

# Examining the Proper Role of Judicial Review in the Regulatory Process

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When it applies, *Chevron* is a powerful weapon in an agency’s regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing a mood rather than a message. By design or default, Congress often fails to speak to the precise question before an agency. In the absence of such an answer, an agency’s interpretation has the full force and effect of law, unless it exceeds the bounds of the permissible. It would be a bit much to describe the result as “the very definition of tyranny,” but the danger posed by the growing power of the administrative state cannot be dismissed.

—*City of Arlington v. Federal Communications Commission*,  
133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)

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

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

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

There may be a pattern here.

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

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

## **I. The Status Quo: Judicial Deference To Agency Interpretations**

Among the most famous statements in American law is Chief Justice John Marshall’s declaration that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.”<sup>2</sup>

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

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<sup>1</sup> See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011).

<sup>2</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

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

publish a list of “each air pollutant” “emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” and for which he intends to “issue air quality criteria.”<sup>4</sup>

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

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

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

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

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

<sup>5</sup> *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

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

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

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

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

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

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

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

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

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

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

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<sup>11</sup> *E.g.*, *Securities and Exchange Comm’n v. Sloan*, 436 U.S. 103 (1978).

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

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

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

<sup>15</sup> 467 U.S. 837, 842–43 (1984) (footnotes omitted).

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

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

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<sup>16</sup> Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 *George L.J.* 833, 834 (2001).

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

<sup>18</sup> Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 *Antitrust L.J.* 191, 193 (1986).

<sup>19</sup> Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *Yale J. REG.* 283, 283 (1986).

<sup>20</sup> Scalia, *The Role of the Judiciary*, *supra* n.18, at 191.

<sup>21</sup> John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 625 (1996).

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

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

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

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

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

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

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

<sup>26</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

<sup>27</sup> *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

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

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

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

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<sup>28</sup> 325 U.S. at 414 (emphasis added).

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

<sup>30</sup> *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

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

the agency's superior competence to understand and explain its own regulatory text.<sup>32</sup>

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

## II. Growing Concerns Over Excessive Deference

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

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<sup>32</sup> Manning, *supra* n.21, at 630–31 (footnotes omitted).

<sup>33</sup> *Auer*, 519 U.S. at 462.

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

<sup>35</sup> *Id.*

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

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

may arrogate sufficient power to themselves to be free of essential checks like congressional oversight.<sup>38</sup>

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

### A. Rethinking *Seminole Rock* Deference

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

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

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

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

<sup>39</sup> Manning, *supra* n.21.

<sup>40</sup> *Id.* at 639.

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

<sup>42</sup> *Id.* at 657.

<sup>43</sup> *Id.* at 662.

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

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

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

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

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<sup>44</sup> *Id.* at 669.

<sup>45</sup> *Id.* at 676.

<sup>46</sup> 131 S. Ct. 2254, 3366 (2011) (Scalia, J., concurring).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 132 S. Ct. 2156, 2162–63 (2012).

<sup>50</sup> *Id.* at 2167 (quotation marks omitted).

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

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

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

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

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<sup>51</sup> *Id.* at 2168.

<sup>52</sup> *Id.* (quotation marks and alteration omitted).

<sup>53</sup> *Id.* at 2168 n.17 (quoting *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring)).

<sup>54</sup> 133 S. Ct. 1326, 1337–38 (2013).

<sup>55</sup> *Id.* at 1338 (Roberts, C.J., concurring).

<sup>56</sup> *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

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

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

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

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

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<sup>57</sup> 135 S. Ct. 1199 (2015).

<sup>58</sup> *Id.* at 1211 (Scalia, J., concurring in the judgment).

<sup>59</sup> *Id.* at 1212–13.

<sup>60</sup> *Id.* at 1220 (Thomas, J., concurring in the judgment).

<sup>61</sup> *Id.* at 1224.

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

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

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

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

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

<sup>64</sup> *Martin*, 499 U.S. at 151.

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

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

<sup>67</sup> *Decker*, 133 S. Ct. at 1341–42 (Scalia, J., concurring in part and dissenting in part).

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

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

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

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

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

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

<sup>69</sup> Manning, *supra* n.21, at 665–66.

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

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

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

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

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

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

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

<sup>74</sup> Richard Pierce, Distinguishing Legislative Rules from Interpretative Rules, 52 Admin. L. Rev. 547, 549 (2000).

<sup>75</sup> *Id.* at 547–48 (footnotes omitted) (citing respective cases).

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

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

<sup>78</sup> *Batterson*, 432 U.S. at 425 n.9.

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

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

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

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

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

<sup>81</sup> *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).

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

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

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

These are, of course, no small things. There is a reason, after all, that Congress requires agencies to bear the “high price” of the rulemaking process in order to bind the public.<sup>85</sup>

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

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<sup>82</sup> *Id.* at 1211–12.

<sup>83</sup> *See id.* at 1209 (acknowledging the obvious).

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

<sup>85</sup> *Id.*

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

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

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

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

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<sup>87</sup> 117 F.3d at 586.

<sup>88</sup> 135 S. Ct. at 1206.

<sup>89</sup> *Id.* at 1207.

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

<sup>91</sup> See *Pierce*, *supra* n.74, at 550–51.

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

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

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

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<sup>92</sup> *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment).

<sup>93</sup> *Id.*

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

### C. Rethinking *Chevron*

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

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

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

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

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

<sup>96</sup> See *supra* n.6 & accompanying text.

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

<sup>98</sup> See generally Scalia, *Judicial Deference*, *supra* n.10.

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

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

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

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

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

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

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

- **The Mercury Rule.** EPA’s Section 112 regulation, known as the “Mercury Rule,” is currently under review by the Supreme Court.<sup>105</sup> The Clean

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<sup>100</sup> 42 U.S.C. § 7411(d)(1)(A)(i).

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

<sup>102</sup> *Id.* at 34.

<sup>103</sup> 79 Fed. Reg. 34,830, 34,836 (June 18, 2014).

<sup>104</sup> *Id.*

<sup>105</sup> *Michigan v. EPA*, No. 14-46.

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

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

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<sup>106</sup> 42 U.S.C. § 7412(n)(1)(A).

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

<sup>108</sup> *Id.* at 23.

<sup>109</sup> *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2435 (2014).

<sup>110</sup> *Id.* at 2444–45.

<sup>111</sup> *Id.* at 2445.

<sup>112</sup> *Elec. Power Supply Ass’n v. F.E.R.C.*, 753 F.3d 216, 219 (D.C. Cir. 2014).

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

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

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

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<sup>113</sup> *Id.* at 220.

<sup>114</sup> *Id.* at 221.

<sup>115</sup> 26 U.S.C. § 36B(b)(2)(A); 42 U.S.C. § 18031.

<sup>116</sup> Brief for the Respondents, at 20–25, *King v. Burwell*, No. 14-114.

<sup>117</sup> *See id.*

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

<sup>119</sup> *Cf.* Timothy Noah, Bill Clinton and the Meaning of “Is,” *Slate*, Sep. 13, 1998, [http://www.slate.com/articles/news\\_and\\_politics/chatterbox/1998/09/bill\\_clinton\\_and\\_the\\_meaning\\_of\\_is.html](http://www.slate.com/articles/news_and_politics/chatterbox/1998/09/bill_clinton_and_the_meaning_of_is.html).

<sup>120</sup> *See* Kent Barnett, Codifying *Chevron*, 90 N.Y.U. L. Rev. 1, 54 n.275 (2015).

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

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

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

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<sup>121</sup> 533 U.S. at 227.

<sup>122</sup> *Id.* at 245 (Scalia, J., dissenting).

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

<sup>124</sup> Eskridge & Baer, *supra* n.23, at 1121.

<sup>125</sup> *Chevron*, 467 U.S. at 842.

<sup>126</sup> Beerman, *supra* n.24, at 817–20.

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

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

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

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

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

<sup>129</sup> 546 U.S. 243 (2006).

<sup>130</sup> *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994).

<sup>131</sup> Beerman, *supra* n.24, at 829 (citing studies).

<sup>132</sup> *Id.* (emphasis added).

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

<sup>134</sup> *See* 12 U.S.C. § 25b(b)(5)(A).

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

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

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<sup>135</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

<sup>136</sup> 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); § 706 (“The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”). One strike against *Chevron* (and *Seminole Rock* and *Auer*) is that it’s flatly inconsistent with the APA. Historical evidence suggests that Congress meant what it said in 1946, but that courts ultimately adopted the more deferential views expressed in the Attorney General’s Manual on the Administrative Procedure Act. See Beerman, *supra* n.24, at 789–90.

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

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

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<sup>138</sup> Scalia, *Judicial Deference*, *supra* n.10, at 521.

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

### III. Conclusion

Chief Justice Roberts’s dissent in *Arlington* is not only stirring but correct in its view that deference must ultimately yield to the constitutional separation of powers. “[T]he obligation of the Judiciary,” he writes, is “not only to confine itself to its proper role, but to ensure that the other branches do so as well.”<sup>140</sup> Thus, the courts’ “duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.”<sup>141</sup> He concludes: “We do not leave it to the agency to decide when it is in charge.”<sup>142</sup> Nor should Congress.

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

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<sup>140</sup> *Id.* at 1886 (Roberts, C.J., dissenting).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*