a DoD/GSA/NASA rule requiring federal contractors to report on violations of federal labor law (H.J.Res.37); a SEC rule that would have forced U.S. companies to report payments to foreign governments, which those companies complain can entail disclosing proprietary information that competitors can use against them (H.J.Res.41); and a CFPB rule that would have sharply cut-back or eliminated covered financial companies' use of mandatory arbitration clauses with class-action waivers.[82]

Other CRA activity is reflected in proposals in the Midnight Rules Relief Act of 2017, HR 21 (115th Cong. 2017) (passed by the House on January 4, 2017) to liberalize the CRA. HR 21 would allow Congress to CRA-disapprove multiple agency rules, *en banc*, rather than having to examine and disapprove each regulation separately, one at a time, as required by the current CRA statute. Time limits focusing the CRA on "midnight regulations" will remain in place, however. And the CRA leaves intact the *status quo ante* on institutional questions about the metes and bounds of Executive Branch agencies' latitude to interpret less-than-precise Congressional statutes.

"suitable" financial products), Obama's **Clean Power Plan** (Obama's signature climate initiative, issued in 2015, imposing federal limits on carbon emissions from power plants. Stayed by the Supreme Court and awaiting decision by the US Court of Appeals for the DC Circuit *en banc*), the EPA's **Water Rule** (bringing more waterways under federal protection. Stayed by a federal court), and the Interior Department's **Methane Rule** (limiting the amount of methane that oil and natural gas operations can emit on public lands). *See Killing Regulations Could Take Years*, WALL ST.J., Dec. 15, 2016, at A4; *Trump Dams the Regulatory Flood*, WALL ST.J. Editorial, Jan.31, 2017, at A14.

80 Time limits for Congress to invoke CRA review involve more than simply counting "legislative days." Thus the Wall Street Journal reports that the CRA potentially may cover more regulations than was earlier appreciated, because many recent regulations were never submitted to Congress to start the running of the 60-legislative-day time limit. *See Draining the Regulatory Swamp*, WALL ST.J., March 1, 2017 at A18 ("The CRA explains that Congress's review period begins either on the date the rule is published in the Federal Register, or the date Congress receives the report – whichever comes *later*. * * * But a 2014 study by the Administrative Conference of the United States found at least 43 'major' or 'significant' rules that had never been reported to Congress.")

81 *See* 5 U.S.C. §801(b)(2); Congressional Research Service, *The Congressional Review Act: Frequently Asked Questions* 16-20 (R43992, November 17, 2016).

82 *See* majorityleader.gov/2017/04/11/cras-complete list.

Timing for the new 115th Congress and President Trump to decide the fate of these regulatory roll-back and reform measures may come in 2018, since Congressional leaders have announced that until then they will focus their attention on repealing/replacing ObamaCare and on tax reform.[83]

4. Law Review Critics

The majority of academic attacks on *Chevron*[84] have been characterized as part of a larger conservative political, judicial and academic attack on the post-New Deal regulatory state.[85] A slightly different recent article, *The Rise of Purposivism and Fall of* Chevron*: Major Statutory Cases in the Supreme Court,*" ["*the Fall of Chevron*"],[86] claims that "*King's* expansion of the so-called 'major question' exception threatens *Chevron's* predominance," because "[t]he exception's trigger – 'deep economic and political significance' – is vague and difficult to administer," and it creates an exception that threatens "to swallow *Chevron's* rule."[87] "More basically," we are told, the major question exception – that some decisions are too critical to leave to agencies, at least absent clear legislative intent to delegate -- is inconsistent with *Chevron's* fundamental premise that Congress would prefer expert, politically accountable agencies (as opposed to generalist, unelected judges) to fill in ambiguous statutory language. *Id.*

What the Supreme Court's statutory interpretation decisions actually show, however, is that Congress' intentions, concerning judicial deference to an administrative agency's interpretations of a statute, vary from statute to statute and from subject matter to subject matter. Where those legislative intentions can be objectively discerned, a court should honor them.[88] The "major question exception" is misguided, not only because it is subjective and unpredictable, but also because it is overbroad: Some statutes want agencies to fill in ambiguous statutory language on "major questions," while other statutes

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83 *See McConnell: ObamaCare repeal in early 2017, then tax reform*, WASHINGTON EXAMINER (December 12, 2016).

84 *See, e.g*., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled*, 42 Conn.L.Rev. 779 (2010); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U.J.L. & Liberty 475 (2016).

85 *See* Gillliam F. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State under Siege*, 131 Harv.L.Rev. 2 (2017) (surveying conservative attacks on the administrative state and concluding: "contemporary anti-admnistrativism is inseparably political and constitutional. Rooted in conservative antistatist constitutional commitments and opposition to strong regulatory government. Yet to the extent anti-administrativism rests on fears of unconstrained and consolidated power, the administrative state is the solution and not the problem. Against a background of broad delegations to the executive branch and rising presidential unilateralism, the administrative state performs essential constitutional functions in supervising, constraining, and effectuating executive power. Even further, in the world of broad delegations in which we live, core features of the administrative state are now constitutionally required." *Id*. at 95).

86 130 Harv.L.Rev. 1227 (February 2017).

87 *The Fall of Chevron*, 130 Harv.L.Rev. at 1239.

88 *See, e.g.,* Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke LJ 511, 516.

do not. The "major question exception" should be rejected, particularly insofar as it operates to disregard discernable legislative intent about an agency's authority to interpret a statute.[89]

The Fall of Chevron also sees a threat to *Chevron* in cases where the Court finds the meaning of a statute clear. But this "threat" seems more formalistic than real since the outcome of such "clear cases" will be the same under *Chevron* step 1 or under a court's direct interpretation of the statute in an opinion that does not mention *Chevron*.[90] Torrents of scholarly commentary have criticized the opinions in *Encino Motors*[91] for failing to clearly articulate the difference between *applying Chevron*'s analytic framework, on the one hand, and *deferring* (or not deferring) to an agency interpretation under *Chevron* step 2, on the other hand.[92] Yet where Congress "has directly spoken to the precise question at issue," "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[93]

Nor do the cost-consideration holdings in *Michigan v. EPA* undermine C*hevron*.[94] To be sure, the Court split 5 to 4 on requiring up-front consideration of costs before an agency embarks on a major regulatory program. But the majority opinion in *Michigan v. EPA* announces general principles of cost consideration that appear to apply (by virtue of the APA) to all agency rulemaking cases, subject to Congress setting a different cost-consideration standard in a particular statute, as Congress did in *American Trucking* (court holds that the CAA §109(b) directs EPA to proceed first to set technology forcing standards for ozone, with cost/feasibility to be considered later). Justice Scalia's opinion for the Court in *Michigan v. EPA* states: An agency has discretion (within reasonable limits set by the

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89 *See, e.g.,* Heinzerling, *The Power Cannons*, 58 Wm & Mary L.Rev. (forthcoming 2017).

90 *See The Fall of Chevron*, 130 Harv.L.Rev. at 1240-1241.

91 Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117 (2016). There the Court refused to give any interpretive weight to a US Department of Labor regulation that changed the agency's interpretation of a statute declaring who was or was not entitled to overtime compensation. Given that the agency "gave almost no reasons at all" for changing its views, which affected significant reliance interests, its latest regulatory position was not supported by "good reasons for the new policy" (FCC v. Fox Television Stations, 556 US 502, 555 (2009)) and was not entitled to *Chevron* deference as an interpretation of the statute. The case was remanded to the lower court "to interpret the statute in the first instance." 136 S.Ct. at 2127.

92 *See, e.g.,* Developments in Administrative Law: Judicial Review at 81-82 (ABA 2016).

93 Chevron v. NRDC, 467 U.S. 837, 842-843 (1984).

94 We are told that *Michigan v. EPA* "departed from prior cases in which the Court concluded that ambiguous language permits agencies to choose whether or not to consider cost because *either* choice is reasonable under *Chevron* step two" *The Fall of Chevron*, 130 Harv.L.Rev. at 1242 Further: "Those cases respected *Chevron's* core tenet that ambiguous language connotes a congressional preference for administrative, not judicial, decision making; *Michigan*, by contrast, effectively imposed a *de novo* standard." *Id.*. But the agency did in fact consider costs in the prior cases, *EME Homer City Generation* and *Entergy*, and the Court upheld the agency's cost-consideration approach in both cases. These earlier cases did not purport to allow agencies to choose whether or not to consider cost. Moreover absent a specific statutory exemption from considering costs, it should be clear after *Michigan v. EPA* that an agency rule could not survive judicial review under the APA if it ignored cost altogether. As even the four dissenting Justices recognized in *Michigan v. EPA*: "cost is almost always a relevant --and usually, a highly important – factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing 'a standard-setting process that ignore[s] economic considerations." 83 USLW at 4627.

statute) to decide "how to account for cost" -- a "formal cost -benefit analysis in which each advantage and disadvantage is assigned a monetary value" is not necessarily required.[95] None of these cost consideration rulings foreshadows the Fall of *Chevron*.

5. White House Executive Orders

(a) Stay of New Executive Regulations. The *Washington Post* reported that President Trump has withdrawn dozens of major rules that had already been sent to the Federal Register for publication and delayed the effective dates of hundreds of other agency rules, including several dozen EPA rules. The White House also imposed a 60-day freeze on new regulations.[96]

(b) "Core Principles for Regulating the Financial System." Trump's *Presidential Order on Core Principles for Regulating the United States Financial System* (February 3, 2017) announces a financial regulatory policy to (among other things) "make regulation efficient, effective, and appropriately tailored." This order directs the Secretary of the Treasury to report to the President within 120 days on laws, regulations, and government policies that either promote or inhibit federal regulation of the US financial system in a manner consistent with the Core Principles.

(c) "Two-for-One" Order. The Trump Administration's January 30, 2017 executive order, and its accompanying OMB Interim Guidance (February 2, 2017), adopt a "two-for-one" regulatory budget that requires agencies "unless prohibited by law" to "identify" two old rules to be repealed for every new one they propose.[97] For every dollar of new cost imposed on the private economy, each agency will have to cut back its own regulations to find two dollars of burden to relieve. The Wall Street Journal reports that this is similar to laws in the United Kingdom and Australia that require the costs of new rules to be offset by deregulation of comparable net value. Trump's two-for-one order is endorsed by the Journal, which notes that, according to a working paper for George Mason's Mercatus Center, the economy might be about 25% larger (more than $4 trillion a year, or $13,000 per person) if the level of U.S. regulation had stayed constant since 1980.[98]

Trump's two-for-one order, if properly narrowed, refined, implemented and overseen by OMB's Office of Information and Regulatory Affairs (OIRA) (these are no simple tasks),[99] would encourage

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95 *See Michigan v. EPA, supra* n. 1, 83 USLW at 4624.

96 *See* Juliet Eilperin & Damian Paletta, *Trump Administration Cancels Hundreds of Obama-Era Regulations*, WASH POST (July 20, 2017); *Ax falls on 860 Obama regulations*, WASH POST at A 17 (July 21, 2017).

97 *See* Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed.Reg. 9339 (January 30, 2017). *Compare* S.56 (RED Tape Act of 2017) (115th Cong. 2017) (containing the same idea).

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

99 Trump's two-for-one order states that any agency "eliminating existing costs associated with prior regulations under this [order] shall do so in accordance with the Administrative Procedure Act and other applicable law." Ordinarily, this would entail notice-and-comment rulemaking (which may take two years or more) for eliminating old regulations. The two-for-one order was clarified to some extent by OIRA/OMB's "Interim Guidance" memorandum (February 2, 2017), which specifies: The

agencies to minimize regulation and to be the judge (at least initially, subject to review by OIRA and the courts) of the importance and cost-effectiveness of their own agency rules. Objections have been registered by Public Citizen and others, which have filed suit challenging the two-for-one order as violative of the Administrative Procedure Act and the Constitution. They make several claims including: many health and safety statutes do not authorize agencies to consider this sort of cost reduction; and the two-for-one order arbitrarily ignores any consideration of the comparative and net benefits obtained from the rules being considered.[100] These objections oversimplify and misstate what is already in the two-for-one order, but they should be further addressed in future clarifications and refinements.[101] In any event, these objections do not seem to be a complete answer to the many pending proposals (in the spirit of HR 5, §307, for example) that would encourage a reduction in the number and cost of federal regulations by requiring agencies to systematically review old rules and regulations, within a reasonable time frame, to collect public comment, and to revise or repeal overly burdensome rules.[102]

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order applies only to "significant regulations" (generally, major rules costing $100 million/year or more); it does not apply to independent agencies like the SEC (though OMB encourages them to voluntarily comply); it explicitly applies only to FY 2017 (ending September 30, 2017) although it establishes a regulatory budgeting program for OMB to set incremental agency budgets for issuing regulations in FY 2018 and beyond; and it has several exemptions, including regulations required to be issued by statute or court order, deregulation rules, and regulations relating to the military, national security or foreign affairs. OMB also may grant case-by-case waivers for new regulations related to "critical" health, safety or financial matters.

100 *See* Public Citizen v. Trump (USDC, DDC, 1:17-ev-00253) (RDM) (filed February 8, 2017) (pending on cross-motions for summary disposition).

101 What is needed are refinements of cost-benefit analysis (including refinements in measuring the social cost of carbon); more explicit emphasis on consideration of regulatory benefits and the comparative benefits of different regulatory approaches, including better ways to recognize values and benefits that are not readily quantifiable; and clarification of the standards and priorities for deregulation, including (among other things) consideration of both the net benefits and the comparative net benefits of the rules being considered for the deregulation chopping block. One aspect of these undertakings, initially, might be to recognize some rough categories, such as (for example) tier 1 = benefits 100 times or more than the costs of a regulation; tier 2 = benefits anywhere from 10 to 100 times more than the costs; tier 3= benefits less than 10 times the costs to achieve them. *See also Presidential Executive Order on Enforcing the Regulatory Reform Agenda* (February 24, 2017) (requiring each agency to create a Regulatory Reform Officer, and Regulatory Reform Task Force, to identify "outdated, unnecessary, or ineffective" regulations for repeal).

102 One criticism of Trump's two-for-one order is that, since 1981 modern discretionary agency rules have been required to have a positive cost-benefit rating. The overbroad implication that some critics seem to suggest is that there can be no valid deregulation of any of these existing agency rules. Yet agency rules can become disfunctional because of rapid developments in science and technology. An initial "positive" cost-benefit assessment may be mistaken or may not remain valid forever. *See, e.g.*, Todd Rubin, *News from ACUS*, 43 Admin & Reg.Law News 22 (Fall 2017) (describing SEC's 2004 re-examination of the "Uptick Rule," which the SEC eventually eliminated two years later). Moreover, there may be different alternative approaches to regulation. If a regulatory evil can be addressed satisfactorily by any one of two or more agency rules (each with a "positive" cost-benefit rating), it may be reasonable to select the regulatory approach of the most efficient, least-costly agency rule with the ***best*** cost-benefit rating. There is considerable uncertainty in conducting cost benefit analysis, in any event, since it is not a simple, straightforward, mathematically precise endeavor. *See, e.g., News from ACUS, supra* (noting that "Agencies promulgate regulations under conditions of great uncertainty," particularly given the risk of "substantial unintended consequences," and discussing the option of "regulatory experimentation"). Over time, society may change its assessment of how best to regulate, as well as how to weigh the costs and benefits of particular agency rules (including the costs imposed by the cumulative sum of myriad individual "small" regulatory burdens, and the weight to be accorded to benefits that are not readily quantifiable).

6. Test Case: The Obama Clean Power Plan

Observers of the September 27, 2016 oral argument in *West Virginia v. EPA* (USCtApp, DC Circuit #15-1363) (*en banc*) (case testing the validity of the Obama Clean Power Plan, stayed by the Supreme Court until all court challenges to it are resolved) were predicting a 6-4 victory for the Obama Administration. They said (before the 2016 election) that this outcome may be followed by a 4-4 or 5-4 affirmance by the US Supreme Court. With Trump-appointee Justice Gorsuch taking Justice Scalia's seat, the outcome in the Supreme Court may well be different now.

The *West Virginia* litigation raises the question: Without the thumb-on-the-scales approach of the major question doctrine, is the statutory language of the Clean Air Act §111(d) broad enough to authorize the Obama Clean Power Plan?[103] Others predict that the litigation will become moot since the Obama Clean Power Plan is likely to be rendered moot in some fashion by President Donald J. Trump and the new 115th Congress. One of the questions that may remain open is: Will the courts support the dramatic diminution of Executive Branch agency power that is implicit in the major question doctrine?

7. The Future of *Chevron*

Despite the outpouring of partisan attacks on Obama Executive Branch agency power, and criticisms of *Chevron* from both Congress and some judges, there is broad agreement that as a matter of practical necessity *Chevron* is here to stay.[104] Technical expertise, held by politically accountable agencies more than generalist federal judges, is desirable in administering increasingly complex and scientifically dependent statutes.[105] Under *Chevron* and *Fox TV*, agencies can change position and implement new policies to come to grips with changes in science, technology and other new circumstances. By contrast, insisting that federal court judges resolve all statutory ambiguities by announcing the single "best" interpretation of a statute would produce "ossification of large portions of our statutory law."[106] Under *Chevron*, the extent to which courts defer to agency interpretations of law ultimately depends on "Congress' intent on the subject as revealed in the particular statutory scheme at issue,"[107] and Congress has repeatedly invested agencies with discretionary power to make policy and

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[103] *See* 85 USLW 417 (September 29, 2016) (short summary of oral argument on the Obama Clean Power Plan, including the following: "The EPA has argued that 'system' [-- in the statutory language of §111(d) requiring the EPA to determine the "best system of emission reduction" that States can employ to meet the emission standards --] * * * is broad enough to encompass many different emissions control strategies, including fostering new renewable energy. In order to overturn the Clean Power Plan, Judge David Tatel said opponents must show the Clean Power Act explicitly forbids that approach.")

[104] *See, e.g.*, Hickman & Bidnar, *Chevron's Inevitability*, 85 Geo.Wash.L.Rev. (forthcoming 2017); Bamzai, *The Origins of Judicial Deference to Executive Interpretations*, 126 Yale L.J. (forthcoming 2017); Cruden, *The Enduring Nature of the Chevron Doctrine*, 2015 Harold Leventhal lecture (November 10, 2015).

[105] *See, e.g.*, Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U.Pa.L.Rev. 509, 510 (1974).

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

[107] Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke LJ 511, 516.

undertake day-to-day administration of the regulatory programs that Congress itself has neither the time nor expertise to administer.

The odds are that *Chevron* will survive and flourish in the future because it "more accurately reflects the reality of government, and thus more adequately serves its needs."[108]

CONCLUSION

Over the years ahead, the courts will continue to umpire fights about the scope of administrative agency power. The objective of the judicial umpire here should be to apply stable neutral principles of statutory interpretation, not result-oriented rules manufactured to favor or disfavor the perceived political views of the agency or the particular agency action under review. Reasonable stability in the law balances the interests favoring predictability with the need to permit reasonable change, reform and innovation by agencies responding to new circumstances, including (within bounds allowed by the statute) new policies from a newly-elected President. This sort of reasonable stability is not achieved by knee-capping Executive Branch agency power through overbroad, subjective, judicially-invented theories like the major question doctrine. Other means of achieving stability, more faithful to implementing the objectively ascertainable public meaning of a statute, are available. Thus courts pay attention to what Harold Leventhal called the "mood" of the statute – whether it reflects a spirit of wide-open delegation of discretion to the agency implementing the statute (*see, e.g.,* the anti-money-laundering provisions of Title III of the USA Patriot Act, in 31 USC 5312(a)(2)(Y)(Z) and 31 USC 5318(h)(2), for example), or instead whether it more tightly constrains the implementing agency (*see, e.g.*. the statute at issue in *Brown & Williamson, supra*). The statutes enacted by Congress might better indicate subject-by-subject, as they can and often do, how much deference they intend to accord to Executive Branch agency interpretations.

Traditional tools of statutory construction, including a look at the "mood" of the specific statute at issue about delegation to the agency, should carry more weight than overbroad, subjective doctrines like the major question doctrine in deciding the amount of discretion enjoyed by the implementing agency in interpreting the statute. Over time, as early court decisions flesh out the meaning of less-than-completely-precise statutory provisions, later court rulings will assimilate those early decisions and proceed more narrowly down the path that was earlier established.[109] As Justice Scalia reminded us, all this still leaves much for "a matter of interpretation." But some principles of statutory interpretation are better than others.

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[108] *Id.* at 521.

[109] *See* Edward H. Levi, INTRODUCTION TO LEGAL REASONING *supra* at 32-33, 54, 57.