DECONSTRUCTING THE ADMINISTRATIVE STATE: *CHEVRON* DEBATES AND THE TRANSFORMATION OF CONSTITUTIONAL POLITICS

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ABSTRACT

This Article contrasts Reagan-era conservative support for Chevron U.S.A. v. NRDC *with conservative opposition to* Chevron *deference today. That dramatic shift offers important context for understanding how future attacks on the administrative state will develop.*

Newly collected historical evidence shows a sharp pivot after President Obama's reelection, and conservative opposition to Chevron *deference has become stronger ever since. The sudden emergence of anti-*Chevron *critiques, along with their continued growth during a Republican presidency, suggests that such arguments will increase in power and popularity for many years to come.*

Although critiques of Chevron *invoke timeless rhetoric about constitutional structure, those critiques began at a very specific moment, and that historical coincidence fuels existing skepticism about such arguments' substantive merit. This Article analyzes institutional questions surrounding* Chevron *with deliberate separation from modern politics. Regardless of one's substantive opinions about President Trump, federal regulation, or administrative deference, this Article identifies extraordinary costs to the legal system of overruling* Chevron *through mechanisms of constitutional law.*

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INTRODUCTION

Administrative law is experiencing a constitutional revolution unlike anything in living memory, and some of those disputes involve deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] No one has explained when, how, or why *Chevron*'s constitutional crisis emerged.[2] Yet those historical questions are vital for anyone who wants to understand modern conflicts, including the lawyers and judges who will someday have to resolve them.[3] This Article adds to existing scholarship about doctrine and theory by demonstrating that ostensibly apolitical arguments against *Chevron* are actually part of a recent phenomenon that has mirrored changes in partisan politics.[4]

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[1] 467 U.S. 837, 843-45 (1984).

[2] Most commentary can be described in two groups. On one hand, most scholars have described *Chevron* as an iconic precedential landmark, but they risk understating the force and sophistication of anti-*Chevron* critiques. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1461 (2017) (concluding that *Chevron* will outlive its critics); Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733, 754 (2019) ("[A]ny conception that Justice Gorsuch will be able to altogether eliminate judicial deference . . . is fanciful."). On the other hand, some scholars have appreciated *Chevron*'s crisis, yet they seldom acknowledge the full scope of its consequences. *See, e.g.*, Catherine M. Sharkey, *Cutting In on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2361-63 (2018) (suggesting that anti-*Chevron* critiques can be deflected); *see also* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 854 (2020) ("As with contemporary politics, . . . that comfortable, overlapping consensus is showing cracks."). This Article suggests that most extant commentary has underappreciated either *Chevron*'s prominence in the recent past or its vulnerability in the imminent future. Two works stand apart from the rest and will be specifically discussed in Part I: Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 14-16, 66-67 (2017), and Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1631-34, 1664-65 (2019) [hereinafter Sunstein, Chevron *as Law*]. A few authors have used personalized biographies to sketch politico-legal dynamics. *See* Heather Elliott, *Gorsuch v. the Administrative State*, 70 ALA. L. REV. 703, 713-15 (2019); Matthew Noxsel, *From Gorsuch to Gorsuch: Family Reformations on Agency Power*, 13 FLA. A&M U. L. REV. 45, 49-55, 68-80 (2017). Yet I have not found any historian, law professor, or political scientist who has considered the evidence and arguments collected herein.

[3] *See* ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 5 (2017) ("[T]he historicized past poses a perpetual threat to the legal rationalizations of the present. Brought back to life, the past unsettles and destabilizes the stories we tell about the law to make us feel comfortable with the way things are.").

[4] For substantive analysis of legal doctrine and theory, see Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 676-732 (2020) [hereinafter Green, Chevron *Debates*]; Metzger, *supra* note 2, at 87-95; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 25-34 (1983); and Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 943-92 (2018).

In the 1980s, Republican conservatives used administrative deference to roll back federal power without amending federal statutes.[5] *Chevron* helped the Reagan Revolution by effectively shifting statutory interpretation away from liberal judges in deference to deregulatory bureaucrats. By comparison, modern objections to *Chevron* are surprising because Republican conservatives' arguments undermined the authority of bureaucrats inside the Trump Administration and within their own party.[6] This remarkably new generation of anti-*Chevron* critiques is linked to personnel shifts in the judiciary and also to broader ideas about the "deconstruction of the administrative state."[7] Conservatives in the 1980s endorsed *Chevron* to implement Reagan's policies after his electoral victory, yet modern conservatives' anti-*Chevron* arguments

[5] *See infra* Part II (describing *Chevron*'s original context). The terms "conservative" and "liberal" are used throughout this Article, as they have also infused political life. *See* CHRISTOPHER ELLIS & JAMES A. STIMSON, IDEOLOGY IN AMERICA 2 (2012); *see also* MEG JACOBS & JULIAN E. ZELIZER, CONSERVATIVES IN POWER: THE REAGAN YEARS, 1981–1989, at vi (2011). Such terminology is necessarily debatable and imprecise, yet it remains a generally comprehensible feature of other modern commentary. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court and Public Schools*, 117 MICH. L. REV. 1107, 1110 (2019) (book review) (describing Supreme Court Justices as "liberal" or "conservative"). To avoid controversy, this Article will stay tightly focused on historical individuals and entities who called themselves "conservatives," were widely understood as conservatives, or both, with supportive citations in footnotes where necessary. Outside the scope of this Article, Democratic conservatives and Republican liberals were certainly present at various historical moments, but those actors were less influential for *Chevron* debates than the Republican conservatives who receive attention herein.

[6] Throughout this Article, historical sources will intermix discussion of "executive" power and "administrative" power. Those two words are not identical because the President's executives do not control all of the administrative state, and also because executive government does not always operate through formal bureaucracies. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 817-18 (2013). On the other hand, "executive" power and "administrative" power are closely linked in practice because the vast majority of administrative power is controlled by the executive, just as most executive power operates through administrative institutions. *See id.* at 824 (arguing that agencies operate within a "spectrum" of presidential control).

[7] Ryan Teague Beckwith, *Read Steve Bannon and Reince Priebus' Joint Interview at CPAC*, TIME (Feb. 23, 2017, 3:59 PM), http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/ [https://perma.cc/SCC5-LZB7] (quoting President Trump's advisor, Steve Bannon). This Article cannot predict whether anti-*Chevron* constitutional arguments will succeed, but legal principles and arguments can be rallying points for professional and political power, and this Article will consider legal debates seriously in their own terms. *See* DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 4 (1987) ("[P]olitical words do more than mystify; they inspire, persuade, enrage, mobilize. With words minds are changed, votes acquired, enemies labeled, . . . [and] the status quo suddenly unveiled as unjust and intolerable."). For more detailed speculation about the success of anti-*Chevron* arguments in the current Supreme Court, see *infra* note 485.

would ultimately hamstring governmental institutions and restrict democratic choice.

Chevron's political history creates an important opportunity to discuss administrative deference outside prevalent binaries of liberal versus conservative, originalist versus nonoriginalist, or proregulatory versus deregulatory. In the recent past, lawyers with all of those labels have argued different sides of *Chevron* deference, and this Article suggests that partisan politics should not determine *Chevron*'s constitutional status today. Cass Sunstein said long ago that any "institutional judgment [about *Chevron* deference] ought to be decided . . . on some ground other than the political one,"[8] but this Article concludes that any effort to overrule *Chevron* on constitutional grounds cannot be understood or justified apart from political dynamics. It is ironic that such recently manufactured, politically interlaced critiques of *Chevron* cite principles that are supposed to be timeless and apolitical. That methodological emphasis on constitutional abstraction and ancient history is dangerous because it ignores the practical costs of abolishing *Chevron* while also obscuring what kind of regime should arise afterward.[9]

This Article defends *Chevron*'s constitutional status without trying to defend the decision itself. For readers who wish to alter or rescind administrative deference, this Article concludes that any changes should occur in the public light of modern politics, with technical input and assistance from bureaucratic experts, using legal mechanisms that are tailored to produce incremental changes and correctable mistakes. Basic issues of American government are too important for resolution based on faraway historical analogies, much less based on artificially ancient principles of constitutional law. That is not how *Chevron* deference was born, and it is not how established governmental doctrines and practices should perish.

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[8] Kenneth W. Starr, Cass R. Sunstein, Richard K. Willard, Alan B. Morrison & Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 379 (1987).

[9] Some readers might suggest that originalism always discards modern practice and future solutions in pursuing the distant past, yet Justice Antonin Scalia is a counterexample. *See Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 38 (1986) (statement of Judge Antonin Scalia) [hereinafter *Scalia Confirmation Hearings*] ("To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on."); *see also id.* at 37-38 ("Let us assume that somebody runs in from Princeton University, and . . . he or she has discovered a lost document which shows that it was never intended that the Supreme Court should have the authority to declare a statute unconstitutional. I would not necessarily reverse *Marbury* v. *Madison* on the basis of something like that."). An earlier generation of originalists often demanded specific evidence before allowing courts to upset democratic majorities and longstanding governmental practice. *See infra* Section III.A (discussing *Chevron*'s mainstream acceptance); *see also generally* Craig Green, Originalism Without the -Ism 1-3 (Feb. 2, 2021) (unpublished manuscript) (on file with author).

The Article proceeds in five steps. Part I introduces *Chevron*'s crisis, including events that are continuing to develop.[10] Part II explains *Chevron*'s original Reagan-era context, which has been mostly forgotten.[11] Administrative deference is often debated using ostensibly neutral ideas about administrative effectiveness, yet in *Chevron*'s era, those institutional questions were closely tied to partisan politics.[12] Political history from the 1980s will offer a crucial benchmark for evaluating disputes about *Chevron* in the modern era.

Part III identifies the modern pivot away from *Chevron*. Legal conservatives deserve attention because they were such a strong force in the Reagan era, and they are also powerful today.[13] Conservative arguments are essential to *Chevron*'s historical origins and its modern siege, but almost no legal scholars have taken such statements seriously.[14] Part III analyzes conservatives' words in a new historical collection of presidential platforms, think-tank publications, legislative proposals, and judicial decisions. One of this Article's main contributions is to identify a broad conservative transformation in 2013—shifting to attack *Chevron* soon after President Obama's reelection.

Part IV explains why conservatives' anti-*Chevron* critiques began when they did, despite earlier conservatives' support for administrative deference. Assaults on *Chevron* gained strength in part because Republican Presidents appointed conservative judges, which made every form of judicial interpretation more politically attractive than it used to be. Trump-era political messages also

[10] Because this Article was mostly complete in the early months of 2020, it only partly describes events that happened afterward.

[11] The best doctrinal history of *Chevron* is Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 282-83 (2014).

[12] For broader examination of how iconic judicial precedents have been manipulated over time, see Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 440-49, 465-66 (2015) [hereinafter Green, *Turning the Kaleidoscope*].

[13] This Article does not claim that liberals have been more consistent than other political actors; one could contrast liberal skepticism about *Chevron* in the 1980s with liberal defense of *Chevron*'s constitutionality today. *Compare* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-82 (1986) (criticizing *Chevron*), Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 4-9 (1986) (predicting that *Chevron* will create unstable results), *and* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287-92 (1986) (calling *Chevron* "an unacceptable basis for judicial review"), *with* Green, Chevron *Debates*, *supra* note 4, at 694-732 (criticizing constitutional arguments against *Chevron*), *and* Metzger, *supra* note 2, at 33-46 (rejecting "anti-administrativism" on various grounds). Analyzing a broader range of political groups would expand this Article's necessarily limited scope. *See* MARY FRANCES BERRY, HISTORY TEACHES US TO RESIST: HOW PROGRESSIVE MOVEMENTS HAVE SUCCEEDED IN CHALLENGING TIMES 1-5 (2018) (highlighting twentieth-century progressive actors); BRADFORD MARTIN, THE OTHER EIGHTIES: A SECRET HISTORY OF AMERICA IN THE AGE OF REAGAN, at ix-xix (2011) (examining political opponents of Reagan-era conservatism). Any historical account risks simplifying events and actors from the past.

[14] An exception that supports the rule is Metzger, *supra* note 2, at 33-71.

attacked administrative government as a whole, and critiques of *Chevron* fit well with those broad efforts to dismantle federal institutions. Both of those dynamics suggest that resistance to *Chevron* and administrative governance will increase in the years to come, with consequences that are deeply uncertain and potentially massive. Part V concludes by analyzing the implications of anti-*Chevron* critiques for constitutional originalism, governmental power, and American democracy.

I. *CHEVRON* UNDER ATTACK

Until recently, administrative law was a stable, insular, almost boring group of topics.[15] Justice Antonin Scalia's began one discussion of *Chevron* by warning that administrative law is not for the faint of heart: "[Y]ou should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture. There will be a quiz afterwards."[16] No commentator would use that introduction today; *Chevron* and administrative law are both living in extraordinarily "interesting times."[17]

This Part briefly introduces *Chevron* and its modern crisis. The *Chevron* Court applied presumptive deference when federal agencies interpret statutes that they administer.[18] If a judge finds that an agency has interpreted statutory ambiguity reasonably, the judge does not have to find that the agency's interpretation is otherwise correct.[19] *Chevron*'s presumption of administrative deference has been a foundation of American government, "one of the very few defining cases" in the last fifty years of public law.[20] Even the decision's critics acknowledge that it would not "stretch the imagination to believe that, on every

[15] *See* American Conservative Union, *CPAC 2018 - A Conversation with the Honorable Don McGahn*, YOUTUBE, at 7:01 (Feb. 22, 2018) [hereinafter *A Conversation with Don McGahn*], https://www.youtube.com/watch?v=WWbiUqq_Lqw ("There was a time . . . where no one really spoke of administrative law or the administrative state or whatever one wants to call it . . . . [Yet by contrast,] the Federalist Society had their annual lawyers' conference last year; the whole topic was administrative law.").

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

[17] Although Robert F. Kennedy quoted "[m]ay he live in interesting times" as a supposedly "Chinese curse," Robert F. Kennedy, Day of Affirmation Address at the University of Capetown (June 6, 1966), https://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/RFK-Speeches/Day-of-Affirmation-Address-as-delivered.aspx [https://perma.cc/BPE4-VL2J], in fact "[n]o authentic Chinese saying to this effect has ever been found," THE YALE BOOK OF QUOTATIONS 669 (Fred R. Shapiro ed., 2006).

[18] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984).

[19] *See id*. at 844.

[20] Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990); *see also* Sunstein, Chevron *as Law*, *supra* note 2, at 1615.

single working day of the year, there exists . . . a judge, an executive officer, or a legislator who expressly invokes or formulates policy premised on *Chevron*."[21]

Chevron deference has deeply influenced how government works and what it can hope to accomplish.[22] Deference has also raised questions about the nature and function of law, including debates about which institutions should be allowed to make it.[23] *Chevron* has generated diverse controversies since the beginning, yet such disputes only confirm its iconic status.[24]

In recent years, *Chevron*'s status has dramatically changed, shifting from a bedrock judicial precedent to a contested doctrine that is sometimes toxic even to mention. This Article will analyze that transition in detail, but two recent examples will set the stage.

Decided in 2018, *Pereira v. Sessions* concerned requirements for an immigrant's notice to appear at a removal proceeding.[25] The majority did not "resort to *Chevron*" because the agency's approach violated "clear and unambiguous" statutory requirements.[26] Justice Anthony Kennedy nonetheless wrote a concurrence attacking administrative deference and explaining that "concerns raised by some Members of this Court" made it "necessary and appropriate to reconsider" not just particular examples or applications of *Chevron* but the foundational "premises that underlie *Chevron*" itself.[27] Kennedy wrote that *Chevron* deference might be unconstitutional because it violates "separation-of-powers principles and the function and province of the Judiciary."[28]

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[21] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017).

[22] *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENV'T L.J. 1, 2 (2005); *see also* City of Arlington v. FCC, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) ("When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal.").

[23] *See* Merrill, *supra* note 11, at 283 ("It is not overstating the matter to say that *Chevron* has become one of a handful of decisions—along with *Marbury v. Madison*, *Brown v. Board of Education*, and *Roe v. Wade*—that are the material for a continuing collective meditation about the role of the courts and indeed of the law itself in the governance of our society."); *see also* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 631 (2014); John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 464-68 (2014).

[24] Lawyers fight more often over cases that matter than over cases that do not. *See* Green, *Turning the Kaleidoscope*, *supra* note 12, at 383-88; *cf.* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) ("[*Chevron*] has now been cited far more than *Erie* [8,009 versus 5,052], a decision Bruce Ackerman once described as the 'Pole Star' for an entire generation of legal scholarship." (quoting BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977))).

[25] Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018).

[26] *Id.* at 2113.

[27] *Id.* at 2121 (Kennedy, J., concurring).

[28] *Id.*

During Kennedy's forty-three years as a federal judge—including twenty years on the Supreme Court—he participated in hundreds of cases that involved *Chevron* deference.[29] Yet *Pereira* was the first and only moment that he ever questioned *Chevron*'s constitutionality, and he did so without any prompting from the parties' briefs or oral arguments.[30] Constitutional objections to deference would have been discredited as heresy during almost all of Kennedy's judicial career. This Article will show how such newly acceptable arguments fit together with larger political phenomena.[31]

In 2019, *BNSF Railway Co. v. Loos* analyzed whether back pay for injured railroad employees should qualify as taxable "compensation."[32] *BNSF* seemed like a routine case of *Chevron* deference because Treasury Department regulations had interpreted the statutory term "compensation" since 1937.[33] Such longstanding administrative interpretation ordinarily would have received judicial respect, leaving only residual disputes about whether to let sleeping regulations lie.[34] At oral argument in *BNSF*, however, respondent's attorney never mentioned "*Chevron*" or "deference."[35] And petitioner's counsel uncomfortably mumbled as her last words of argument: "[Y]ou know, in any event, I hate to cite it, but I will end with *Chevron*. I mean, he has to win under the plain language for you to affirm."[36] The *BNSF* Court ultimately agreed with the petitioner and supported the agency's interpretation, but Justice Ruth Bader Ginsburg's majority opinion ignored *Chevron* entirely.[37]

In dissent, Justice Neil Gorsuch praised the litigants for eschewing *Chevron*—"if it retains any force"—because they were "well aware of the mounting criticism of *Chevron* deference."[38] Gorsuch also celebrated the majority's silence about *Chevron*:

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[29] *E.g.*, Fed. Express Corp. v. Holowecki, 552 U.S. 389, 395 (2008) (Kennedy, J.) ("[W]hen an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations." (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U. S. 837, 843-45 (1984))).

[30] *See* Petition for a Writ of Certiorari, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Brief for Petitioner, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Brief for the Respondent in Opposition, *Pereira*, 138 S. Ct. 2105 (No. 17-459); Transcript of Oral Argument, *Pereira*, 138 S. Ct. 2105 (No. 17-459).

[31] Early evidence of this jurisprudential change can be traced to Chief Justice John Roberts's dissent in *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting), which Justice Kennedy also joined. *See infra* Section III.B.4.

[32] BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 897 (2019).

[33] *Id.* at 898.

[34] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 3, 15, 33, *BNSF Ry. Co.*, 139 S. Ct. 893 (No. 17-1042).

[35] *See* Transcript of Oral Argument, *BNSF Ry. Co.*, 139 S. Ct. 893 (No. 17-1042).

[36] *Id.* at 58.

[37] *BNSF Ry. Co.*, 139 S. Ct. at 897, 904.

[38] *Id.* at 908 (Gorsuch, J., dissenting).

> Instead of throwing up our hands and letting . . . the federal government's executive branch . . . dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is . . . . Though I may disagree with the result the Court reaches, my colleagues rightly afford the parties before us an independent judicial interpretation of the law. They deserve no less.[39]

Chevron has become volatile in the highest echelons of legal practice, and recent petitions for certiorari are further evidence of *Chevron*'s fall from grace.[40]

Some readers might think that overruling *Chevron* on constitutional grounds is comparable to other doctrinal reversals, but not all precedents are created equal.[41] For example, when the Court recently overruled a prior decision about state sovereign immunity,[42] Justice Stephen Breyer complained that the Court should only disregard precedents where "the circumstances demand it," so that law can "retain the necessary stability."[43] Breyer was clearly worried about future cases, wondering ominously "which cases the Court will overrule next."[44] Many people thought Breyer was referring to *Roe v. Wade*,[45] but as a former administrative law professor, he also could have had administrative deference in mind. This Article suggests that overturning an iconic case like *Chevron* would be more like overruling *Roe* than overruling any ordinary precedent. Part V

[39] *Id*. at 908-09.

[40] *See, e.g.*, Petition for a Writ of Certiorari at 31-34, Child.'s Hosp. Ass'n of Tex. v. Azar, No. 19-1203, *cert. denied*, 141 S. Ct. 235 (2020) (mem.); Petition for Writ of Certiorari at 11-33, Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 19-296, *cert. denied*, 140 S. Ct. 789 (2020); Petition for Writ of Certiorari at 16-21, Valent v. Saul, No. 19-221, *cert. dismissed*, 140 S. Ct. 450 (2019); Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners at 2, Cal. Sea Urchin Comm'n v. Combs, No. 17-1636, *cert. denied*, 139 S. Ct. 411 (2018) (mem.); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 14, Breckinridge Health, Inc. v. Azar, No. 17-1408, *cert. denied*, 139 S. Ct. 64 (2018); *see also* Transcript of Oral Argument at 65, Niz-Chavez v. Barr, No. 19-863 (U.S. argued Nov. 9, 2020) ("Justice Gorsuch: . . . [T]he government has actually mustered the courage to make a Chevron step 2 argument here, which is interesting to me.").

[41] *See* Green, *Turning the Kaleidoscope*, *supra* note 12, at 379-88.

[42] Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1491-92 (2019), *overruling* Nevada v. Hall, 440 U.S. 410, 412, 426 (1979) (holding that states cannot invoke sovereign immunity in the courts of other states).

[43] *Id*. at 1506 (Breyer, J., dissenting).

[44] *Id*.

[45] 410 U.S. 113, 165-66 (1973). Doctrinal threats to *Roe* are certainly plausible. *See* Orrin G. Hatch, *There's Nothing "Super" About* Roe v. Wade, 29 STAN. L. & POL'Y REV. ONLINE 1, 23-24 (2018) (arguing that *Roe* is not "super precedent"); Martin Pengelly & Richard Luscombe, *Trump Says Overturning Roe v Wade 'Possible' with Barrett on Supreme Court*, GUARDIAN (Sept. 27, 2020, 7:39 PM), https://www.theguardian.com/us-news/2020/sep/27/trump-amy-coney-barrett-supreme-court-roe-v-wade [https://perma.cc/8C4T-SL5D].

considers *Chevron*'s future in detail, but the point for now is that *Chevron* was tremendously important for decades, and it is currently under attack.

No one has explained how that shift happened. Scholarship about *Chevron* is notably broad,[46] yet two works have provided the best existing commentary. Gillian Metzger's outstanding article, "1930s Redux," compared the modern era to pre–New Deal politics in order to identify a transhistorical phenomenon of "anti-administrativism."[47] However, Metzger's analysis of anti-administrativism as a category was not able to chart the concept's full historical development, and her emphasis on two specific periods necessarily overshadowed the decades in between. Without this Article's historical evidence, some readers could misconstrue conservative opposition to agencies as a straight-line march through the decades, with anti-*Chevron* critiques as just another phase in the endless struggle between business and government.[48] Such a long-arc historical approach would overlook fundamental events that happened during the last forty years.

Another important article is "*Chevron* as Law" by Cass Sunstein.[49] Sunstein's long professional experience with deference demonstrated that "everything from the late 1970s and early 1980s has been turned on its head,"[50] and he could have noticed a similarly dramatic disruption with respect to the 1990s and 2000s as well.[51] Sunstein explained that *Chevron*'s crisis needs careful historical analysis: "It is impossible to understand *Chevron*'s success without a sense of the legal and political background, which seems to have been lost in recent years and which some people might find surprising."[52] And he exclaimed in disbelief that "[*Chevron*'s] political valence has flipped. . . . How has a decision originally celebrated—mostly by the right—for its insistence on judicial humility come to be seen as a kind of abdication or capitulation? From 1984 to the present, what on Earth happened?"[53]

This Article offers answers to those historical questions. Sunstein's normative arguments crowded out any effort at descriptive research, leaving his own article to rely on a speculative hypothesis about short-term political cycles: "[E]valuation of *Chevron* would seem to depend on who occupies the White

[46] Sunstein, Chevron *as Law*, *supra* note 2, at 1619 n.19 ("It is an understatement to say that the academic literature on *Chevron* is voluminous."); *see also supra* note 2 (describing current scholarship).

[47] Metzger, *supra* note 2, at 4.

[48] *See id*. at 14-16, 65-67. *See generally* James D. Carroll, *Public Administration in the Third Century of the Constitution: Supply-Side Management, Privatization, or Public Investment?*, 47 PUB. ADMIN. REV. 106, 106-07 (1987) (discussing the impact of Reagan-era privatization on business regulations and government).

[49] *See* Sunstein, Chevron *as Law*, *supra* note 2, at 1615.

[50] Sunstein, Chevron *as Law*, *supra* note 2, at 1634.

[51] *See infra* Part III.

[52] Sunstein, Chevron *as Law*, *supra* note 2, at 1631.

[53] *Id*. at 1664.

House. . . . Crudely speaking, we might expect positions about *Chevron* to flip accordingly."[54] This Article tells a very different story. For decades, *Chevron* flourished under presidential administrations from both political parties, and it is clear that new anti-*Chevron* critiques will likewise endure through the Biden presidency as they did during the presidencies of Obama and Trump.[55] This Article's history of *Chevron* and its modern critics will uncover harmful institutional consequences that even Metzger and Sunstein did not notice, and such historical excavation must start by locating *Chevron* in its original political context.

II. *CHEVRON*'S ORIGINAL POLITICS

Chevron did not emerge from apolitical reasoning or natural evolution. On the contrary, increased administrative deference was a major achievement for Republican conservatives.[56] *Chevron*'s history is quite familiar as a narrative about legal principles and arguments, yet modern scholarship has overlooked the decision's political circumstances. This Part describes the politics surrounding *Chevron*'s birth as context to understand its modern crisis. When *Chevron* was decided in 1984, its effects on environmental policy, institutional choice, and partisan control were obvious.[57] Yet most current discussion summarizes the "*Chevron* two-step" as a verbal abstraction—statutory ambiguity plus agency reasonableness.[58] This Part offers new details about *Chevron*'s origins and a new perspective on the decision's connection to national politics.

A. Chevron *as a Political Event*

In his first inaugural address, President Ronald Reagan said that "government is not the solution to our problem; government is the problem."[59] Although Reagan promised to "reverse the growth of government" and "curb the size and influence of the Federal establishment," Republicans were a minority in Congress that could not repeal existing statutes; the resultant impasse dominated political fights over the Clean Air Act.[60] Deference to agencies was an important Reaganite solution, and exploring these twentieth-century episodes will help

[54] *Id*. at 1665.

[55] *See infra* Parts III-IV.

[56] Roger Thompson, *Environmental Conflicts in the 1980s*, 1 ED. RSCH. REPS. 123, 132 (1985); Linda Greenhouse, *Court Upholds Reagan on Air Standard*, N.Y. TIMES, June 26, 1984, at A8. For discussion of this Article's reference to "Republican conservatives," see *supra* note 5.

[57] *See infra* Section II.A.

[58] *See* Cary Coglianese, *Foreword:* Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1341-44 (2017) (criticizing modern fixations upon *Chevron*'s "beguiling simplicity").

[59] Ronald Reagan, U.S. President, Inaugural Address of President Ronald Reagan (Jan. 20, 1981), *in* 17 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1, 2 (1981).

[60] *Id*.; Thompson, *supra* note 56, at 124-25.

identify similar arguments from the modern era when conservatives took the opposite side.[61]

In 1970, Congress created the Environmental Protection Agency ("EPA") and authorized the agency to define and enforce environmental standards.[62] Reagan complained quite a lot about environmental restrictions such as the Clean Air Act.[63] His objections that "nature is the chief air polluter"[64] and "trees cause more pollution than cars" inspired one protester to put a sign on a tree: "Cut me down before I kill again."[65] A Reagan official claimed that "[f]or ten years we've been in an environmental time warp. EPA and its minions . . . have assumed an absolute monopoly right to flood the American economy with regulations, litigation, and compliance costs that are out of proportion to any environmental problem."[66] Broad environmental laws were "blank checks that authorize hotshot junior lawyers and zealots ensconced in the EPA to bleed American industry of scarce funds needed for investment, modernization, and job creation."[67] Something had to be done about such burdensome statutes.

A few advisers wanted to change the Clean Air Act itself, but in the meantime, Reagan appointed Anne Gorsuch, a pro-business bureaucrat, as EPA Administrator.[68] The *New York Times* declared on Inauguration Day 1981 that "Environmental Action Enters New Era," describing efforts to amend the Clean Air Act as "the first clear indication of how environmental issues will fare with

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[61] *See infra* Section III.B.

[62] Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 3, 4, 84 Stat. 1676, 1677, 1679-87 (codified as amended at 42 U.S.C. §§ 7401-7642); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended in scattered sections of 42 U.S.C.).

[63] Thompson, *supra* note 56, at 123.

[64] Joanne Omang, *Reagan Criticizes Clean Air Laws and EPA as Obstacles to Growth*, WASH. POST, Oct. 9, 1980, at A2.

[65] Gary Blankenship, *Political Humor Leaves Them Laughing at Judicial Luncheon*, FLA. BAR NEWS, July 15, 2000, at 10.

[66] MARISSA MARTINO GOLDEN, WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS 118 (2000) (quoting ANNE BURFORD WITH JOHN GREENYA, ARE YOU TOUGH ENOUGH?: AN INSIDER'S VIEW OF WASHINGTON POLITICS 29 (1986)); *see also* David A. Stockman, *How to Avoid an Economic Dunkirk*, CHALLENGE, Mar.-Apr. 1981, at 17, 19.

[67] GOLDEN, *supra* note 66, at 118 (quoting BURFORD WITH GREENYA, *supra* note 66, at 29).

[68] Thompson, *supra* note 56, at 126. For Anne Gorsuch's political alignment, see Philip Shabecoff, *Reagan and Environment: To Many, a Stalemate*, N.Y. TIMES, Jan. 2, 1989, at 1 [hereinafter Shabecoff, *Reagan and Environment*] (describing Anne Gorsuch as an "aggressive champion[] of industry"). *See also* Noxsel, *supra* note 2, at 50-52 (recounting Gorsuch's attempts to limit government as a Colorado state legislator and as EPA administrator). Anne Gorsuch was the mother of Supreme Court Justice Neil Gorsuch, and she changed her surname in 1983 after marrying Robert F. Burford. *Personalities*, WASH. POST, Feb. 21, 1983, at C3. *See generally* BURFORD WITH GREENYA, *supra* note 66; Douglas Martin, *Anne Gorsuch Burford, 62, Reagan E.P.A. Chief, Dies*, N.Y. TIMES, July 22, 2004, at C13.

the ascendancy of conservative politics."[69] By contrast, Anne Gorsuch downplayed statutory reform because she believed that administrative regulations and experts should be dominant features of the Reagan Revolution.[70] Those same institutional debates about which governmental entities should design and implement legal change have remained central for modern disputes about administrative deference today.[71]

The Reagan Administration never did succeed in revising the Clean Air Act; instead, it was agency bureaucrats who implemented their own conservative agenda.[72] In the 1970s, President Richard Nixon organized "The Administrative Presidency" to weaken an "entrenched bureaucracy of 'New Deal' Democrats who could resist . . . his policies."[73] Likewise in 1981, the conservative Heritage Foundation (or "Heritage") urged President Reagan to "hit the ground

[69] Philip Shabecoff, *Environmental Action Enters New Era*, N.Y. TIMES, Jan. 20, 1981, at 28 [hereinafter Shabecoff, *Environmental Action*]; *see also* Shabecoff, *Reagan and Environment*, *supra* note 68 (describing Reagan's intention to make environmental policy "a prime target of his social revolution").

[70] *See* Anne M. Gorsuch, *The 1980's—A Decade of Challenge*, EPA J., Jan.-Feb. 1982, at 5, 9 (stressing that improvements to environmental policies must happen through regulatory reform and better management); Philip Shabecoff, *Reagan Delaying Proposals for Clean Air Act*, N.Y. TIMES, July 28, 1981, at A1 (explaining Gorsuch's preference to leave the Clean Air Act intact while a scientific review board examined air quality standards).

[71] *Compare* Erik M. Erlandson, *A Technocratic Free Market: How Courts Paved the Way for Administered Deregulation in the American Financial Sector, 1977–1988*, 29 J. POL'Y HIST. 350, 351 (2017) (explaining that Reagan-era conservatives embraced *Chevron* because administrative deference helped them "erode New Deal regulations and move bureaucratic government in a rightward direction"), *with infra* Section III.B (documenting the sudden transformation after President Obama's reelection from conservatives' supporting *Chevron* to conservatives' opposing it).

[72] *See* JACOBS & ZELIZER, *supra* note 5, at 55; Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan's First Term*, 2 YALE J. ON REG. 293, 298, 318 (1985) ("In the absence of legislative change, the Reagan legacy will be broadened administrative discretion . . . ."); Shabecoff, *Environmental Action*, *supra* note 70; Shabecoff, *Reagan and Environment*, *supra* note 68; *see also* GOLDEN, *supra* note 66, at 117 (speculating that Reagan followed the Heritage Foundation's recommendation that policy goals could be best achieved through administrative oversight). A parallel development during this period was conservative advocacy of "unitary executive" theory, which sought to absorb all administrative power within the President himself. *See* Stephen Skowronek, *The Conservation Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2073-76 (2009); *see also* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021) (criticizing unitary executive theories as historically misguided).

[73] Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283, 289-90 (2007); *see also* RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY, at vii-x (1983) (explaining that Nixon attempted to create an administrative presidency but failed because of Watergate).

running"[74] and to pursue policy goals through mechanisms of "administrative direction and not legislative remedies."[75] Nixon, Reagan, and Heritage all recognized that the Constitution allowed administrative bureaucrats to interpret federal statutes; that had been conventional wisdom for decades.[76] Conservative political leaders therefore wished to use that established interpretive authority to implement deregulatory policies immediately without new federal legislation.[77] The institutional decision to use bureaucrats instead of Congress is what gave rise to the *Chevron* litigation, and it yielded other deregulatory achievements throughout Reagan's presidency.[78]

Chevron involved the interpretation of "source," a term in the Clean Air Act that federal agencies, courts, and Congress had debated for years.[79] Several statutory provisions regulate "sources" that emit a certain quantity of pollution, yet Congress had never defined exactly what the word "source" meant.[80] Two pre-*Chevron* cases highlight the political consequences of administrative deference, thus illustrating why *Chevron* was understood as a victory for Republicans, deregulatory conservatism, and administrative authority across the board.[81]

The first pre-*Chevron* struggle concerned "New Source Performance Standards" ("NSPS") that governed the modification of a stationary pollution "source."[82] The EPA's original regulations applied NSPS requirements to each pollution-emitting component at an industrial facility—for example, a

[74] Kelley, *supra* note 73, at 290 (citing JAMES P. PFIFFNER, THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING 13-14 (2d ed., rev. 1996)).

[75] Louis J. Cordia, *Environmental Protection Agency*, *in* HERITAGE FOUND., MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 969, 970 (Charles L. Heatherly ed., 1981); *see also* GOLDEN, *supra* note 66, at 117-18; Stockman, *supra* note 66, at 19 (urging Reagan to implement regulatory action swiftly before legislative backlash could cause political dissolution).

[76] Green, Chevron *Debates*, *supra* note 4, at 677.

[77] *See* Stockman, *supra* note 66, at 19.

[78] Metzger, *supra* note 2, at 14-16; *see also* Hicks v. Cantrell, 803 F.2d 789, 793-94 (4th Cir. 1986) (holding that courts must defer to the Secretary of Labor's interpretation of statutes as long as the results are reasonable, even if they contradicted previous interpretations), *abrogated by* Malcomb v. Island Creek Coal Co., 15 F.3d 364, 369 n.5 (4th Cir. 1994); Fix & Eads, *supra* note 72, at 306-07 ("*Chevron* . . . may indeed have reinforced[] the agency's continuing practice of promulgating policies . . . in the form of policy guidelines, rather than by statute, or by regulation.").

[79] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984); Ala. Power Co. v. Costle, 636 F.2d 323, 395 (D.C. Cir. 1979); ASARCO Inc. v. EPA, 578 F.2d 319, 321-25 (D.C. Cir. 1978).

[80] Clean Air Act § 111, 42 U.S.C. § 7411.

[81] *Compare Ala. Power Co.*, 636 F.2d at 395, *and ASARCO*, 578 F.2d at 321-25, *with infra* notes 100-18 and accompanying text.

[82] *ASARCO*, 578 F.2d at 322.

smokestack or chimney.[83] In 1976, a Republican EPA Administrator issued new regulations that reinterpreted "source" to include buildings, structures, or facilities that "contain[]" a polluting facility.[84] Under those regulations, one pollution source could legally enclose another pollution source inside itself—a so-called "bubble"—which meant that any increased pollution from one smokestack would not trigger NSPS "modified source" requirements if the industrial facility's overall pollution levels were "unmodified."[85] Factory owners could offset any increase in pollution from one smokestack by lowering pollution from another smokestack, providing greater flexibility and lower regulatory costs.[86]

In *ASARCO Inc. v. EPA*, the D.C. Circuit held that these "bubble regulations" violated the Clean Air Act.[87] The EPA claimed that the "'broad' statutory definition of . . . *source*" granted administrative "'discretion' to define [that word] as either a single facility or a combination of facilities."[88] However, liberal Judge Skelly Wright held that the EPA's bubble regulations would "change the basic unit" for applying NSPS requirements from smokestacks to factories and that "[t]he agency has no authority to rewrite the statute in this fashion."[89] Wright explained that only legislation from Congress could create major changes in statutory meaning. Wright's arguments would resurface decades later as a hallmark of anti-*Chevron* critiques.[90]

Conservative Judge George MacKinnon dissented, asserting that Congress implicitly "invest[ed] the Administrator with discretion to promulgate the

[83] Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(d) (1975) [hereinafter 1975 Standards] ("'Stationary source' means any building, structure, facility, or installation . . . ."); *see also ASARCO*, 578 F.2d at 323 & n.9 (noting that the EPA's original regulations provided that "affected facilities" like kilns, coolers, and dryers were not synonymous with "entire plants" (quoting 40 C.F.R. § 60.60)).

[84] Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(d) (1976) [hereinafter 1976 Standards] ("'Stationary source' means any building, structure, facility, or installation which . . . *contains any one or combination of the following* . . . ." (emphasis added)); *see also ASARCO*, 578 F.2d at 324.

[85] *See* Merrill, *supra* note 11, at 257-60.

[86] *ASARCO*, 578 F.2d at 327-28.

[87] *Id.* at 329.

[88] *Id.* at 326.

[89] *Id.* at 326-27. For Wright's liberal politics, see Louis Michael Seidman, *J. Skelly Wright and the Limits of Legal Liberalism*, 61 LOY. L. REV. 69, 70 (2015) ("By candidly and self-consciously using the law as a means to achieve social change, he pushed legal liberalism to its limits."). Some readers might hesitate at labeling federal judges as "conservative" or "liberal," *see supra* note 5, yet that is certainly how Wright and other judges were viewed in their era. Without questioning any judge's impartiality or predicting their adjudicative results, this Article's focus on political history suggests that including such political identifications—instead of ignoring or hiding them—might generate accurate and productive historical analysis.

[90] *See infra* Section III.B.

bubble concept."[91] MacKinnon claimed that the majority improperly limited EPA discretion and "reduce[d] the flexibility with which the Act was intended to be implemented" while "misapprehend[ing] the words of the statute" that broadly authorized the agency to interpret "source" in various ways.[92] MacKinnon's views about administrative deference mirrored the position of Reagan Republicans in *Chevron*, and those views are precisely what twenty-first-century conservatives would eventually reject.[93]

A second dispute involved "clean-air areas" that satisfied environmental standards.[94] In 1978, a Democratic EPA Administrator issued regulations that required permits for "major new sources" in clean-air areas, and those regulations applied a bubble concept to define the statutory term "source."[95] In *Alabama Power Co. v. Costle*, the D.C. Circuit upheld the EPA's bubble definition with respect to clean-air areas.[96] Conservative Judge Malcolm Wilkey explained that the "EPA has discretion to define the terms reasonably to carry out the intent of the Act," and "[*w*]*e view it as reasonable* . . . to define ['source'] broadly enough to encompass an entire plant."[97] The *Alabama Power* decision did allow the EPA to "change the basic unit" of regulation from individual smokestacks to aggregate industrial plants,[98] and it also authorized the EPA to change its mind in the future because "[t]here is . . . no rule of administrative *stare decisis*."[99] Everyone understood that flexible variability and administrative deference were two sides of the same coin.

The third and final dispute was *Chevron* itself, and it concerned Administrator Anne Gorsuch's bubble regulations for "nonattainment areas" that did not meet

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[91] *ASARCO*, 578 F.2d at 331-32 (MacKinnon, J., concurring in part and dissenting in part). For MacKinnon's political alignment, see Joseph Zengerle, *Changing of the Chiefs*, 9 GREEN BAG 2D 175, 176 (2006) (describing the D.C. Circuit as "divided at the time between . . . [liberal] Judge Skelly Wright on the one hand and . . . [conservative Judge] George MacKinnon on the other").

[92] *ASARCO*, 578 F.2d at 333-35 (MacKinnon, J., concurring in part and dissenting in part).

[93] *Compare infra* notes 100-18 and accompanying text, *with infra* Section III.B.

[94] *See generally* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified at 42 U.S.C. §§ 7470-7479); Ala. Power Co. v. Costle, 636 F.2d 323, 343 (D.C. Cir. 1979).

[95] 1977 Clean Air Act: Prevention of Significant Air Quality Deterioration: State Implementation Plans; Requirements, 43 Fed. Reg. 26,379 (June 19, 1978) (codified at 40 C.F.R. pts. 51-52 (1979)); *see also Ala. Power Co.*, 636 F.2d at 401 (explaining that EPA adopted bubble concept in new regulations).

[96] *Ala. Power Co.*, 636 F.2d at 396.

[97] *Id.* (emphasis added). For Judge Wilkey's political background, see Douglas Martin, *Malcolm Wilkey, 90, Noted Judge, Dies*, N.Y. TIMES, Sept. 19, 2009, at A16 ("[H]is mainly conservative opinions drew note, even when they were for the losing side.").

[98] *Ala. Power Co.*, 636 F.2d at 397-98; ASARCO Inc. v. EPA, 578 F.2d 319, 327 (D.C. Cir. 1978).

[99] Bankamerica Corp. v. United States, 462 U.S. 122, 149 & n.10 (1983) (White, J., dissenting).

federal emissions standards.[100] As a matter of environmental policy, the new rules' definition of "source" weakened legal requirements, lowered "regulatory burdens and complexities," and boosted "flexibility for the states."[101] This fulfilled Republican campaign promises without amending the Clean Air Act itself.[102] The D.C. Circuit invalidated the agency's nonattainment regulations in an opinion by then-Judge Ruth Bader Ginsburg.[103] Her opinion followed "the force of [D.C. Circuit] precedent in *Alabama Power* and *ASARCO*," emphasizing that "[w]e express no view on the decision we would reach if . . . [those cases] did not control our judgment."[104] At the time, this seemed like a perfectly normal case about established judicial doctrine.

Ginsburg invalidated the Reagan Administration's bubble regulations because *ASARCO* and *Alabama Power* had created a "bright line test" that separated the EPA's authority in clean-air areas from its authority in nonattainment areas.[105] Ginsburg viewed prior judicial interpretations of "source" as authoritative legal precedents that must bind the EPA's new leadership just as they constrained new judges like herself. Regardless of whether the D.C. Circuit's earlier decisions were substantively correct, their interpretation of "source" had become fixed as a matter of law, and any remedy had to come from Congress rather than federal courts or the EPA.[106] Under

[100] *See* Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 719-20 (D.C. Cir. 1982), *rev'd sub nom*. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[101] *Id*. at 724 n.27 (quoting Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (Mar. 12, 1981)) (noting that new regulations were promulgated as part of government-wide reexamination of excessive and burdensome regulations).

[102] *See supra* notes 59-71 and accompanying text.

[103] *Nat. Res. Def. Council, Inc*., 685 F.2d at 720. As a D.C. Circuit Judge and in her early years on the Supreme Court, Ruth Bader Ginsburg was known as a "paragon of judicial restraint" as opposed to anything more "notorious." Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES MAG., Oct. 5, 1997, at 60; *see also* Dahlia Lithwick, *The Mysterious RBG*, ATLANTIC, Jan.-Feb. 2019, at 28 (reviewing Justice Ginsburg's legacy as a feminist who "believes in the transformational power of the rule of law"). For Ginsburg's liberal reputation over the years, compare Rosen, *supra* (describing her as guided by "an affinity for resolving cases on narrow procedural grounds rather than . . . bold assertions of judicial power"), *with* Linda Greenhouse, *Ruth Bader Ginsburg, 'Jurist of Historic Stature,' Dies at 87*, N.Y. TIMES, Sept. 20, 2020, at A24 (detailing her status as "a pioneering advocate for women's rights, who in her ninth decade became a much younger generation's unlikely cultural icon").

[104] *Nat. Res. Def. Council, Inc*., 685 F.2d at 720 n.7.

[105] *Id*. at 726-28.

[106] *See, e.g*., Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) ("[*S*]*tare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.").

Ginsburg's legal approach, a "source" meant whatever existing judicial precedent prescribed, until and unless Congress were to declare otherwise.[107]

The Supreme Court unanimously reversed in an opinion by moderate Republican Justice John Paul Stevens.[108] According to Stevens, all of these D.C. Circuit decisions about the Clean Air Act misunderstood how to interpret statutes that involve federal agencies.[109] Statutes without administrative agencies often require courts to produce clear meanings in the face of statutory vagueness, but the EPA's authority changed the judiciary's role. For statutes involving a federal agency, the D.C. Circuit had erred by adopting "a static judicial definition of the term 'stationary source' [that] . . . Congress itself had not commanded."[110] Whenever an agency has interpreted a statutory ambiguity, federal courts must not "simply impose [their] own construction."[111] On the contrary, when "Congress has explicitly left a gap," that ambiguity represents "an express delegation of authority to the agency to elucidate [statutory vagueness] by regulation,"[112] Courts should analyze only two questions: whether Congress has directly spoken to the legal question under dispute and, if not, whether the agency's statutory interpretation is "reasonable."[113]

The Clean Air Act's vague statutory language presumptively authorized the EPA to interpret "source" through regulations. Congress "either inadvertently did not resolve" whether the Clean Air Act should use a bubble definition, or perhaps Congress "intentionally left [such issues] to be resolved by the

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[107] To summarize Ginsburg's conclusion, the statutory term "source" was sufficiently broad to include "bubble" polluting facilities with respect to clean-air areas, but "source" included only components with respect to nonattainment areas. *Nat. Res. Def. Council, Inc.*, 685 F.2d at 726-27. *Compare* Ala. Power Co. v. Costle, 636 F.2d 323, 402 (D.C. Cir. 1979) (recognizing EPA discretion to apply broad statutory boundaries with respect to clean-air areas), *with* ASARCO Inc. v. EPA, 578 F.2d 319, 329 (D.C. Cir. 1978) (holding that bubble concept regulations contradicted the language and purpose of nonattainment NSPS provisions).

[108] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Justices Thurgood Marshall, William Rehnquist, and Sandra Day O'Connor did not participate in the *Chevron* decision. Greenhouse, *supra* note 56, at A8 ("Justice Marshall was ill the day the case was argued, and the other two Justices presumably had stock in one of the many corporations participating in the case."). For Stevens's political alignment in the 1980s, see RUTH JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION, at ix (1988) (describing him as "pragmatic," "independent-minded," and "moderate[]"); and Linda Greenhouse, *Bow-Tied Field Marshal of the Court's Liberal Wing*, N.Y. TIMES, July 17, 2019, at A1 (describing his transformation from "a Republican antitrust lawyer into the outspoken leader of the court's liberal wing").

[109] *Chevron*, 467 U.S. at 845.

[110] *Id.* at 842.

[111] *Id.* at 843.

[112] *Id.* at 843-44.

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

agency."[114] Stevens declared that, "[f]or judicial purposes, it matters not which of these things occurred."[115] Congress did not prescribe a substantive meaning for the word "source." Instead, it erected an institutional structure to resolve ambiguities.[116] The latter framework allocated interpretive responsibility to agencies rather than courts, and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[117]

Chevron held that federal courts must accept an agency's statutory interpretation even when that interpretation has been changed to follow the winds of politics. "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[118] Congress's choices in the Clean Air Act allow the EPA to change statutory interpretations based on new policies instead of sticking with judicial interpretation that would necessarily freeze statutory meaning in legal precedents. *Chevron* recognized congressional power to create interpretive institutions, not just specific substantive laws, and dozens of post-*Chevron* statutes have implicitly incorporated *Chevron*'s categorical approach, just as countless pre-*Chevron* statutes incorporated various standards of deference before *Chevron*.[119]

Chevron was a victory for conservative environmental policy and also for agencies that aspired to produce legal change. Because the Supreme Court granted administrative reinterpretations deference equal to an agency's initial interpretation, bureaucrats like Anne Gorsuch could transform substantive legal requirements without requiring Congress to amend statutes. By contrast, if the D.C. Circuit's nondeferential approach had prevailed, the EPA would have been constrained by prior agency decisions and judicial precedents, thus defeating a large fraction of Reagan's deregulatory revolution.

Lawyers, judges, and scholars have debated whether *Chevron* was a valid extension of older precedents about administrative deference.[120] Regardless of

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

[115] *Id*. at 865.

[116] *See id*. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (alteration in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

[117] *Id*. at 844.

[118] *Id*. at 866.

[119] *See* Elliott, *supra* note 22, at 3; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 906, 994 (2013); Manning, *supra* note 23, at 467-68.

[120] *See, e.g.*, Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 243 (1991) ("The existence of some historical precedent for a deferential style of review, however, does not necessarily suggest that either history or political theory fully supports the *Chevron* decision."); *cf*. Merrill, *supra* note 11, at 282 ("*Chevron* presents a striking instance of a case that became great not because of the

those debates, no court or litigant in the early 1980s claimed that administrative deference was unconstitutional. Likewise, every President after *Chevron* has invoked administrative deference to escape from ideologically undesirable interpretations and precedents that persisted from previous administrations, thereby allowing the EPA to implement new legal policies and priorities without statutory reform. In metaphorical terms, Presidents from both political parties used administrative deference to steer the governmental wagon rightward or leftward, without endeavoring to break the axle or split the wheels. That would eventually change.

B. Chevron *as a Political Issue*

Some commentators understood very well the link between administrative deference and Reaganite politics. In 1981, then-Professor Antonin Scalia wrote an article called "Regulatory Reform—The Game Has Changed," which chastised any Republican who sought to reduce bureaucratic lawmaking power "[a]t a time when the GOP has gained control of the executive branch."[121] Ignoring technical distinctions between bureaucratic officials and executive agents,[122] Scalia wrote that conservatives seemed "perversely unaware that the accursed 'unelected officials' downtown are now *their* unelected officials, presumably seeking to move things in *their* desired direction."[123] Scalia denounced efforts to abolish administrative deference because he saw the 1980s as a time to push conservative policies forward. Restricting agencies' interpretive power would "eliminate[] the Reagan Administration's authority to give content to relatively meaningless laws" through agencies.[124] To limit Reagan's bureaucrats would transfer statutory interpretation to "federal courts which . . . will be dominated by liberal Democrats for the foreseeable future."[125]

Generations of pre-Reagan conservatives had criticized federal agencies that served "regulation-prone" Democratic Presidents Jimmy Carter, Lyndon Johnson, and Franklin Roosevelt.[126] By contrast, to advocate likeminded restrictions for "an executive that is seeking to dissolve the encrusted regulation

inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later determined to make it a great case.").

[121] Antonin Scalia, *Regulatory Reform–The Game Has Changed*, REGUL., Jan.-Feb. 1981, at 13, 13-15 [hereinafter Scalia, *Regulatory Reform*].

[122] *See supra* note 6 (describing the relationship between executive agencies and independent agencies).

[123] Scalia, *Regulatory Reform*, *supra* note 121, at 13.

[124] *Id*.; *see also* NATHAN, *supra* note 73, at 12 (describing the Reagan Administration's "dual strategy" of using administrative and legislative actions to reduce government spending); Kelley, *supra* note 73, at 289-92 (describing the Reagan Administration's strategy of having agencies execute centralized political priorities).

[125] Scalia, *Regulatory Reform, supra* note 121, at 13.

[126] *Id*. at 14.

of past decades . . . will impede the dissolution."[127] Efforts to prioritize federal courts' interpretive authority "do not . . . deter regulation. What they deter is change."[128] Scalia used a vivid metaphor to describe agency authority during the Reagan Revolution: "Regulatory reformers who . . . continue to support the unmodified proposals of the past as though the fundamental game had not been altered, *will be scoring points for the other team*."[129] Deference and partisan victory were inextricably linked.[130]

The conservative chorus supporting administrative deference quickly grew louder.[131] Douglas Kmiec, Judge Laurence Silberman, Judge Kenneth Starr, and Richard Willard all endorsed *Chevron*, even though—like Scalia himself—none of them had embraced administrative deference prior to Reagan's election.[132] In fact, no prominent conservatives criticized *Chevron* in the 1980s, and some conservatives suggested that administrative deference was *constitutionally required* to preserve the separation of powers.[133]

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[127] *Id*.

[128] *Id*.

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

[130] As further evidence of his own partisan commitments, Scalia made exactly the opposite argument about administrative deference before President Reagan took office. *See* Antonin Scalia, *On Saving the Kingdom: Federal Trade Commission*, REGUL., Nov.-Dec. 1980, at 18, 19 [hereinafter Scalia, *Federal Trade Commission*] ("Replacing 'their' bureaucracy with 'ours' does not solve the underlying difficulty. The point is that *no* bureaucracy should be making basic social judgments. . . . It is perverse to delight in our ability to change the law without changing the laws.").

[131] *Cf*. ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 114 (1983) ("[A]lthough many political conservatives had earlier been sympathetic to higher legal standards of review for regulations, they realized that during the Reagan period any new legal hurdles would only frustrate efforts to roll back rules already on the books.").

[132] *See supra* note 130 (discussing Scalia's previous opposition to administrative deference). For the political alignment of conservatives mentioned in the text, see Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 290 (1988); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1559 (2009) (describing Kmiec as "a well-known conservative" during this period); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990); LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 249-52 (1997) (describing Judge Silberman's conservatism); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REGUL. 283, 308 (1986); *Bush to Tap Judge Starr for Solicitor-General Post*, WALL ST. J., Feb. 2, 1989, at 1 (describing Starr as "conservative federal appeals court judge"); Starr et al., *supra* note 8, at 372-73 (quoting Richard Willard's positive views about *Chevron*); and Stephanie Goldberg, *Meese's Point Men*, A.B.A. J., Feb. 1, 1987, at 68, 68 (quoting Daniel Popeo, founder of the Washington Legal Foundation, describing Willard as a "team player" for the Reagan Administration).

[133] *See, e.g*., Kmiec, *supra* note 132, at 269; Silberman, *supra* note 132, at 824; Starr, *supra* note 132, at 308.

As a D.C. Circuit judge, Scalia confirmed his support for administrative deference,[134] and after joining the Supreme Court, he endorsed Justice Stevens's parallel approach in *Chevron*.[135] Scalia explicitly dismissed concerns about separation of powers, condemning some lawyers' "stubborn refusal . . . to admit that courts ever accept executive interpretation."[136] Scalia said that *Chevron* recognized a legislatively "presumed intent" whenever Congress granted agencies legal mechanisms (agency rulemaking or adjudication) for interpreting statutes.[137] He firmly dismissed any notion "that both court and agency were searching for the one, permanent, 'correct' meaning" of substantive statutes because *Chevron* only applies to issues that Congress left unresolved.[138] Under such circumstances, courts should apply Congress's clear institutional choices, which often leave an agency "free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose," regardless of a court's own preferences or earlier precedents.[139]

Scalia argued that "there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind,"[140] and that is how *Chevron* wrestled authority away from judges and Congress for the benefit of deregulatory bureaucrats. Scalia explicitly acknowledged *Chevron*'s partisan implications: "'[S]ource' can mean a range of things, and it is up to the agency, in light of its advancing knowledge (and also, to be realistic about it, *in light of the changing political pressures* . . .) to specify the correct meaning."[141] Scalia told courts that they should "accept changes in agency interpretation *ungrudgingly*" and allow the agency to adopt "new social attitudes impressed upon it through the political process."[142] Old statutory interpretations did not have to be wrong to be revised, and the Reagan Revolution demonstrated how

[134] Am. Trucking Ass'ns v. Interstate Com. Comm'n, 697 F.2d 1146, 1148 (D.C. Cir. 1983) ("The first step in our analysis is to determine whether . . . [Congress] meant to refer to a well-established legal definition or series of legal precedents, in which case we should not defer to the agency's interpretation; or rather in a sense . . . to be informed by the nature and purpose of the statutory scheme which the Commission is charged with elaborating."); *id*. at 1149 ("Our task, then, is to determine whether the Commission's interpretation . . . is so unreasonable as to go beyond the bounds of interpretive discretion which Congress evidently afforded.").

[135] Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 16, at 512-15.

[136] *Id*. at 514.

[137] *Id*. at 517 (dismissing search for genuine legislative intent as "a wild-goose chase").

[138] *Id*.

[139] *Id*. During his Supreme Court confirmation hearings, Scalia expressed some ambivalence about *Chevron*'s application in particular circumstances but none about the decision's constitutional validity. *See Scalia Confirmation Hearings*, *supra* note 9, at 62-63.

[140] Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 16, at 517.

[141] *Id*. at 518 (emphasis added).

[142] *Id*. at 518-19.

"political pressures" and "new social attitudes" could alter statutory meaning without congressional involvement.[143]

Scalia ended with one other point about judicial politics: because *Chevron* only applies to ambiguous statutory language, he asked, "How clear is clear?"[144] Scalia noted that *Chevron*'s Reaganite enthusiasts were almost always "strict constructionist[s]" with respect to statutory interpretation, and Scalia described such overlap as "obvious."[145] Both statutory textualists and *Chevron* supporters were soldiers in the Reagan Revolution, and Scalia claimed that conservative textualists like himself almost always rejected statutory ambiguity, which meant they never encountered *Chevron*'s "triggering requirement."[146] By contrast, *Chevron* would require a liberal judge "who abhors a 'plain meaning' rule" of statutory interpretation and resorts to legislative history "to accept an interpretation he thinks [is] wrong" with "infinitely greater" frequency.[147]

For *Chevron*'s conservative supporters, partisan asymmetries were a feature, not a glitch. To increase administrative deference would let Reaganite agencies change substantive law regardless of liberal judges, agency precedents, or gridlocked legislators. *Chevron* would also impede the legal preferences of liberal judges "infinitely" more than those of conservative judges. Whether viewed as an institutional matter or a substantive one, as a short-term outcome or otherwise, *Chevron* was a dramatic success for Reaganite politics across the board—and conservatives knew it at the time.[148]

III. *CHEVRON*'S CONSTITUTIONAL CRISIS

If *Chevron* was conservatives' darling in the 1980s, it is their unconstitutional demon today, and that shift is very recent. Everyone knows that constitutional law does not exist in a timeless or apolitical present, and opposition to *Chevron* deference emerged from the broader context of political history. The important questions are when and how. Metzger identified echoes between modern anti-

[143] *Id*.

[144] *Id*. at 520.

[145] *Id*. at 521.

[146] *Id*.

[147] *Id*.

[148] Although conservatives played a leading role in the legal developments surrounding *Chevron*, they were not the decision's only supporters. After all, liberal Justice William Brennan joined Stevens's majority opinion. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839 (1984). One strangely polemical law review article about *Chevron* in the courts of appeals noticed that liberal D.C. Circuit Judges Abner Mikva and Skelly Wright had recognized doctrinal tensions concerning administrative deference before *Chevron*, that an en banc opinion by liberal Judge Patricia Wald applied *Chevron* despite liberal Judge David Bazelon's dissent, and that an opinion by conservative Judge Robert Bork ignored *Chevron* despite a contrary opinion by liberal Judge Ruth Bader Ginsburg. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 8, 40-41, 45 (2013).

administrativism and pro-business politics from the 1930s,[149] but Sunstein's historical question still remains unanswered: "From 1984 to the present, what on Earth happened?"[150] Why did political conservatives oppose administrative deference in the 1930s—as they do today—while strongly supporting deference in the 1980s, 1990s, and 2000s?

This Article seeks to identify when *Chevron*'s transformation occurred, and the resultant evidence will support some causal explanations while eliminating others. This Part analyzes the conservative transformation from the Reagan era to the Trump era using four kinds of material: presidential platforms, think-tank publications, statutory proposals, and judicial opinions. All of those sources together are necessary before making any generalization about mainstream conservatives, and this Article's mutually corroborative evidence reveals a change in constitutional arguments around 2013. Part IV will analyze why that shift emerged, and Part V will discuss its consequences. However, the first task is to demonstrate that anti-*Chevron* critiques rose to power recently and swiftly, contradicting mainstream conservatism from just a few years earlier.[151]

A. *Reagan to Obama: Mainstream Acceptance*

From 1980 to 2008, mainstream conservatives did not oppose administrative deference, much less did they claim that deference violates the separation of powers. Conservative support during this era echoed Nixon's "Administrative Presidency," even as Reagan's deregulatory bureaucrats fundamentally changed how the federal government operates.[152] Even after Democratic President Bill

[149] *See* Metzger, *supra* note 2, at 6.

[150] *See* Sunstein, Chevron *as Law*, *supra* note 2, at 1664.

[151] As a methodological sidenote, this Article does not seek to identify the intellectually first or original critiques of *Chevron* deference. The goal instead is to understand when such arguments gained political power. Consider one law review article from 1991 that claimed *Chevron* was unconstitutional. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 759 (1991). Several judges cited that article for other purposes without mentioning that constitutional thesis. *See* United Transp. Union-Ill. Legis. Bd. v. Surface Transp. Bd., 169 F.3d 474, 477 (7th Cir. 1999) ("Great deference, even *Chevron* deference, is not abject deference." (citing Caust-Ellenbogen, *supra*, at 761)); Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 195-96 (3d Cir. 1995) (describing "agency capture" as concern that reduces "majoritarian" quality of agency action but still finding deference preferable to judicial interpretation (citing Caust-Ellenbogen, *supra*, at 814)). Yet in 2016, a federal judge did cite the article in order to attack *Chevron*. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 & n.6 (10th Cir. 2016) (Gorsuch, J., concurring) ("[Y]ou might ask how it is that *Chevron* . . . can evade the chopping block." (citing Caust-Ellenbogen, *supra*, at 774)). For purposes of this Article, the latter date of political significance is much more important than the date of intellectual authorship.

[152] *See* CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 3-21, 94-95, 210-11 (2018) [hereinafter SUNSTEIN, COST-BENEFIT REVOLUTION]; Peter M. Benda & Charles H. Levine, *Reagan and the Bureaucracy: The Bequest, the Promise, and the Legacy*, *in* THE REAGAN

Clinton took office, some mix of inertia and optimism kept mainstream conservatives from dismantling basic tools of administrative government. Given the quirky influence of third-party candidate Ross Perot, perhaps Republicans thought that Clinton would lose in 1996.[153] Whatever their reasons, Republicans did not attack the legal architecture that had produced so many conservative victories for Presidents Reagan and George H.W. Bush.

After President Clinton was reelected in 1996, a few conservatives did question the scope of administrative government, but Clinton's personal scandals overshadowed separation-of-powers objections.[154] President George W. Bush was elected with promises to "restore" presidential authority, and the September 11 attacks further increased agencies' regulatory power.[155] With a few exceptions, mainstream conservatives did not attack administrative deference until Obama's reelection in 2012.[156] Until then, most Republicans viewed bureaucratic power as a weapon against congressional torpor and hostile judges. This Section presents almost thirty years of newly collected evidence to support the foregoing generalizations, and Section III.B performs the same kind of analysis from 2013 to the present.

1. Party Platforms

The first group of historical material includes Republican presidential platforms, which represent centrally organized statements about constitutional law and the federal government. From 1980 to 2012, none of the Republican platforms offered any criticism of administrative deference. In 1980, Republicans faced "a time of crisis" and "one of the most dangerous and disorderly periods in history."[157] The party sought to scale back "big government" and defend eighteenth-century ideals, but the conceptual principle

LEGACY 102, 107-30 (Charles O. Jones ed., 1988).

[153] *See* R. Michael Alvarez & Jonathan Nagler, *Economics, Issues and the Perot Candidacy: Voter Choice in the 1992 Presidential Election*, 39 AM. J. POL. SCI. 714, 718-19 (1995); *see also* RONALD B. RAPOPORT & WALTER J. STONE, THREE'S A CROWD: THE DYNAMICS OF THIRD PARTIES, ROSS PEROT, AND REPUBLICAN RESURGENCE 171-89 (1st paperback ed. 2008) (suggesting that the "Perot vote" contributed to Republican victories in 1994 and 2000 elections).

[154] *See* Everett Ladd & Karlyn Bowman, *Clinton and the Polls*, WKLY. STANDARD, Feb. 23, 1998, at 16, 16-17; Suzanne Garment, Opinion, *A Charade of Scandal for Clinton*, L.A. TIMES, Sept. 28, 1997, at 2; William Schneider, *For Now, Clinton's Getting a Break*, 29 NAT'L J. 486, 486 (1997).

[155] *See* Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 904-05 (2007); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 3-4 (2006).

[156] *See* Metzger, *supra* note 2, at 3.

[157] Republican Nat'l Comm., *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/CL5K-K4Q8] (last visited Feb. 15, 2021).

at stake was always constitutional federalism, not separation of powers.[158] Limiting the authority of administrative agencies versus other federal branches was not on the agenda. The 1980 Republican platform did not seek governmental reform through courts or constitutional law because the party believed that institutional change should happen through Congress and administrative agencies themselves.[159] The platform never mentioned "separation of powers," and even when Republicans offered statutory changes to the Administrative Procedure Act ("APA"), the only targets were administrative adjudications and congressional disclosures, rather than agencies' authority to interpret statutes.[160]

The 1984 Republican platform was similarly silent about separation of powers and agencies.[161] If anything, Republicans pushed for greater executive authority and weaker separation of powers by endorsing a "line-item veto" that would have increased presidential influence over congressional lawmaking.[162] The platform explicitly condemned judges' usurpative power "at the expense of our representative institutions. It is not a judicial function to reorder the economic, political, and social priorities of our nation."[163] Even as Republicans invoked "the public's dissatisfaction with an elitist and unresponsive federal judiciary," they promised to appoint judges "who share [their] commitment to judicial restraint" because "the best governments are those most accountable to the people."[164] Questions about substantive regulation and governmental structure were directed to the political branches, assisted by administrative agencies if and when Congress gave them interpretive authority.

The 1988 and 1992 platforms were more of the same. Republicans claimed to "[r]estor[e] the Constitution" through "adherence to the Tenth Amendment" and

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[158] *Id*. ("Excessive regulation remains a major component of our Nation's spiraling inflation and continues to stifle private initiative, individual freedom, and state and local government autonomy.").

[159] *See id*. ("The only malaise in this country is found in the leadership of the Democratic Party, in the White House and in Congress."); *id*. ("[W]e support use of the Congressional veto, sunset laws, and strict budgetary control of the bureaucracies as a means of eliminating unnecessary spending and regulations.").

[160] The only reference to courts and constitutional adjudication did not concern federal agencies. *Id*. ("We protest the Supreme Court's intrusion into the family structure through its denial of the parent's obligation and right to guide their minor children.").

[161] Republican Nat'l Comm., *Republican Party Platform of 1984: America's Future Free and Secure*, AM. PRESIDENCY PROJECT [hereinafter *1984 GOP Platform*], https://www.presidency.ucsb.edu/documents/republican-party-platform-1984 [https://perma.cc/TYA7-VYBY] (last visited Feb. 15, 2021).

[162] *Id*.

[163] *Id*.

[164] *Id*. Republicans also indicated a certain distaste for judicially imposed separation of powers by seeking a "constitutional procedure which will enable Congress to properly oversee executive branch rules by reviewing and, if necessary, overturning them" to replace the legislative veto that was invalidated by *INS v. Chadha*, 462 U.S. 919, 968 (1983). *1984 GOP Platform*, *supra* note 161.

state-centered federalism, but they used "separation of powers" only as a synonym for *judicial restraint*.[165] There was no argument that courts should impose constitutional limits on administrative authority. Instead, the 1988 platform complained, "When the courts try to reorder the priorities of the American people, they undermine the stature of the judiciary and erode respect for the rule of law."[166] It was impossible for Republicans to imagine that courts should strike down *Chevron* on constitutional grounds. Such a proposal would have contradicted the party's arguments for politically accountable governance.

Republicans in the Reagan-Bush era did not express separation-of-powers concerns about aggressive agencies, but they did criticize other governmental institutions. For example, the 1988 platform condemned "legislative measures that impinge on the President's constitutional prerogatives" without worrying that federal agencies themselves might offend constitutional limits.[167] The 1992 platform ignored charges of an "Imperial Presidency" that critics once lodged against Nixon.[168] On the contrary, Republicans excoriated "the Imperial Congress" and compared federal legislators to Cuba and Fidel Castro.[169] The platform never suggested that separation-of-powers principles should restrict the administrative state, nor did it argue that judges should take a leading role in doing so.

Conservative enthusiasm for administrative power was understandably convenient while Republicans held the White House. Yet even President Clinton's election and bureaucracy did not lead Republicans to criticize administrative government as a category. The 1996 platform expressed ordinary conservative affection for small government and the Tenth Amendment, while once again criticizing federal judges instead of federal bureaucrats:

> The notion of judicial review has in some cases come to resemble judicial supremacy . . . . Make no mistake, the separation of powers doctrine, complete and unabridged, is the linchpin of a government of laws. . . .

[165] Republican Nat'l Comm., *Republican Party Platform of 1988: An American Vision: For Our Children and Our Future*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1988 [https://perma.cc/6R7C-BFCD] (last visited Feb. 15, 2021) ("Our Constitution provides for a separation of powers . . . . In that system, judicial power must be exercised with deference toward State and local authority . . . .").

[166] *Id*.

[167] *Id*.

[168] *Compare* Republican Nat'l Comm., *Republican Party Platform of 1992: The Vision Shared: The Republican Platform, Uniting Our Family, Our Country, Our World*, AM. PRESIDENCY PROJECT [hereinafter *1992 GOP Platform*], https://www.presidency.ucsb.edu/documents/republican-party-platform-1992 [https://perma.cc/P6JL-HUVC] (last visited Feb. 15, 2021), *with* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 189 (1973) (describing President Nixon's aggressive use of the military and war powers).

[169] *1992 GOP Platform, supra* note 168.

> [The federal judiciary] has *usurped the right of citizen legislators and popularly elected executives to make law* by declaring duly enacted laws to be "unconstitutional" through the misapplication of the principle of judicial review.[170]

The 1996 platform complained about overbroad federal regulations, but Republicans continued to seek change through political actors instead of constitutional adjudication and courts. Achieving deregulation through Congress and agencies promised to give America "a smaller, more effective and less intrusive government that trusts its people to decide what is best for them."[171] Aggressive judicial efforts to upset long-standing governmental operations or administrative deference would have been entirely out of place.

Republican platforms from 2000 to 2008 mirrored earlier views about administrative law. Each platform used "separation of powers" to criticize federal judges rather than administrative agencies.[172] Since the Republican Party's origins in 1856, the first platform to explicitly use the term "separation of powers" was an attack on judicial activism in 1984,[173] and the platform of 1992 chastised Congress for asserting "separation of powers" against the executive branch.[174] Section III.B will show that Republicans' long-standing

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[170] Republican Nat'l Comm., *Republican Party Platform of 1996*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1996 [https://perma.cc/762W-KT8G] (last visited Feb. 15, 2021) (emphasis added).

[171] *Id*.

[172] *E.g*., Republican Nat'l Comm., *2000 Republican Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/2000-republican-party-platform [https://perma.cc/6YCM-NB52] (last visited Feb. 15, 2021) ("A Republican Congress, working with a Republican president, will restore the separation of powers and reestablish a government of law."); Republican Nat'l Comm., *2004 Republican Party Platform: A Safer World and a More Hopeful America*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/2004-republican-party-platform [https://perma.cc/5LP3-XX5W] (last visited Feb. 15, 2021) ("A Republican Congress, working with a Republican president, will restore the separation of powers and re-establish a government of law."); REPUBLICAN NAT'L COMM., 2008 REPUBLICAN PLATFORM 19-20 (2008), https://prod-static-ngop-pbl.s3.amazonaws.com/docs/2008platform.pdf [https://perma.cc/7XCV-22P8] ("Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers . . . .").

[173] *See 1984 GOP Platform*, *supra* note 161 (arguing that "judicial power must be exercised with deference towards State and local officials" to avoid violating separation-of-powers principles).

[174] *See 1992 GOP Platform, supra* note 168 ("The Democrat Leadership of the Congress has turned the healthy competition of constitutional separation of powers into mean-spirited politics of innuendo and inquisition."); *cf*. Republican Nat'l Comm., *Republican Party Platform of 1940*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1940 [https://perma.cc/D43X-2EHV] (last visited Feb. 15, 2021) (stating without further specification that "[t]he constitutional distribution of legislative, executive, and judicial functions is essential to the preservation of this system. We pledge

support for administrative power and their distaste for judicial intervention started to change in 2012; both of those positions shifted dramatically in 2016.

2. Conservative Think Tanks

A second group of historical materials comes from prominent conservative entities like the Cato Institute, The Heritage Foundation, and the American Enterprise Institute ("AEI").[175] Though different from one another, each of these organizations aspired to channel and influence conservative opinions, and they mirrored presidential platforms with respect to the constitutional status of administrative law. For example, the Cato Institute started publishing a new *Handbook for Congress* in 1995, which advocated a "Revolt Against Big Government" to reduce taxes and regulations.[176] Much like Republican

ourselves to make it the basis of all our policies affecting the organization and operation of our Republican form of Government"); Republican Nat'l Comm., *Republican Party Platform of 1944*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1944 [https://perma.cc/X3MB-3WEU] (last visited Feb. 15, 2021) (stating also without explanation that "[f]our more years of New Deal policy would centralize all power in the President, and would daily subject every act of every citizen to regulation by his henchmen; and this country could remain a Republic only in name").

[175] To understand the ascent and prominence of these three political entities, see ALLAN J. LICHTMAN, WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT 301-18 (2008); JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 93-111 (2017); SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008, at 89-90 (2008). For discussion of another prominent entity, the Federalist Society, see *infra* notes 278-83 and accompanying text. Additional research might consider the histories of other conservative entities during this period, such as the Hoover Institution and the Manhattan Institute. The Manhattan Institute's *City Journal* includes several modern attacks on *Chevron*. *E.g.*, James R. Copland, *The Four Horsemen of the Regulatory State*, CITY J., Summer 2018, at 12 (predicting that the Supreme Court will "undo the broader excesses of the regulatory state" by overruling *Chevron*); James R. Copland & Rafael A. Mangual, *Toward a Less Dangerous Judicial Branch*, CITY J., Winter 2019, at 82 (noting an important tension between modern attacks on *Chevron* and the opinions of earlier conservatives like Robert Bork); Philip Hamburger, *How Government Agencies Usurp Our Rights*, CITY J., Winter 2017, at 30 (attacking *Chevron* as "a dual deprivation of rights—both administrative and judicial"); Myron Magnet, *The Founders' Grandson, Part II*, CITY J., Winter 2018, at 78 (decrying *Chevron* as flatly unconstitutional); Adam J. White, *Break the Bureaucracy!*, CITY J., Winter 2017, at 26 (endorsing a limited form of *Chevron* deference "tie[d] . . . to the agencies' acquiescence to better, more transparent, procedures"); James R. Copland, *The Winner? It Might Be the Administrative State*, CITY J. (Nov. 4, 2020), https://www.city-journal.org/real-election-winner-might-be-administrative-state [https://perma.cc/CHL4-RRN8].

[176] Edward H. Crane & David Boaz, *The Revolt Against Big Government*, *in* CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 104TH CONGRESS 1, 6 (1995) [hereinafter CATO HANDBOOK FOR THE 104TH CONGRESS], https://www.cato.org/cato-handbook-policymakers/cato-handbook-congress-policy-recommendations-104th-congress-1995 [https://perma.cc/SZ5D-ADG4] (asserting that the federal government's "taxes and regulations are sapping the strength and vitality out of the economy and harming our standard

platforms, the first edition argued for state-based federalism and Tenth Amendment principles, yet even Cato's chapter on "Regulatory Rollback" did not mention separation of powers,[177] much less did it question agencies' authority to interpret statutes under *Chevron*. Least of all did it mention constitutional litigation as a proper mechanism for limiting agencies' authority.[178]

After President Clinton's reelection, the Cato handbook introduced a new section that was reprinted from 1997 to 2009, "The Delegation of Legislative Powers."[179] Cato criticized the New Deal and President Roosevelt for betraying eighteenth-century constitutionalism, and it praised *Lochner*-era Supreme Court decisions that the Court discarded in the 1940s, such as *A.L.A. Schechter Poultry Corp. v. United States*[180] and *Panama Refining Co. v. Ryan*.[181] Yet Cato did not seek to revive "buried" judicial decisions because "this [was] not a Handbook for the Supreme Court."[182] Instead, Cato sought a statutory commitment from Congress "to vote on each and every administrative regulation that establishes a rule of private conduct."[183] Cato acknowledged that such congressional supervision of regulatory bureaucrats would be "the most revolutionary change in government since the Civil War."[184] But unlike modern anti-*Chevron* critics, Cato's radical proposal would have required Democratic political approval, and that is one reason it never happened. Cato's analysis also ignored a host of administrative actions during the Reagan-Bush era that affected "private conduct" without specific congressional approval.[185]

Publications from The Heritage Foundation likewise embraced administrative government and presidential power. In 1989, Heritage printed *The Imperial*

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of living").

[177] *See* Edward L. Hudgins, *Regulatory Rollback*, *in* CATO HANDBOOK FOR THE 104TH CONGRESS, *supra* note 176, at 183, 183-90.

[178] *Id.* at 190 (asserting that congressional committee hearings should be used to "focus attention on the victims of regulation" and that "[t]ruly reducing the regulatory burden will require amending or repealing major laws already on the books").

[179] *E.g.*, David Schoenbrod & Jerry Taylor, *The Delegation of Legislative Powers*, *in* CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 105TH CONGRESS 45 (1997) [hereinafter CATO HANDBOOK FOR THE 105TH CONGRESS], https://www.cato.org/cato-handbook-policymakers/cato-handbook-congress-policy-recommendations-105th-congress-1997 [https://perma.cc/9UBV-8S2Q].

[180] 295 U.S. 495 (1935).

[181] 293 U.S. 388 (1935); *see also* Schoenbrod & Taylor, *supra* note 179, at 46-47. For current debates about constitutional structure in the eighteenth century, see generally Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

[182] David Boaz & Edward H. Crane, *Introduction* to CATO HANDBOOK FOR THE 105TH CONGRESS, *supra* note 179, at 1, 5.

[183] Schoenbrod & Taylor, *supra* note 179, at 52.

[184] *Id.*

[185] *Id.* at 45-53.

Congress: Crisis in the Separation of Powers, celebrating Reagan's administrative agenda and criticizing congressional impediments without any sense that federal courts should restrain administrative bureaucrats.[186] In 1992, the Heritage journal *Policy Review* published an article seeking to distinguish "Reagan/Bush Judges vs. Their Predecessors."[187] The author celebrated the fact that "Reagan/Bush judges tend to accord greater deference to the substantive decisions of expert agencies," with Justice Scalia's commitment to *Chevron* as an important example.[188] In 2001, a Heritage author wrote that "aggressive use" of executive orders and presidential proclamations was "necessary for a modern President . . . to manage the largest bureaucracy in the world."[189] He predicted that nonstatutory administrative lawmaking could be important for the new Bush Administration due to "narrow margins" of Republican support in Congress.[190] Reagan had felt the same way about Democratic majorities in his era; a complete generation of deregulatory policy makers had relied on bureaucratic initiatives more than legislative reform.

A Heritage article in 2006 echoed the vocabulary of Republican presidential platforms, citing "separation of powers" as a way to restrain federal courts, while also praising Scalia's efforts to enforce only "the clear commands of an intelligible Constitution."[191] At that time, conservatives including Scalia viewed *Chevron* as a proper constitutional arrangement rather than as any kind of "clear" or "intelligible" betrayal.[192] Heritage published many articles advocating strong administrative power, limited judicial review, or both.[193] None of them argued

[186] HERITAGE FOUND. & CLAREMONT INST., THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (Gordon S. Jones & John A. Marini eds., 1988).

[187] Daniel E. Troy, *A Difference of Opinion: Reagan/Bush Judges vs. Their Predecessors*, POL'Y REV., Summer 1992, at 27, 27.

[188] *Id*. at 32.

[189] TODD F. GAZIANO, HERITAGE FOUND. LEGAL MEMORANDUM, Feb. 2001, at 1, 24 (Feb. 21, 2001), https://www.heritage.org/political-process/report/the-use-and-abuse-executive-orders-and-other-presidential-directives [https://perma.cc/7WCL-53GM].

[190] *Id*.

[191] Christopher Wolfe, *From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America*, HERITAGE FOUND. FIRST PRINCIPLES ESSAYS, Mar. 2006, at 1, 11, https://www.heritage.org/the-constitution/report/constitutional-interpretation-judicial-activism-the-transformation-judicial [https://perma.cc/79V5-UJDE].

[192] *See supra* Section II.B (discussing *Chevron* as a political issue and Scalia's support for administrative deference); *see also* Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 16, at 521.

[193] *E.g.*, Joshua Dunn, *The Perils of Judicial Policymaking: The Practical Case for Separation of Powers*, HERITAGE FOUND. FIRST PRINCIPLES ESSAYS, Sept. 2008, at 1, 3-6, https://www.heritage.org/political-process/report/the-perils-judicial-policymaking-the-practical-case-separation-powers [https://perma.cc/32EN-MHLR] (using legal realism to illustrate several criticisms of judicial policy making); Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, HERITAGE LECTURES, Apr. 2005, at 1, 1, https://www.heritage.org/report/judicial-usurpation-and-the-

that judges should restrain administrative deference using constitutional law and separation of powers.

AEI publications were similar. In 2001, conservative Judge Harvie Wilkinson III delivered a lecture entitled, "Is There a Distinctive Conservative Jurisprudence?"[194] Wilkinson defended the Rehnquist Court's aggressive use of federalism—not separation of powers—as entirely separate from liberal Warren Court activism and individual rights. Expressing conventional wisdom about the separation of powers, Wilkinson said that, "[o]f course, judicial deference to . . . the coordinate federal branches is not only appropriate but indeed essential."[195] He cited *Marbury v. Madison* as a restraint on federal power relative to states, but never as a limit on agencies relative to courts.[196] Along with other mainstream conservatives, Wilkinson could not imagine any constitutional reason to invalidate *Chevron*.

A different AEI essay—"Federalism, Yes. Activism, No."—addressed the federal courts' proper constitutional role.[197] The author described the Rehnquist Court's federalism cases as seeking "to limit [the judiciary's] role and to commit the pursuit of national purposes where it belongs—to the political branches of government."[198] Disputes over judicial federalism were never linked to separation-of-powers limits for agencies, much less to the elimination of *Chevron* deference.

When AEI authors analyzed administrative law, they actually endorsed federal bureaucrats and public policy instead of federal courts and constitutional law. In 2002, AEI's *Environmental Policy Outlook* echoed Reagan-era themes about "centralization and the expense of environmental regulation."[199] However, Congress and federal courts were the true villains in AEI's story, not administrative agencies. The authors wrote, "Many modern environmental

constitution-historical-and-contemporary-issues [https://perma.cc/T4QJ-2LFD] (denouncing judicial activism "usurp[ing] the authority of the people" as an unconstitutional act).

[194] *See* J. Harvie Wilkinson, Judge, U.S. Ct. of Appeals for the Fourth Cir., Bradley Lecture: Is There a Distinctive Conservative Jurisprudence? (Mar. 5, 2001), https://www.aei.org/research-products/speech/is-there-a-distinctive-conservative-jurisprudence/. Wilkinson was described as a "conservative stalwart" who interviewed alongside John Roberts and Samuel Alito for a possible Supreme Court appointment. L.A. Powe, Jr., *Judges Struck by Lightning: Some Observations on the Politics of Recent Supreme Court Appointments*, 39 ARIZ. ST. L.J. 875, 882 (2007).

[195] Wilkinson, *supra* note 194.

[196] *Id.* ("To contend the Supreme Court has no role as a textual interpreter or as a structural referee is almost to say that Marbury v. Madison doesn't exist.").

[197] Michael S. Greve, *Federalism, Yes. Activism, No.*, AM. ENTER. INST. FEDERALIST OUTLOOK, July 2001, at 1, 1, https://www.aei.org/wp-content/uploads/2011/10/Federalism%20Yes-%20Activism%20No.pdf [https://perma.cc/28S6-9W9X].

[198] *Id.* at 2.

[199] STEVEN F. HAYWARD & CHRISTOPHER DEMUTH, AEI'S ENVIRONMENTAL POLICY OUTLOOK 3 (2002), http://www.aei.org/wp-content/uploads/2011/10/20070418_14224g.pdf [https://perma.cc/MYE3-576X].

statutes were [unhelpfully] written with the tacit purpose of compelling the courts to enter into a quasi-administrative role."[200] That judicial interference with administrative governance "compromises the independence and flexibility of executive branch policymakers and further erodes the separation of powers between the branches of government."[201] None of these AEI publications expressed any hesitation about *Chevron* deference, nor did the organization's *Annual Report*.[202]

AEI also did not raise constitutional objections to administrative governance. At every turn, mainstream conservatives viewed deregulatory policy as something that Congress or administrative agencies should implement without interference from federal courts or constitutional law.[203] Anne Gorsuch, Scalia, and other Reagan bureaucrats were archetypal templates for that agency-forward institutional approach.

3. Legislative Proposals

A third set of materials reflecting conservatives' constitutional vision is statutory proposals in Congress. From 1975 to 1983, Republican conservatives did not try to limit agencies' interpretive authority, but Democratic Senator Dale Bumpers did.[204] The well-known Bumpers Amendment would have statutorily required that federal courts "de novo decide all relevant questions of law" and "interpret constitutional and statutory provisions" without deference to any agency's legal opinion.[205] That would have prevented *Chevron* before it arrived, and in 1981, then-Professor Scalia specifically derided the Bumpers Amendment because it would help "the other team."[206] The Reagan Revolution could not have survived anything like the Bumpers Amendment's aggressive judicial oversight, especially given the prevalence of liberal judges and bureaucratic precedents from prior administrations.[207]

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[200] *Id*.

[201] *Id*.

[202] *See generally, e.g.*, AM. ENTER. INST., 2004 ANNUAL REPORT (2004), https://www.aei.org/wp-content/uploads/2011/10/20050119_annualReport04.pdf. All AEI annual reports from 2004-2019 are available at *Annual Report,* AEI, http://www.aei.org/about/annual-report (last visited Feb. 15, 2021).

[203] One dramatic example of deregulatory commitment was the statement by conservative activist Grover Norquist in an NPR interview: "I don't want to abolish government. I simply want to reduce it to the size where I can . . . drown it in the bathtub." *Conservative Advocate*, NPR, at 7:30 (May 25, 2001, 12:00 AM), https://www.npr.org/templates/story/story.php ?storyId=1123439.

[204] *See* Ronald M. Levin, Comment, *Review of "Jurisdictional" Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 355-56.

[205] S. 2408, 94th Cong. (1975).

[206] Scalia, *Regulatory Reform*, *supra* note 121, at 13-14.

[207] *See supra* Section II.A (discussing regulatory background that set the stage for *Chevron*).

There were no Republican proposals in this period to restrict the interpretive power of administrative agencies. The idiosyncratic Republican Representative Ron Paul coauthored a Separation of Powers Restoration Act in 1999 and 2001, but that only sought to repeal the War Powers Resolution and restrict the legal effect of presidential orders.[208] Paul's proposal did not concern administrative agencies or interpretive authority, and it never received a congressional vote. Conservatives would not pursue antiadministrative legislative reforms until many years later.

4. Judicial Decisions

Judicial opinions before 2012 matched other evidence of mainstream conservatism, as the Supreme Court did not question *Chevron*'s constitutional status, and many decisions explicitly or implicitly affirmed *Chevron*. In 2001, for example, *Whitman v. American Trucking Ass'ns* held that agencies' authority to exercise discretion under vague statutes did not violate the separation of powers.[209] The Clean Air Act told the EPA to set environmental standards that would "'protect the public health' with 'an adequate margin of safety,'" and the constitutional question was whether Congress's vague language provided an "intelligible principle" for the EPA to follow, such that this was a constitutional delegation of administrative authority.[210] Writing for a unanimous Court, Justice Scalia buried the plaintiffs' separation-of-powers objections under a heap of citations,[211] and his opinion was later described as "the death knell to the delegation doctrine."[212] As one commentator concluded, "[I]f even Justice

[208] H.R. 2655, 106th Cong. (1999); H.R. 864, 107th Cong. (2001).

[209] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[210] *Id*. at 465 (quoting 42 U.S.C. § 7409(b)(1)); *see also id*. at 472, 475.

[211] *Id*. at 473-75 (first citing Touby v. United States, 500 U.S. 160, 163 (1991) (upholding agency interpretation of the vague statutory standard "necessary to avoid an imminent hazard to the public safety" (quoting 21 U.S.C. § 811(h)); then citing Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 647 (1980) (same for statutory standard that "adequately assures, to the extent feasible, . . . that no employee will suffer *any* impairment of health" (quoting 29 U.S.C. § 655(b)(5))); then citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) ("unduly or unnecessarily complicate[d]" (quoting 15 U.S.C. §§ 79 to 79z-6 (repealed 2005))); then citing Yakus v. United States, 321 U.S. 414, 420, 423-26 (1944) ("generally fair and equitable [prices that] will effectuate [diverse] purposes of the Act" (quoting 50 U.S.C. § 902 (repealed 1956))); then citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943) ("public interest" (quoting 47 U.S.C. § 157)); and then citing Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.")).

[212] The Federalist Society, *The Evolution of Justice Scalia's Views on Administrative Law*, YOUTUBE 1:27:37 (Nov. 20, 2016), https://www.youtube.com/watch?v=Wr0nHHRbJnY (statement of E. Donald Elliott).

Scalia is not going to have delegation concerns [in *American Trucking*], I don't think that's really on the table anymore."[213]

Scalia's majority opinion did not analyze the "intelligible principle" test in terms, nor did the Court describe any functional constitutional limits. Instead, Scalia explained that the Clean Air Act closely resembled vague legislative standards under the Controlled Substance Act, the Occupational Safety and Health Act, the Public Utility Holding Company Act, and other statutes that the Court had uniformly upheld since 1935.[214] Scalia wrote that the Clean Air Act's broad language was "well within . . . [the Court's] nondelegation precedents."[215] Two pre–New Deal cases—*A.L.A. Schechter* and *Panama Refining*—were comparatively strict in analyzing congressional delegation.[216] But *American Trucking* discarded those rulings as outdated pariahs that were hardly worth mentioning; they certainly were not analyzed or distinguished as a matter of constitutional principle.[217]

American Trucking's implications for *Chevron* were obvious. *Chevron* deference applies when Congress uses vague statutory language that requires an agency to determine its specific meaning. When *American Trucking* approved broad statutory delegations like "public health" and "safety" as constitutionally acceptable, it implicitly approved the EPA's discretion to set standards within that range of statutory ambiguity—much like the term "source" in *Chevron* itself. Everyone understood that federal courts would not review de novo whether specific air standards actually optimize "public health" or "safety" as a scientific matter. Deference and delegation worked hand in hand, just as Congress presumptively wanted, and "well within" the limits of long-standing constitutional precedents.[218]

Justice Clarence Thomas's concurrence in *American Trucking* seemed unimportant at the time. Thomas agreed that EPA regulations satisfied existing constitutional precedents, but he invited the Court to reconsider whether its "delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[219] In 2001, that seemed unrealistic, and *American*

[213] *Id*. at 1:27:41 (statement of E. Donald Elliott).

[214] *Am. Trucking*, 531 U.S. at 473-75; *see also supra* note 211 (reviewing cases).

[215] *Am. Trucking*, 531 U.S. at 474.

[216] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 432-33 (1935).

[217] *Am. Trucking*, 531 U.S. at 474; *see also* Elliott, *supra* note 2, at 710; *Scalia Confirmation Hearings*, *supra* note 9, at 40-41. *But cf*. Antonin Scalia, *A Note on the Benzene Case*, REGUL., July-Aug. 1980, at 25, 28 (expressing ambivalence about the nondelegation doctrine prior to Reagan's election); Scalia, *Federal Trade Commission*, *supra* note 130 (criticizing administrative deference prior to Reagan's election).

[218] *Am. Trucking*, 531 U.S. at 474.

[219] *Id*. at 487 (Thomas, J., concurring).

Trucking effectively defanged nondelegation arguments for more than a decade.[220]

In 2005, Thomas applied *Chevron* more aggressively than even Scalia could accept. *National Cable & Telecommunications Ass'n v. Brand X Internet Services* upheld an agency's statutory interpretation as reasonable despite contrary Ninth Circuit precedent.[221] The Court held that agencies were bound to follow unambiguous statutes, but agencies were not bound to follow judicial interpretation of statutory ambiguities.[222] Thomas's majority opinion understood that *Chevron* since the beginning had liberated agencies from that kind of judicial oversight.[223]

In 2006, Scalia wrote a dissent in *Gonzales v. Oregon* that Thomas joined, endorsing very broad deference for an administrative official's statutory interpretation.[224] Thomas also dissented separately in *Gonzales*, explaining that "expansive federal legislation and broad grants of authority to administrative agencies are merely the inevitable and inexorable consequence of this Court's Commerce Clause and separation-of-powers jurisprudence."[225] Thomas refused to worry about those constitutional issues, however, because nondelegation objections were "now water over the dam."[226] That acquiescence to established Supreme Court precedents would not last.[227]

A final example is the Court's unanimous decision from 2011 in *Mayo Foundation for Medical Education v. United States*, which applied *Chevron* deference to the field of tax law.[228] *Mayo* analyzed whether medical residents' stipends were exempt from wage taxes because such individuals were "students."[229] The majority opinion by Chief Justice John Roberts explained that Congress did not define the term "student," and "[i]n the typical case, such ambiguity would lead us inexorably to *Chevron* step two."[230] Applying *Chevron*, Roberts declared that the agency's interpretation of "student" should be upheld

[220] *See, e.g.*, Reynolds v. United States, 565 U.S. 432, 439-46 (2012) (rejecting a nondelegation challenge that would later resurface, and would again be rejected, in *Gundy v. United States*, 139 S. Ct. 2116 (2019)).

[221] *Compare* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (Thomas, J.), *with id.* at 1007 (Scalia, J., dissenting).

[222] *Id.* at 982.

[223] *See id.* at 982-83; *supra* Section II.A.

[224] Gonzales v. Oregon, 546 U.S. 243, 276 (2006) (Scalia, J., dissenting) ("[T]he Attorney General's independent interpretation of the *statutory* phrase 'public interest' . . . and his implicit interpretation of the statutory phrase 'public health and safety' . . . are entitled to deference . . . and they are valid under *Chevron* . . . ."). Chief Justice John Roberts also joined this opinion.

[225] *Id.* at 301 (Thomas, J., dissenting).

[226] *Id.*

[227] *See infra* notes 310-37 and accompanying text.

[228] Mayo Found. for Med. Educ. v. United States, 562 U.S. 44, 55 (2011).

[229] *Id.* at 47.

[230] *Id.* at 53.

"unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'"[231]

The petitioners in *Mayo* claimed that the government's tax regulations should receive less and more flexible deference than statutory interpretations in other contexts.[232] Roberts disagreed: "[W]e are not inclined to carve out an approach to administrative review good for tax law only."[233] Roberts found that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context," and he quoted such principles at length: "[T]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[234] The agency's regulation was "squarely within the bounds of, and is properly analyzed under, *Chevron*."[235] Roberts upheld the regulation as "reasonable," and no Justice or litigant ever suggested that administrative deference violated the separation of powers.[236]

Judicial opinions from 1980 to 2012 closely resemble other evidence about mainstream conservatism, yet a brief observation seems apt about constitutional theory from this era. These three decades represented the origin and ascent of constitutional originalism—including scholarship by Robert Bork and Raoul Berger, governmental politics from Attorney General Edwin Meese, and judicial opinions of Reagan appointees like Scalia himself.[237] These eminent leaders repeatedly emphasized a commitment to eighteenth-century history and the separation of powers, yet none of them voiced any constitutional concerns about administrative deference or *Chevron*. Except for Berger, the first generation of "original originalists" were deregulatory Reaganites, and they continued to endorse and apply *Chevron* as a bedrock precedent throughout their public careers without any reservation.

Of course, the fact that some "new originalists" disagree with "original originalists" does not mean that either of those groups is right or wrong. Such historical differences merely confirm that the constitutionality of administrative deference does not have to divide liberals from conservatives, much less

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[231] *Id*. (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)).

[232] *Id*.

[233] *Id*. at 55.

[234] *Id*. at 55-56 (second alteration in original) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

[235] *Id*. at 58.

[236] *Id*. at 58-59; Brief for Petitioners at 19-44, *Mayo Found*., 562 U.S. 44 (No. 09-837); Brief for the United States at 19-42, *Mayo Found*., 562 U.S. 44 (No. 09-837); Reply Brief for Petitioners at 2-20, *Mayo Found*., 562 U.S. 44 (No. 09-837).

[237] *See* Paul Baumgardner, *Originalism and the Academy in Exile*, 37 LAW & HIST. REV. 787, 789-92 (2019) (explaining how increasing populations and diversity in law schools in the 1980s led to an increase in interdisciplinary research that "challenge[d] the prevailing norms surrounding legal scholarship"); Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 200-06 (2017) (describing two competing accounts of originalism's development—one based on principle, the other on politics).

originalists from nonoriginalists. Scalia's generation of legal conservatives valued deregulation and originalism just as much as modern conservatives, yet they also firmly supported *Chevron* deference. The modern legal community has failed to recognize originalists on both sides of *Chevron* debates, and such historical forgetfulness has allowed anti-*Chevron* critics to mischaracterize current disputes as timeless or methodological.[238] That same mistake of ignoring *Chevron*'s history has also prevented modern scholars and jurists from understanding the dramatic political shift that occurred after 2012.

B. *Obama to Trump: Mainstream Critique*

This Section charts the sudden transition from conservative support for *Chevron* to constitutional opposition. Detailed historical analysis can avoid caricatured images of conservatives that are drawn to fit popular theories and agendas. Conservative voices must speak for themselves, in their own historical context, before this Article can proceed to analyze modern doctrinal implications. This Section explores the same evidentiary categories discussed above in order to describe modern conservatives' constitutional opposition to *Chevron*.

The timing of that conservative shift is remarkably recent. When Justice Samuel Alito was confirmed in 2006, constitutional precedents in many contexts shifted rightward.[239] However, even President Obama's election in 2008 did not lead conservatives to highlight separation-of-powers arguments against *Chevron* deference. On the contrary, resistance to *Chevron* entered mainstream politics only after Obama's reelection in 2012. At that moment, some conservatives amplified fears that majority-minority racial demographics could give

[238] One observer has described earlier originalists as overcome by "pressing political needs of the moment," in contrast to new originalists' attention to "long-term socio-legal effects of deference." Noxsel, *supra* note 2, at 83-87. This Article suggests that such characterizations are oversimplified. There is no reason to think that political needs felt more important in the 1980s than they do today or that today's legal conservatives use a longer time horizon for constitutional decision-making than their precursors.

[239] Scholars have disputed the exact size of that ideological shift. *Compare, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 948 (2008) ("[T]his is the most conservative Court since the mid-1930s . . . ."), *with* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983, 1012 (2008) ("There are certainly some issues . . . where the Court is to the right of its predecessors. . . . It would also be fair to suggest that the Roberts Court . . . has a more conservative trajectory."). In 2018, the appointment of Justice Brett Kavanaugh represented another move rightward. *See* Adam Liptak, *Confirmation Battle May Have Eroded Public Trust*, N.Y. TIMES, Oct. 7, 2018, at A1. Justice Amy Coney Barrett's confirmation to succeed Justice Ginsburg might have even greater significance for legal conservatives. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*., N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html.

Democrats a permanent electoral advantage.[240] Other conservatives were upset about Obama's use of executive power to overcome congressional gridlock, including immigration policies regarding "deferred action."[241] Whatever their subjective motivations, many conservatives suddenly advocated institutional restraints on administrative power, including limits on presidential policy making. For the first time, mainstream conservatives also advocated constitutional adjudication as a mechanism for achieving those goals. Both of those shifts were crucial to *Chevron*'s transformation as a matter of constitutional politics.

1. Party Platforms

The Republican platform of 2012 held a few signs of change. In earlier times, President Reagan and both Presidents Bush had increased the institutional power of agencies, whereas the party's platform excoriated judges and Congress.[242] By contrast, the new party platform celebrated "A Restoration of Constitutional

[240] *See* Symposium, *53 Leading American Writers and Thinkers Answer the Question: "What Is the Future of Conservatism in the Wake of the 2012 Election?*," COMMENTARY, Jan. 2013, at 13 (collecting diverse reactions to the challenges that conservatives faced after Obama's reelection); Karl Rove, Opinion, *About That 'Permanent Democratic Majority*,' WALL ST. J., Jan. 31, 2013, at A13; *see also* Jamelle Bouie, *The Democrats' Demographic Dreams*, AM. PROSPECT, July-Aug. 2012, at 6, 6-9 (describing Republican efforts to attract Latinx voters); Paul West, *Obama's Victory Demonstrates Fundamental Shift in Electorate*, L.A. TIMES, Nov. 8, 2012, at AA1 ("If left unchecked by Republicans, . . . demographic trends [will] give Democrats a significant edge in future presidential elections"); Diane Roberts, *No Country for Angry Old White Men: The GOP's Diminishing Demographic*, GUARDIAN (Sept. 10, 2012, 2:06 PM), https://www.theguardian.com/commentisfree/2012/sep/10/no-country-for-angry-old-white-men [https://perma.cc/2723-ZAPX] (criticizing "cosmetic" Republican efforts to include racial minorities). For earlier expressions of fearmongered ethnic nationalism, see PATRICK J. BUCHANAN, THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION 1-10 (2002).

[241] *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 136-41 (2015) (describing Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parents of Americans ("DAPA") programs); John Malcolm & Hans A. von Spakovsky, *President Barack Obama's Unilateral, and Unconstitutional, Move*, HERITAGE FOUND. (Nov. 25, 2014), https://www.heritage.org/immigration/commentary/president-barack-obamas-unilateral-and-unconstitutional-move [https://perma.cc/DJS6-REQF]; *see also* LOUIS FISHER, PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS 57-87 (2018) (describing Obama's reliance on independent executive actions and his lack of effort to instead pass his initiatives through bipartisan support in Congress).

[242] *E.g.*, *1984 GOP Platform*, *supra* note 161 ("We share the public's dissatisfaction with an elitist and unresponsive federal judiciary."); *1992 GOP Platform*, *supra* note 168 (decrying the "Imperial Congress"); *see also supra* notes 152-55 (describing previous expansions of agency authority).

Order" that included separation-of-powers limits on the presidency itself.[243] For the first time, Republicans celebrated Congress's "adherence to the Constitution . . . in stark contrast to the antipathy . . . demonstrated by the [Obama] Administration," while criticizing Obama for "appointing 'czars' to evade the confirmation process, making unlawful 'recess' appointments . . . , using executive orders to bypass the separation of powers . . . , encouraging illegal actions by regulatory agencies . . . [, and] refusing to defend the nation's laws in federal courts or enforce them on the streets."[244]

This was the only Republican platform in modern history to invoke "separation of powers" against the President instead of against Congress or federal judges. Even so, the 2012 platform sought to implement its constitutional vision through political branches instead of courts. The platform maintained Republicans' opposition to "an activist judiciary, in which some judges usurp the powers reserved to other branches of government," calling the judicial threat "even more dangerous" than presidential misconduct.[245] Constitutional dissatisfaction with the Obama Administration was viewed as a solid reason to vote Republican, but it was not yet a reason for interventionist judges to reformulate governmental practice on their own.

That final rejection of Reagan-era administrative authority occurred in the 2016 platform. For the first time, separation of powers eclipsed federalism as the platform's guiding constitutional principle.[246] And when Republicans promised a "Rebirth of Constitutional Government," they claimed that the "Constitution is in crisis" because "[m]ore than 90 percent of federal requirements are now imposed by regulatory agencies, without any vote of the House or Senate or signature of the President."[247]

The Republican Party that had previously endorsed broad administrative authority for twenty-five years condemned it like never before: "The [Obama] Administration has exceeded its constitutional authority [and] brazenly and flagrantly violated the separation of powers . . . . The President has refused to defend or enforce laws he does not like, used executive orders to enact national

[243] REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2012: WE BELIEVE IN AMERICA 9 (2012) (emphasis omitted), https://www.presidency.ucsb.edu/sites/default/files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/101961.pdf [https://perma.cc/RY4F-P67K].

[244] *Id*.

[245] *Id*. at 10.

[246] REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 9-10 (2016) [hereinafter 2016 GOP PLATFORM], https://www.presidency.ucsb.edu/sites/default/files/books/presidential-documents-archive-guidebook/national-political-party-platforms-of-parties-receiving-electoral-votes-1840-2016/117718.pdf [https://perma.cc/2G62-L9JP].

[247] *Id*. at 9 (emphasis omitted).

policies . . . , [and] directed regulatory agencies to overstep their statutory authority . . . ."[248] The platform continued:

> Our most urgent task as a Party is to . . . elect[] a president who will . . . honor constitutional limits on executive authority . . . . We need a Republican president who will end abuses of power by departments and agencies . . . and by the White House itself. Safeguarding our liberties requires a president who will respect the Constitution's separation of powers, including the authority of Congress to write legislation and define agency authority.[249]

All of this rhetoric came from the same political party that had invented the "Administrative Presidency" under Nixon, pursued bureaucratic deregulation under Reagan, and supported a line-item veto to increase presidential power over congressional lawmaking.[250] The party did not acknowledge the new platform's reversal from earlier eras, much less did it explain the reversal.

Some elements of the 2016 platform echoed the past, including an attack on "an activist judiciary that usurps powers properly reserved to the people through other branches of government," and a celebration by name of "the late Justice Antonin Scalia."[251] On the other hand, the 2016 platform criticized Congress for violating Article I by granting increased "amounts of legislative authority to executive departments, agencies, and commissions, laying the foundation for today's vast administrative state."[252] Unlike direct substantive attacks on regulatory costs—which Reagan certainly lodged against environmental restrictions—the 2016 platform launched unprecedented institutional objections to administrative government as a category. Contradicting Scalia's opinion in *American Trucking*, the Republican platform invoked the nondelegation doctrine, proclaiming that "[t]he Constitution makes clear that these powers were granted to Congress . . . and must therefore remain solely with the people's elected representatives."[253]

The 2016 platform also denounced *Chevron* deference—without acknowledging Reagan-era bureaucrats' victories under that doctrine—because

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[248] *Id*.

[249] *Id*. at 9-10; *see also id*. at 28 ("The current President and his allies on Capitol Hill have used those agencies as a super-legislature, disregarding the separation of powers, to declare as law what they could not push through the Congress."); *cf*. Republican Nat'l Comm., *Republican Party Platform of 1936*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/republican-party-platform-1936 [https://perma.cc/9TCZ-G4VL] (last visited Feb. 15, 2021) (claiming without specification that "[t]he powers of Congress have been usurped by the President").

[250] *See* Kelley, *supra* note 73, at 289-90 (discussing how Reagan took over the "Administrative Presidency" from Nixon and expanded "the number of political appointees to strategic positions within the bureaucracy"); *see also supra* note 73 and accompanying text.

[251] 2016 GOP PLATFORM, *supra* note 246, at 10.

[252] *Id*.

[253] *Id*.; *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475-76 (2001).

"courts should interpret laws as written by Congress rather than allowing executive agencies to rewrite those laws to suit administration priorities."[254] Nothing like that had appeared in any Republican platform in 150 years, and mainstream conservatives just a decade earlier would have been profoundly confused by anti-administrativism's presence in the 2016 platform.[255] To borrow Scalia's quote from the 1980s, didn't the 2016 platform risk "scoring points for the other team," insofar as Republicans sought to restrict administrative bureaucrats that, after President Trump's victory, would soon be "*their* unelected officials"?[256] Perhaps strangest of all, the Republican Party did not generate a new platform in 2020; it simply republished the 2016 platform, which included attacks on President Obama as though he were "the current President."[257] The awkwardness of Republicans' attacking the same government they managed was even more striking and explicit in 2020 than it had been in 2016.

2. Conservative Think Tanks

Nongovernmental entities followed a similar path at slightly different moments. The Heritage Foundation acted first, offering a platform for conservative ideas along the political sidelines. Before Obama's election, Heritage published an article claiming that the administrative state was "fundamentally at odds with . . . our Constitution."[258] Likewise, in 2009, a long-standing critic of administrative government wrote an article titled "Limited Government, Unlimited Administration," asking with desperation, "Is It Possible to Restore Constitutionalism?"[259] These were critiques at the margins.

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[254] 2016 GOP PLATFORM, *supra* note 246, at 10.

[255] Another development in the Republican Party during this period was the appearance of Tea Party activism in American political life, which quickly altered the mechanisms and policies of Republican politics. *See* THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 3-18 (2012).

[256] Scalia, *Regulatory Reform*, *supra* note 121, at 13-14.

[257] *See* Reid J. Epstein, *G.O.P. Offers No New Platform for 2020, Aside from Enthusiastic Support of Trump*, N.Y. TIMES, Aug. 26, 2020, at A20; Reid J. Epstein & Annie Karni, *G.O.P. Platform, Held Over from 2016, Rebukes the 'Current President,'* N.Y. TIMES, June 12, 2020, at A14; *see also* REPUBLICAN NAT'L COMM., RESOLUTION REGARDING THE REPUBLICAN PARTY PLATFORM (2020), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf [https://perma.cc/QK86-Q8DC] ("[T]he 2020 Republican National Convention will adjourn without adopting a new platform until the 2024 Republican National Convention . . . .").

[258] Ronald Pestritto, *The Birth of the Administrative State: Where It Came from and What It Means for Limited Government*, HERITAGE FOUND. FIRST PRINCIPLES ESSAYS, Nov. 2007, at 1, 1, https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited (arguing that the "architects" of the administrative state intended for it to be a "comprehensive attack on the . . . Constitution").

[259] Gary Lawson, *Limited Government, Unlimited Administration: Is It Possible to Restore Constitutionalism?*, HERITAGE FOUND. FIRST PRINCIPLES ESSAYS, Jan. 2009, at 1, https://www.heritage.org/political-process/report/limited-government-unlimited-administration-it-possible-restore.

Anti-*Chevron* arguments were much more frequent and prominent over time. In 2017, Heritage released an article called "Doomed Deference Doctrines: Why the Days of *Chevron*, *Seminole Rock*, and *Auer* May Be Numbered," along with a lecture by then-Judge Brett Kavanaugh about *Chevron*'s jurisprudential evils and a lecture by President Trump's chief bureaucrat about executive agencies' inconsistency with "the Structure of the Constitution."[260] All of those authors claimed that judges and constitutional law should be major actors in transforming structures of government. In 2017, a Heritage lecture by Justice Thomas specifically tackled *Chevron*: "[As] a constitutional matter, we are obligated to be more exacting in our review [of agencies]. That doesn't mean you don't show them some deference. But I think we're obligated to do more than just wave our hands at it and say, 'Well, *Chevron*,' and be done with it."[261] Thomas's speech did not identify the source or limits of any purportedly constitutional "obligation," nor did he explain how such objections could be solved by his newly proposed but undefined standard of "some deference."[262]

AEI responded to Obama's reelection with a symposium called *Founders Betrayed? New Threats to U.S. Democracy and Rule of Law*, where one speaker condemned the administrative state and Obama's "vast amount of executive power."[263] John Yoo, an especialy strong advocate for presidential power,

[260] Elizabeth Slattery, *Doomed Deference Doctrines: Why the Days of* Chevron*,* Seminole Rock*, and* Auer *Deference May Be Numbered*, HERITAGE FOUND. LEGAL MEMORANDUM, Dec. 2017, at 1, https://www.heritage.org/courts/report/doomed-deference-doctrines-why-the-days-chevron-seminole-rock-and-auer-deference-may [https://perma.cc/R6SL-BVKC]; Brett Kavanaugh, Judge, U.S. Ct. of Appeals for the D.C. Cir., Joseph Story Distinguished Lecture: The Role of the Judiciary in Maintaining the Separation of Powers (Oct. 25, 2017) [hereinafter Kavanaugh, The Role of the Judiciary], https://www.heritage.org/courts/report/the-role-the-judiciary-maintaining-the-separation-powers [https://perma.cc/G9LU-MZM5]; Neomi Rao, Adm'r, Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, The Administrative State and the Structure of the Constitution (Oct. 4, 2017), https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution [https://perma.cc/DT4W-Q8QW]; *see also* Paul J. Larkin, Jr., *The World After* Chevron, HERITAGE FOUND. LEGAL MEMORANDUM, Sept. 2016, at 1, 5-6, https://www.heritage.org/courts/report/the-world-after-chevron [https://perma.cc/ETZ6-AQQJ] (suggesting that if *Chevron* were overturned, federal courts would regain authority over statutory interpretation, but agency opinions would still be persuasive). Neomi Rao, Trump's former head bureaucrat, is now a judge on the D.C. Circuit. *See* Karen Zraick, *Trump Pick Is Confirmed to Take Seat on Key Court*, N.Y. TIMES, Mar. 14, 2019, at A20.

[261] Clarence Thomas, Just., U.S. Supreme Court & John G. Malcolm, Dir., Meese Ctr. for Legal & Judicial Stud., Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas (Oct. 26, 2016), https://www.heritage.org/courts/report/joseph-story-distinguished-lecture-conversation-clarence-thomas [https://perma.cc/TE6N-R5DC].

[262] *Id*.

[263] American Enterprise Institute, *Founders Betrayed? New Threats to US Democracy and Rule of Law*, YOUTUBE, at 37:00 (May 1, 2014), https://www.youtube.com/watch?v=pxGH6ipbkvQ&feature=emb_imp_woyt (statement of Nicholas Quinn Rosenkranz) (arguing that the President should not be able to step in if Congress has "fail[ed] to legislate").

explained that perhaps conservatives should nonetheless "rethink" and repudiate the "Reagan Revolution in law."[264] With respect to administrative agencies, Yoo said, "I feel like we're at a time of change for conservatives . . . . [F]or thirty [or] forty years, we've worked within some of the *choices about constitutional law that were made by conservatives* in response to the Warren Court . . . and really found their highest expression . . . in the Reagan years."[265] During the new era, Yoo thought that Republicans should disclaim old "assumptions about the way government worked" and should encourage conservative judges to constrain agencies in new ways.[266] Much like Scalia's partisan vocabulary from the 1980s, Yoo proposed that the regulatory game was changing once more after 2012, "reversing the polarity of . . . [conservative] constitutional law to focus much more on agency action as the real enemy of liberty."[267] A number of AEI publications and lectures expressed similar sentiments, marking a strong departure from conservative reactions to Obama's 2008 election, not to mention reactions to Clinton's election and reelection in the 1990s.[268]

[264] *Id*. at 46:21 (statement of John Yoo).

[265] *Id*. at 38:48 (statement of John Yoo) (emphasis added).

[266] *Id*. at 39:43 (statement of John Yoo) (describing how conservative thinkers used to believe that the primary threat to liberty was Congress, which led to a number of doctrines that do not address the more urgent threat from agencies).

[267] *Id*. at 53:29 (statement of John Yoo); *see also id*. at 20:50-33:50 (statement of Nicholas Quinn Rosenkranz) (focusing on DACA and DAPA as unconstitutional applications of executive power that discriminate against people who do not fall under their provisions); *cf*. *supra* Section II.B (discussing Scalia's Reagan-era rhetoric).

[268] *See, e.g*., John Yoo, Opinion, *Executive Power Run Amok*, N.Y. TIMES, Feb. 6, 2017, at A21 (criticizing some of Trump's executive actions as outside the powers of the President); Andy Smarick, *The First Branch Steps Up*, AM. ENTER. INST. (Mar. 8, 2017), https://www.aei.org/articles/the-first-branch-steps-up/; John Yoo & Dean Reuter, Opinion, *Our Next President's Challenge: The Unaccountable Bureaucracy*, FOX NEWS (Feb. 8, 2016), https://www.foxnews.com/opinion/our-next-presidents-challenge-the-unaccountable-bureaucracy [https://perma.cc/Y83J-EV5Q] (arguing that all three branches of government must work together to "rein in the bureaucracy"); *cf*. Andrew E. Busch, *Introduction* to THE IMPERIAL PRESIDENCY AND THE CONSTITUTION 1, 1-4 (Gary J. Schmitt, Joseph M. Bessette & Andrew E. Busch eds., 2017) (debating how to "facilitate and constrain executive power," and introducing various positions on that issue); PETER J. WALLISON, AM. ENTER. INST., LIMITING THE RELENTLESS GROWTH OF THE ADMINISTRATIVE STATE 10-12 (2015), https://www.aei.org/wp-content/uploads/2015/12/Wallison-Limiting-the-relentless-growth-of-the-administrative-state.pdf?x88519 (distinguishing legislation and administration and arguing that "administrative agencies should not have the power to legislate" because "[i]n a democracy . . . , that is what legislatures are for and that is what legislatures do"); Peter J. Wallison, *Decentralization, Deference, and the Administrative State*, NAT'L AFFAIRS, Fall 2016, at 69, 77-79 (articulating a theory to distinguish between legislation and administration); Philip Hamburger, *The Administrative Threat to Civil Liberties,* FIELDSTEAD & CO. (Aug. 25, 2018), https://www.fieldstead.com/post/philip-hamburger-the-administrative-threat-to-civil-liberties [https://perma.cc/83GD-U5B4] ("[C]ertain facets of administrative law have come to represent a marked threat to the effective exercise of

The Cato Institute had criticized administrative delegations since Clinton's reelection, yet a new edition of its *Handbook for Policymakers* in 2017 highlighted separation of powers more than ever.[269] According to Cato, "since the 1930s, Congress has gotten into the habit of passing broad laws and leaving the details to administrative agencies," and the handbook for the first time denounced that practice in constitutional language.[270] Cato's revised handbook for Congress now proffered recipes for judicial doctrine. The 2017 edition claimed that, ever since the "'constitutional revolution of 1937,' the federal judiciary—and [the Senate], in ratifying judicial nominees—have focused too little attention on fulfilling the role of the courts in enforcing constitutional restraints."[271] Cato's emphasis on judges and constitutional doctrine represented a stark institutional shift. The handbook for the first time urged Congress to revise the APA to make courts "decide questions of federal law de novo, without deference to agencies' interpretations of their own authority."[272] In nearly 7,000 pages of earlier Cato handbooks, *Chevron* deference had never drawn that kind of attention or critique.

Perhaps the most prominent contributor to the new rebellion against administrative agencies was legal academic Philip Hamburger. His book, *Is Administrative Law Unlawful?*, self-consciously echoed the scholarship of earlier professors, and if such a 500-page discussion of centuries-old English constitutionalism had been written a few years earlier, it might have joined other disgruntled scholarship along the academic fringe.[273] In 2014, however, Hamburger's book found a sweet spot in constitutional polemics.[274] Its historical sources were unfamiliar and sophisticated, but its thesis was simple: the category of federal administrative law is unlawful. Conservative judges across the country

adjudication and thus deleteriously impact civil liberties, and every citizen's access to due process.").

[269] David Boaz, *Introduction* to CATO HANDBOOK FOR POLICYMAKERS 1, 10-11 (8th ed. 2017), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition_1.pdf [https://perma.cc/EW3S-8WEN]; Tom G. Palmer, *Limited Government and the Rule of Law*, *in* CATO HANDBOOK FOR POLICYMAKERS, *supra*, at 13, 19-21; Gene Healy & John Samples, *Toward a Constitutional Resurgence*, *in* CATO HANDBOOK FOR POLICYMAKERS, *supra*, at 25, 31-32.

[270] David Boaz, *Introduction* to CATO HANDBOOK FOR POLICYMAKERS, *supra* note 269, at 1, 11 ("Congress cannot constitutionally delegate its lawmaking authority to any other body . . . .").

[271] *Id*. at 20.

[272] *Id*. at 25.

[273] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 515 n.1 (2014) (collecting earlier academic scholarship that, until 2015, was never cited by any courts of appeals with respect to *Chevron*).

[274] *See* Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251, 1251-52 (2001) ("Academics, like everyone else, are subject to *cascade effects*. They start, join, and accelerate bandwagons. . . . Some cascades produce unpredictable and seemingly random movements, as external shocks lead in dramatic directions.").

cited Hamburger's work,[275] and in 2017, he won a $250,000 prize from a leading conservative foundation.[276] The point is not to characterize Hamburger's motives as partisan or otherwise. Regardless of his subjective intentions, Hamburger's book arrived right on schedule for an unprecedented wave of anti-*Chevron* conservatism. In 2017, Hamburger created a nonprofit law firm called the New Civil Liberties Alliance, which "focuses primarily on fighting administrative power," including "Chevron and Auer deference to administrative agencies—doctrines that threaten judicial independence and unbiased judgment."[277] No one could have anticipated such a powerful mixture of conservative funding, academic argument, and strategic anti-*Chevron* litigation.

The Federalist Society is another new participant in *Chevron* debates. Although the Federalist Society started in the 1980s, the organization did not initially have enough staff and resources for publications comparable to other conservative entities.[278] Instead, one of the Federalist Society's most prominent events was its National Lawyers Convention, and that event's trajectory reinforces other evidence about mainstream conservatism. As late as 2008, a ninety-minute panel entitled "The 25th Anniversary of Chevron" included no discussion from the participants or audience about *Chevron*'s constitutionality.[279] By contrast, a *Chevron* panel at the 2013 Convention

[275] *See, e.g.*, Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

[276] *Philip Hamburger Receives Bradley Prize for Innovative Scholarship*, COLUM. L. SCH. (Apr. 14, 2017), https://www.law.columbia.edu/news/archive/philip-hamburger-receives-bradley-prize-innovative-scholarship [https://perma.cc/R4TC-UDS7].

[277] Christopher J. Walker, *Interested in Challenging the Administrative State? NCLA Seeks Senior and Junior Litigators*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 6, 2017), http://yalejreg.com/nc/interested-in-challenging-the-administrative-state-ncla-lawyer-job-postings/ [https://perma.cc/3TKE-VQST]; *Amicus Briefs*, NEW C.L. ALL., https://nclalegal.org/case-documents/ [https://perma.cc/6M2M-4BFB] (last visited Feb. 15, 2021).

[278] *See* MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 2 (2013) (describing how the Federalist Society emerged from a small group of conservative professors); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 2 (2015) (noting the Federalist Society's modest funding); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 136 (2008) (explaining the Federalist Society's eventual success); *cf. Publications Archives*, FEDERALIST SOC'Y, https://fedsoc.org/publications-archives [https://perma.cc/5EBT-DLJU] (last visited Feb. 15, 2021) (listing back issues of the *Federalist Society Review* starting in 2002, back issues of *The Federalist Paper* starting in 2010, and just a few white papers starting in 1997).

[279] *See 2008 National Lawyers Convention: The People and the Judiciary*, FEDERALIST SOC'Y (Nov. 22, 2008), https://fedsoc.org/conferences/2008-national-lawyers-convention?#agenda-item-administrative-law-the-25th-anniversary-of-chevron [https://perma.cc/8A23-

featured Hamburger's constitutional critique of administrative governance alongside other panelists who did not agree.[280] In 2017, the entire National Lawyers Convention was dedicated to "Administrative Agencies and the Regulatory State," including numerous critics of *Chevron* and administrative law,[281] and the 2018 Convention revisited similar ideas under the title of "Good Government through Agency Accountability and Regulatory Transparency."[282] Even though evidence about the Federalist Society is somewhat scant relative to other conservative organizations, its timeline of 2008, 2013, 2017, and 2018 matches the anti-*Chevron* shift of other conservative entities. As a final example, one of the Federalist Society's founders endorsed *Chevron* as constitutionally valid several times prior to 2013, yet he has never done so after 2013.[283]

3. Legislative Proposals

During the Obama and Trump presidencies, congressional Republicans offered new and extraordinary proposals to limit administrative power, which would have codified their transformative constitutional vision in statutory language. One of those was the Separation of Powers Restoration Act of 2016 ("SOPRA").[284] Echoing the forty-year-old Bumpers Amendment, SOPRA would have required courts to aggressively review agency action by deciding "de novo all relevant questions of law, including the interpretation of

DYPK] (click "Administrative Law: The 25th Anniversary of Chevron"); *id*. at 39:00 (statement of Kristin E. Hickman); *id*. at 1:24:00 (statement of William N. Eskridge).

[280] *2013 National Lawyers Convention: Textualism and the Role of Judges*, FEDERALIST SOC'Y (Nov. 16, 2013), https://fedsoc.org/conferences/2013-national-lawyers-convention (click "Showcase Panel III: Formalism and Deference in Administrative Law"); *see also id*. at 44:00 (statement of Philip Hamburger); *id*. at 10:00, 55:00 (statement of Kristin Hickman).

[281] *See 2017 National Lawyers Convention: Administrative Agencies & the Regulatory State*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2017-national-lawyers-convention (last visited Feb. 15, 2021).

[282] *2018 National Lawyers Convention: Good Government Through Agency Accountability and Regulatory Transparency*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2018-national-lawyers-convention (last visited Feb. 15, 2021).

[283] *See* Stephen G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U. L. REV. 77, 84-85 (2004) ("The first development of revolutionary significance on the Rehnquist Court is the development of *Chevron* deference in administrative law cases."); Stephen G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 7-9 (1998) ("[L]egal interpretations entitled to *Chevron* deference greatly reinforce the power and voice of the national majority that elects the President." (footnote omitted)); Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 546 (2012) ("We think Justice Stevens's opinions in *Chevron* and its progeny . . . are all helpful . . . .").

[284] H.R. 4768, 114th Cong. (2016); *see also* H.R. 4321, 114th Cong. (2016) ("To provide that any executive action that infringes on the powers and duties of Congress under section 8 of article I of the Constitution of the United States . . . has no force or effect . . . .").

constitutional and statutory provisions, and rules made by agencies."[285] SOPRA's effort to eliminate *Chevron* passed the House, but it failed in the Senate.[286] In 2017, SOPRA and similar administrative reforms passed the House as the Regulatory Accountability Act, but that proposal also failed in the Senate.[287]

A different statutory proposal, offered periodically from 2011 to 2015, was Senator Rand Paul's "Write the Laws Act."[288] This strangely worded statute would have barred Congress from authorizing any other entity—agencies and courts alike—to create or clarify any "regulation, prohibition or limitation applicable to the public . . . that is not fully and completely defined in an Act of Congress."[289] Insofar as courts and agencies were forbidden to clarify statutes, perhaps Paul wanted to stop Congress from enacting ambiguous statutes altogether because his proposal provided that any law that did not "fully and completely define[]" applicable prohibitions and limitations would "have no force or effect."[290] Whatever Paul's particular motivations, his Write the Laws Act would have categorically prevented *Chevron* deference and nondelegation problems by eliminating *Chevron*'s triggering requirement of statutory vagueness.[291] Paul's proposal never received a vote in the House or the Senate.[292]

From 2009 to 2017, Republicans proposed the Regulations from the Executive in Need of Scrutiny ("REINS") Act, which would have required both houses of Congress to approve all "major rules" from administrative agencies before they could take effect.[293] The REINS Act would not have technically altered administrative deference, nor would it have eliminated the delegation of interpretive power that underlies *Chevron* deference. Instead, Congress would have diminished *Chevron*'s practical scope by reducing agencies' procedural

[285] H.R. 4768 § 2(3).

[286] *See* H.R. 76, 115th Cong. (2017); S. 1577, 115th Cong. (2017).

[287] S. 951, 115th Cong. (2017); *see also* Kristin E. Hickman, *SOPRA? So What?* Chevron *Reform Misses the Target Entirely*, 14 U. ST. THOMAS L.J. 580, 588 (2018) ("[T]he real problem is not *Chevron* itself but rather congressional delegation of policymaking discretion."). In 2019, SOPRA was introduced again in the House and the Senate. H.R. 1927, 116th Cong. (2019); S. 909, 116th Cong. (2019). It did not receive a vote in either chamber.

[288] S. 1575, 114th Cong. (2015) ("To end the unconstitutional delegation of legislative power which was exclusively vested in the Senate and House of Representatives by article I, section 1 of the Constitution of the United States . . . ."); S. 1663, 113th Cong. (2013); S. 3361, 112th Cong. (2012).

[289] S. 1575 § 4.

[290] *Id.* §§ 3(11), 4.

[291] *See* Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 16, at 521.

[292] S. 1575.

[293] H.R. 26, 115th Cong. (2017); S. 21, 115th Cong. (2017); H.R. 427, 114th Cong. (2015); S. 226, 114th Cong. (2015); H.R. 10, 112th Cong. (2011); S. 299, 112th Cong. (2011); H.R. 3765, 111th Cong. (2009).

authority to generate major regulations without congressional approval. The REINS Act echoed Cato's proposal from 1997 that Congress should "vote on each and every administrative regulation," which Cato had characterized as "the most revolutionary change in government since the Civil War."[294] During the Obama and Trump presidencies, that type of radical reform had suddenly become part of mainstream Republicans' legislative agenda.

SOPRA, the Write the Laws Act, and the REINS Act signaled new conservative efforts to limit the kind of administrative powers that Reagan-era conservatives had mobilized for deregulatory purposes. To be clear, modern statutory proposals—just like the Bumpers Amendment—did not depend on judicial intervention against the political branches. Also like the Bumpers Amendment, none of them was ultimately passed into law. Nonetheless, they embodied the same constitutional values that appeared in presidential platforms and conservative publications after 2012, thereby confirming a twenty-first-century transformation in conservative politics with respect to administrative deference and bureaucratic government.[295]

4. Judicial Decisions

Before Obama's reelection, no judicial opinion ever suggested that *Chevron* was unconstitutional. Since that time, however, anti-*Chevron* opinions have attacked administrative deference even when litigants did not brief the issue.[296] Judicial arguments against *Chevron*'s constitutionality did not emerge naturally from timeless ideas about governmental structure, nor did they come from ordinary litigative procedures. On the contrary, constitutional objections to *Chevron* appeared suddenly, alongside changes in conservative politics, in a set of judicial opinions that might have been called "activist" under other circumstances.[297] Political and judicial histories of anti-*Chevron* arguments were linked together at every stage of their mutual development.

The first case was *City of Arlington v. FCC* in 2013, which relied on *Chevron* to uphold the FCC's interpretation of "reasonable . . . time," even though those words affected the agency's jurisdiction.[298] Justice Scalia's majority opinion

[294] *See* Schoenbrod & Taylor, *supra* note 179, at 52.

[295] Careful readers will notice that the dates of statutory proposals in Congress generally overlap with other categories of historical evidence, but they are not a precise match. Perhaps that is because failed congressional proposals—especially when deployed by idiosyncratic legislators—can somewhat easily depart from mainstream values and timelines. The most important point from this Section is to demonstrate a large shift in conservative thinking around Obama's reelection and to contrast legislative activity during that period with Republicans' relative inaction for the previous thirty years.

[296] *See* Metzger, *supra* note 2, at 26.

[297] *See generally* Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (offering a modern framework for analyzing whether judicial decisions qualify as "judicial activism").

[298] City of Arlington v. FCC, 569 U.S. 290, 294 (2013).

celebrated *Chevron* as "a stable background rule against which Congress can legislate," holding that "there is no difference" between determining an agency's jurisdiction and making nonjurisdictional substantive decisions that implement the agency's legal authority.[299] Any effort to separate jurisdictional issues from nonjurisdictional ones would be "dangerous" because such line drawing might bring "greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself."[300]

In dissent, Chief Justice Roberts quoted James Madison and decried modern agencies' tendency to combine executive, legislative, and judicial power as "the very definition of tyranny."[301] Roberts lamented that "[t]he administrative state 'wields vast power and touches almost every aspect of daily life'" to a degree that "[t]he Framers could hardly have envisioned," with ever more cumbersome agencies and regulations still "on the way."[302] Roberts admitted that "[i]t would be a bit much" to describe *Chevron* deference as "'tyranny,' but the danger posed by the . . . administrative state cannot be dismissed."[303]

Whereas Scalia perceived a normalizing tradition of agencies that "make rules . . . and conduct adjudications, . . . and have done so since the beginning of the Republic,"[304] Roberts denounced "thousands of pages of regulations" and "hundreds of federal agencies poking into every nook and cranny of daily life" as proof that modern courts must restrict administrative deference more than they had in the prior fifty years.[305] Roberts acknowledged that courts analyzing nonjurisdictional statutes should "give binding deference to permissible interpretations of statutory ambiguities because Congress has delegated to the agency the authority to interpret those ambiguities."[306] Yet he refused to apply that same presumptive deference to statutory ambiguities that affect an agency's jurisdiction. In 2013, it was debatable whether Roberts's ultimate target was "*Chevron* itself."[307] His unprecedented claim that administrative deference might violate judges' obligation "to police the boundary between the Legislature

[299] *Id*. at 276, 296, 299 (emphasis omitted).

[300] *Id*. at 304; *see also* Pereria v. Sessions, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring) (citing *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting), as evidence that *Chevron* might be unconstitutional).

[301] *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)); *see also id*. at 304 n.4 (majority opinion). Justices Kennedy and Alito joined Roberts's dissenting opinion. *Id*. at 312 (Roberts, C.J., dissenting).

[302] *Id*. at 313 (Roberts, C.J., dissenting) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

[303] *Id*. at 315 (quoting THE FEDERALIST NO. 47, *supra* note 301, at 324).

[304] *Id*. at 304 n.4 (majority opinion).

[305] *Id*. at 315 (Roberts, C.J., dissenting) (claiming that "[t]he rise of the modern administrative state has not changed [courts'] duty" to "say what the law is" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[306] *Id*. at 317 (emphasis omitted).

[307] *Id*. at 304 (majority opinion).

and the Executive" was an important doctrinal warning, but its precise content and scope were unclear.[308]

Despite joining Scalia's pro-*Chevron* analysis in *City of Arlington*, Justice Thomas wrote three opinions in 2015 that challenged administrative law in general and administrative deference in particular. Those opinions have become vastly more powerful in recent years.

The first case, *Perez v. Mortgage Bankers Ass'n*, was a dispute over the APA's procedural requirements for agency rulemaking.[309] In deciding that issue, the majority refused to apply prior Supreme Court precedents *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which had required deference to an agency's interpretation of its own regulations.[310] Nonetheless, Thomas wrote a concurring opinion to declare that *Auer* and *Seminole Rock* were unconstitutional, and he criticized the Court's general laxness "about protecting the structure of our Constitution."[311] Thomas cited Hamburger and urged courts to prevent "deviation[s]" from the separation of powers.[312] He referenced *Seminole Rock* as "one such deviation" and condemned *Chevron* by inference.[313] Just as it is "critical for judges to exercise independent judgment *in applying statutes*"—contrary to *Chevron*—"it is critical for judges to exercise independent judgment *in determining that a regulation properly covers the conduct of regulated parties*"—contrary to *Seminole Rock*.[314] The litigants in *Mortgage Bankers* did not brief or argue the constitutional status of *Seminole Rock* deference for regulations, much less did they challenge *Chevron* deference for statutes. Thomas nonetheless declared on his own initiative that "the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."[315]

Auer deference reached the Court again in *Kisor v. Wilkie*, with profoundly unclear implications for *Chevron*.[316] The majority applied a limited version of *Auer* deference and implicitly upheld the constitutionality of *Chevron* deference

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[308] *Id.* at 327 (Roberts, C.J., dissenting).

[309] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203-04 (2015) (holding that the APA requires notice and comment rulemaking for interpretive rules that significantly deviate from a previously adopted interpretation); *see also* Auer v. Robbins, 519 U.S. 452, 461-62 (1997) (holding that the Secretary of Labor's interpretation of 29 U.S.C. § 213(a)(1) was reasonable and within statute's plain meaning and therefore controls § 213(a)(1)'s application); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (holding that courts must defer to an agency's interpretation of a regulation when language is unclear or in dispute, unless the agency's interpretation is plainly erroneous or inconsistent with the regulation).

[310] *Perez*, 135 S. Ct. at 1206-07; *see also Auer*, 519 U.S. at 461-62; *Seminole Rock & Sand Co.*, 325 U.S. at 414.

[311] *Perez*, 135 S. Ct. at 1215 (Thomas, J., concurring in the judgment).

[312] *See id.* at 1218-21.

[313] *Id.* at 1217.

[314] *Id.* at 1217-20 (emphasis added).

[315] *Id.* at 1225.

[316] Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

as well.[317] Justice Gorsuch wrote a concurring opinion, which Thomas, Alito, and Kavanaugh joined, condemning *Auer* as unconstitutional and implicitly condemning *Chevron* as well.[318] Roberts was the fifth vote for *Kisor*'s majority, and he wrote a terse concurrence declaring that—because *Auer* deference was "distinct" from *Chevron*—he did "not regard the Court's decision today to touch upon the latter question."[319] Given the logical proximity of *Auer* and *Chevron* deference as a matter of constitutional law, it is hard to understand why Roberts characterized them as separate, much less can anyone predict *Kisor*'s future implications for *Chevron*.

The second case from 2015 is *Department of Transportation v. Ass'n of American Railroads*, which affirmed Amtrak's status as a "governmental entity" that can set standards for passenger railroads.[320] Thomas wrote a separate opinion to lament that the Court has "come to a strange place in [its] separation-of-powers jurisprudence."[321] Referencing Hamburger's scholarship several times, Thomas rejected the vast bulk of administrative law as unconstitutional: "[H]istory confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make . . . generally applicable rules of private conduct."[322] The same nondelegation precedents that Thomas once called "water over the dam"[323] were suddenly a house on fire. And although no litigant had raised such legal issues, Thomas opined that the Court had "overseen and sanctioned the growth of an administrative system . . . that finds no comfortable home in our constitutional structure."[324] Thomas's analysis would have effectively ended *Chevron*

[317] *Id*. at 2415-18, 2422-24 (limiting *Auer*'s applicability only to situations in which (i) a statute is genuinely ambiguous, (ii) a court exhausts all traditional tools of construction, (iii) the agency's interpretation remains reasonable, (iv) the character and context of agency interpretation entitles it to controlling weight, and (v) the agency's interpretation reflects a fair and considered judgment).

[318] *Id*. at 2437-41 (Gorsuch, J., concurring in the judgment) ("Not only is *Auer* incompatible with the APA; it also sits uneasily with the Constitution.").

[319] *Id*. at 2425 (Roberts, C.J., concurring in part); *see also id*. at 2449 (Kavanaugh, J., concurring in the judgment) (quoting and endorsing Roberts's view that *Chevron* and *Auer* are "distinct").

[320] Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1228 (2015).

[321] *Id*. at 1240 (Thomas, J., concurring in the judgment). This Article would certainly endorse Thomas's statement about the constitutional "strangeness" of modern times, but history suggests that anti-administrativist critics like Thomas have caused more of those anomalies than they have cured.

[322] *Id*. at 1245; *id*. at 1242-43 (citing HAMBURGER, *supra* note 273, at 33-38).

[323] *See* Gonzales v. Oregon, 546 U.S. 243, 301 (2006) (Thomas, J., dissenting) ("I agree with limiting the application of the [Controlled Substances Act] in a manner consistent with the principles of federalism and our constitutional structure. But that is now water over the dam." (citations omitted)); *see also supra* notes 225-26 and accompanying text.

[324] *Dep't of Transp*., 135 S. Ct. at 1254-55 (Thomas, J., concurring in the judgment).

deference by constitutionally eviscerating agencies' authority to adjudicate and make regulations in the first place.

The Court revisited the nondelegation doctrine in *Gundy v. United States*.[325] Kavanaugh did not participate because the case was argued a few days before his confirmation, and the other eight Justices could not produce a majority opinion. Applying long-standing precedents, the plurality upheld the challenged statute,[326] but Alito was the fifth vote, and he ominously declared, "If a majority . . . were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[327] Gorsuch wrote a dissent that explicitly embraced *A.L.A Schechter* and *Panama Refining* without one word about Scalia's formerly authoritative opinion in *American Trucking*.[328] Thomas and Roberts joined Gorsuch's opinion, which Kavanaugh later praised as a "scholarly analysis" with "important points" that might "warrant further consideration in future cases."[329] If either Justice Barrett or Justice Kavanaugh were willing to revive the nondelegation doctrine, *Gundy*'s consequences for *Chevron* deference and administrative law could be quite dramatic.

The third case from 2015 is *Michigan v. EPA*, which analyzed whether the statutory language "appropriate and necessary" required EPA regulations to analyze costs.[330] Scalia's majority opinion applied *Chevron* deference and held that Congress unambiguously required attention to costs.[331] Thomas concurred separately to raise "serious questions about the constitutionality of . . . deferring to agency interpretations of federal statutes."[332] Once again, the litigants did not raise any constitutional issues, yet Thomas cited his concurrence in *Mortgage Bankers* and claimed, "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."[333] According to Thomas, *Chevron* deference unconstitutionally "wrests from Courts the ultimate interpretive authority to 'say what the law is,'

[325] 139 S. Ct. 2116 (2019).

[326] *Id.* at 2129 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (alteration in original) (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474-75 (2001) (Scalia, J.))).

[327] *Id.* at 2131 (Alito, J., concurring in the judgment).

[328] *Id.* at 2131-48 (Gorsuch, J., dissenting) (first citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-22 (1935); then citing *id.* at 553 (Cardozo, J., concurring); and then citing Panama Refining Co. v. Ryan, 293 U.S. 388, 415, 418, 426, 430 (1935)).

[329] Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

[330] Michigan v. EPA, 135 S. Ct. 2699, 2704 (2015) (quoting 42 U.S.C. § 7412(n)(1)(A)).

[331] *Id.* at 2712.

[332] *Id.* (Thomas, J., concurring).

[333] *Id.* (alteration in original) (quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment)).

and hands it over to the Executive," thus violating separation of powers and Article III's requirement that only judges can exercise judicial power.[334]

Thomas wrote that *Chevron*'s usurpation of judicial power under Article III simultaneously usurped legislative power under Article I.[335] In Thomas's hyperformalist world, where legislation and adjudication never overlap, it is not clear how an act of administrative deference could occupy both categories at once.[336] But Thomas argued in the alternative, without trying to resolve whether *Chevron* was unconstitutional one way or the other. Instead, he capped off an extraordinary year in administrative law by declaring that the Court "seem[s] to be straying further and further from the Constitution without so much as pausing to ask why."[337] This casual criticism ignored hundreds of articles, cases, and commentaries that had analyzed and accepted *Chevron* deference for three decades—implying that administrative deference was somehow a legal issue that had arrived recently or by accident.[338]

Thomas knew better. On the day his anti-*Chevron* critique was published, Thomas had been a Supreme Court Justice for twenty-three years, working a decade before that as D.C. Circuit judge, Chair of the EEOC, and Assistant Secretary of Education.[339] Thomas never explained why 2015 was the year that sparked a constitutional awakening about issues of administrative deference and congressional delegation that had been omnipresent throughout his career. He also did not explain whether Reagan's transformative success with deregulatory bureaucracy was similarly unconstitutional. Consistent with legal experts across the political spectrum, Thomas simply ignored conservative ideas from the 1980s, 1990s, and 2000s, including his own prior opinions that applied *Chevron*.[340] Despite Thomas's formalism and timeless rhetoric, the strange timing of his dramatic shift matches the actions of many other conservatives. Such synchronization has not been noticed because the political history of *Chevron* and anti-*Chevron* critiques has been widely overlooked.

In 2016, then-Judge Neil Gorsuch became the second jurist in history to attack *Chevron*'s constitutionality. In *Gutierrez-Brizuela v. Lynch*, he analyzed the technical date when an agency's interpretation of immigration law should be effective if the agency's interpretation contradicts circuit precedent.[341]

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

[335] *Id*. at 2713; *see also* U.S. CONST. art. I, § 1; *id*. art. III, § 1.

[336] For example, if any governmental action must as a formal matter be either entirely legislative or entirely adjudicative, it is hard to understand how *Chevron* deference can be both at once.

[337] *Id*. at 2714.

[338] *But cf*. Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 16, at 512, 521 (describing *Chevron* as a "highly important decision" as early as 1989).

[339] CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 191-240 (2007).

[340] *E.g*., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 968-69 (2005).

[341] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144-45 (10th Cir. 2016).

Gorsuch's unanimous opinion held that the agency's new interpretation was powerless until the date that his appellate court accepted it.[342] Yet Gorsuch also wrote an opinion concurring with his own majority opinion. Even though no one had raised the issue, Gorsuch's concurrence stated "[t]here's an elephant in the room with us today" because *Chevron* allows "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution."[343]

If Thomas's analysis from the Supreme Court was surprising, Gorsuch's Tenth Circuit opinion was shocking. Not many judges would condemn handfuls of Supreme Court decisions. Still fewer would express contempt for the thirty-year-old *Chevron* decision as a "judge-made doctrine for the abdication of the judicial duty."[344] Gorsuch cited Hamburger and Thomas, claiming that administrative deference is simultaneously unconstitutional as legislation under Article I and adjudication under Article III.[345]

Similar to Thomas, Gorsuch had encountered *Chevron* many times before 2016 without expressing any constitutional concerns. Gorsuch was a Supreme Court clerk when Justice Kennedy applied *Chevron* deference to statutory interpretation by the Secretary of Health and Human Services.[346] Gorsuch's private and public career developed in close proximity to administrative law and *Chevron* deference.[347] And as recently as 2010, Gorsuch had applied *Chevron* on the Tenth Circuit without any commentary about constitutional problems.[348] None of Gorsuch's biographical and jurisprudential experience with *Chevron* was mentioned in *Gutierrez-Brizuela*, much less was it distinguished as a matter of constitutional principle. Only the times had changed.[349]

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[342] *Id*. at 1145.

[343] *Id*. at 1149 (Gorsuch, J., concurring).

[344] *Id*. at 1152.

[345] *Id*. (citing HAMBURGER, *supra* note 273, at 287-91); *id*. at 1154 (citing Michigan v. EPA, 135 S. Ct. 2699, 2713-14 (2015) (Thomas, J., concurring)).

[346] *See* Elliott, *supra* note 2, at 712 & n.67 (discussing Thomas Jefferson Univ. v. Shalala 512 U.S. 504 (1994)).

[347] *See* JOHN GREENYA, GORSUCH: THE JUDGE WHO SPEAKS FOR HIMSELF 100-02 (2018).

[348] *E.g*., Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145-46 (10th Cir. 2010) (Gorsuch, J.) ("Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, including statutory ambiguities affecting the agency's jurisdiction." (citation omitted)); Wilkins v. Packerware Corp., 260 F. App'x 98, 104 (10th Cir. 2008) (Gorsuch, J.) ("While this circuit does not appear to have passed on this particular regulation, we have previously held that challenged [Department of Labor] regulations implementing the [Family Medical Leave Act] are entitled to *Chevron* deference, as the DOL is charged with administering the statute.").

[349] In his recent book, Justice Gorsuch mischaracterized these events, writing that "[i]n a short and recent span . . . courts have taken these doctrines [of administrative deference] and run with them." NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 69 (2019). Precisely the opposite—it is *Chevron*'s constitutional opponents who have

When Gorsuch was nominated to the Supreme Court, he had a more aggressive record opposing *Chevron* than any circuit judge in history. Trump's principal adviser on judicial appointments called *Gutierrez-Brizuela* "certainly his standout opinion at the Tenth Circuit."[350] The adviser said, "It's not a coincidence, it's a part of a larger . . . plan . . . . The thing that did stand out in [Gorsuch's] record . . . is his track record on speaking about administrative law. . . . [Gorsuch] is sort of leading the vanguard on this, and you see this catching on more and more."[351] One observer noted that "[t]hree months before Gorsuch authored *Gutierrez-Brizuela*, then-presidential candidate Donald Trump released eleven potential names to fill Scalia's vacancy on the Supreme Court—and Gorsuch did not make the list. But in September, exactly one month after the *Gutierrez-Brizuela* concurrence, Trump updated the list to include Gorsuch."[352]

The Gorsuch confirmation and media coverage prompted other conservative judges to suddenly question *Chevron*'s constitutional status.[353] Even state courts cited Gorsuch's constitutional critique as they applied state-law versions of *Chevron* deference.[354] Perhaps Gorsuch was charting a new anti-*Chevron* model

"run" across a dramatically "short and recent span" of American legal history. By contrast, exponents and defenders of *Chevron* deference have been continuously at work for forty years.

[350] A Conversation with McGahn, *supra* note 15, at 6:12; *see infra* notes 400-14 (discussing McGahn's role in judicial appointments).

[351] *Id*. at 4:55-7:00.

[352] Noxsel, *supra* note 2, at 81 (footnote omitted).

[353] *See, e.g*., United States v. Havis, 907 F.3d 439, 451-52 (6th Cir. 2018) (Thapar, J., concurring), *rev'd en banc*, 927 F.3d 382, 387 (6th Cir. 2019); Chamber of Com. v. U.S. Dep't of Lab., 885 F.3d 360, 379 n.14 (5th Cir. 2018); S.E.R.L. v. Att'y Gen., 894 F.3d 535, 554 (3d Cir. 2018) (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring)); Aqua Prods., Inc. v. Matal, 872 F.3d 1290, 1334 (Fed. Cir. 2017) (Moore, J., concurring); Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring); Helen Mining Co. v. Elliott, 859 F.3d 226, 238 (3d Cir. 2017) (citing *Egan*, 851 F.3d at 278-83 (Jordan, J., concurring)); Our Country Home Enters., Inc. v. Comm'r, 855 F.3d 773, 790 (7th Cir. 2017) (first citing *Gutierrez-Brizuela*, 834 F.3d at 1149-58 (Gorsuch, J., concurring); and then citing *Egan*, 851 F.3d at 278 (Jordan, J., concurring)); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 407, 409, 417 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (citing HAMBURGER, *supra* note 273); *The Constitution and the Administrative State*, NAT'L CONST. CTR.: INTERACTIVE CONST., 1:32:00-2:33:00, https://constitutioncenter.org/interactive-constitution/town-hall-video/the-constitution-and-the-administrative-state (last visited Feb. 15, 2021) (panel interview including Judge Kent A. Jordan); *see also* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017) ("[I]n cases where *Chevron* applies . . . the law's interpretation becomes the province of an executive agency. One may fairly ask, therefore, whether the doctrine allocates core judicial power to the executive—or perhaps simply blocks the exercise of judicial power in cases where the doctrine applies.").

[354] *See, e.g*., Stambaugh v. Killian, 398 P.3d 574, 578 (Ariz. 2017) (Bolick, J., concurring)

for judicial greatness, alongside a correspondingly novel path to judicial promotion.[355]

Similar to Thomas and Gorsuch, *Chevron*'s judicial critics often expressed themselves in concurring opinions, which often insulated their arguments from appellate review. On the Supreme Court, however, Thomas and Gorsuch have continued to interpret the separation of powers aggressively, and litigants have continued to file briefs that challenge *Chevron*'s constitutional status.[356] Thomas and Gorsuch were the first judges who ever raised such anti-*Chevron* objections, and it is likely that they will also help produce new doctrinal results.[357]

As discussed in Part I, *Pereira* and *BNSF* represent the strongest evidence of anti-*Chevron* sentiment among conservative judges. A few years ago, some observers might have dismissed arguments from Thomas and Gorsuch as

(citing *Gutierrez-Brizuela*, 834 F.3d at 1149-58 (Gorsuch, J., concurring)); Whynes v. Am. Sec. Ins. Co., 240 So. 3d 867, 872 (Fla. Dist. Ct. App. 2018) (Levine, J., concurring specially) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring)); Pedraza v. Reemployment Assistance Appeals Comm'n, 208 So. 3d 1253, 1257 (Fla. Dist. Ct. App. 2017) (Shepherd, J., concurring in the result); King v. Miss. Mil. Dep't, 245 So. 3d 404, 408 (Miss. 2018) ("[W]e find persuasive the reasoning of then-Judge Gorsuch."); Sierra Packaging & Converting, LLC v. Chief Admin. Officer of OSHA, 406 P.3d 522, 527 (Nev. Ct. App. 2017) (Tao, J., concurring) (citing *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring)); Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 48 (Wis. 2018) (citing *Gutierrez-Brizuela*, 834 F.3d at 1151-52 (Gorsuch, J., concurring)); *see also* Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 24, 2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/ [https://perma.cc/NA3N-A8HB] ("At least seven state supreme courts have issued decisions that decisively reject *Chevron* or *Auer* like deference. And two more states have rejected deference via legislation or referendum.").

[355] *A Conversation with Don McGahn*, *supra* note 15, at 6:35 ("[W]hat really resonated with the President was, here was a person with impeccable credentials . . . , but frankly stuck his neck out on an issue that anyone else would fear may hurt their chances of promotion to the higher court.").

[356] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., joined by Thomas, J., concurring in the judgment); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 908-09 (2019) (Gorsuch, J., joined by Thomas, J., dissenting); Sessions v. Dimaya, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (noting how vagueness doctrine requires the legislature to "act with enough clarity that . . . judges can apply the law consistent with their limited office"); *id*. at 1248 (Thomas, J., dissenting) ("[T]he Constitution prohibits Congress from delegating core legislative powers to another branch."); *see also supra* note 40 (listing Supreme Court briefs that have challenged *Chevron*).

[357] *See, e.g.*, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482 (2020) (Thomas, J., dissenting) ("[D]eference under [*Chevron*] likely conflicts with the Vesting Clauses of the Constitution." (citation omitted)); Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from the denial of certiorari) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring in the judgment) (asking the Court to "reconsider" *Chevron* on constitutional grounds).

extreme or idiosyncratic. But it is impossible to ignore statements in *Pereira* from the long-standing swing vote, Justice Kennedy, that the Court should "reconsider [*Chevron*'s] premises" based on "constitutional separation-of-powers principles."[358] None of Kennedy's peers disputed that conclusion, nor did any Justice defend *Chevron* on the merits. Gorsuch's *BNSF* dissent went even further, suggesting that *Chevron* might not "retain[] any force" at all.[359]

All of the foregoing evidence supports a remarkable conclusion: Reagan conservatives' support for *Chevron* lasted for almost thirty years, and despite anti-*Chevron* rhetoric about ageless structures and principles, a sudden shift happened soon after President Obama's reelection. Just a few years later, constitutional critiques are powerful and prevalent. Part IV suggests that such dynamics will not stop or slow down in the foreseeable future.

IV. *CHEVRON* AND DECONSTRUCTION

The last step is to consider why anti-*Chevron* attacks continued under the Trump Administration. Deregulatory presidents such as Nixon, Reagan, and both Bushes tried to decrease judicial oversight and enlarge administrative authority when—like today's conservatives—they could not revise existing statutes. The Trump Administration followed that trend in some contexts by mobilizing bureaucratic authority for specific policy goals.[360] Yet Trump's

[358] Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). Kennedy's successor, Justice Brett Kavanaugh, also criticized *Chevron* before his nomination. *See* Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911-13 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150-54 (2016) (book review) (criticizing *Chevron* because it "encourages the Executive Branch . . . to squeeze its policy goals into ill-fitting statutory authorizations and restraints"); Kavanaugh, The Role of the Judiciary, *supra* note 260, at 7-9; *HLS in the World: A Conversation with Federal Judges About Federal Courts*, HLS 200, at 27:48 (statement of Brett Kavanaugh), http://200.hls.harvard.edu/events/hls-in-the-world/conversation-federal-judges-federal-courts/ [https://perma.cc/FKC6-TRLQ] (last visited Feb. 15, 2021) (criticizing *Chevron* because it requires a determination that statute is ambiguous, and there is "no objective standard" for determining ambiguity); *see also* Ed Whalen, *Judge Kavanaugh's Record Against the Administrative State*, NAT'L REV.: BENCH MEMOS (July 4, 2018, 10:38 AM), https://www.nationalreview.com/bench-memos/judge-kavanaughs-record-against-the-administrative-state/ ("Judge Kavanaugh is a strong critic of [*Chevron* deference]—both of the foundation of that principle and of the manner in which it is often exercised.").

[359] *BNSF Ry. Co.*, 139 S. Ct. at 908 (Gorsuch, J., dissenting).

[360] *E.g.*, Coral Davenport, *Trump Administration Is Set to Replace an Obama-Era Water Regulation*, N.Y. TIMES, Jan. 23, 2020, at A21; Lara Jakes, *Nigeria Was 'Blindsided' by Trump's Travel Ban, Says Top Diplomat*, N.Y. TIMES, Feb. 5, 2020, at A6; Robert Barnes & Tara Bahrampour, *Trump's Bid to Exclude Undocumented Immigrants from Reapportionment Arrives at Supreme Court*, WASH. POST (Nov. 28, 2020, 12:36 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-census-undocumented-immigrants-reapportionment-/2020/11/28/be238a3c-30d0-11eb-96c2-aac3f162215d_story.html; Adam Liptak, *Supreme Court Leaves Census Question on*

relatively predictable efforts to deploy bureaucratic power coexisted with unprecedented assaults on administrative governance and *Chevron* from the inside.[361] The latter phenomenon raises a new kind of puzzle: why haven't modern conservatives concluded—as Scalia did in the 1980s—that attacking administrative agencies under a Republican President risks "scoring points for the other team"?[362]

Historical evidence can at least debunk a few plausible theories. For example, the massive anti-*Chevron* shift did not coincide with Alito's confirmation in 2006, nor with Obama's election in 2008. Anti-*Chevron* critiques did not develop from originalism's methodological popularity, nor did it follow pro-business interests in the early 2000s. The shift was not sparked by new historical discoveries about eighteenth-century history, nor by new political theories about the current era.[363] On the contrary, *Chevron*'s decline happened too recently and too quickly for any of those explanations. Anti-*Chevron* critiques entered mainstream conservatism during an era of opposition to Obama that encompassed policy disputes about immigration law, as well as racist attacks that President Obama was not born in America.[364] Yet even fierce anti-Obama resistance cannot explain why anti-*Chevron* critiques continue to grow today.

Citizenship in Doubt, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/politics/census-citizenship-question-supreme-court.html.

[361] *See* David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 767 (2019) [hereinafter Lewis, *Deconstructing*] ("Ironically, at the same time the president was trumpeting the need for new investment in America's roads, bridges, and levees, his top policy advisor was proposing to tear down the already neglected infrastructure of government. Conflating the departments and agencies of government with the policies they pursue, the new Trump administration sought to limit bureaucratic activity by unraveling the machinery of government." (footnote omitted)); *see also Tracking Deregulation in the Trump Era*, BROOKINGS, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ [https://perma.cc/WRZ2-3U95] (last updated Jan. 19, 2021).

[362] Scalia, *Regulatory Reform*, *supra* note 121, at 13.

[363] For modern debates about nondelegation, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1299 (2003). *See also* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007); Mortenson & Bagley, *supra* note 181, at 280-81 (arguing against originalist argument for nondelegation doctrine); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1331-32 (2003); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017).

[364] *See* MICHAEL TESLER, POST-RACIAL OR MOST-RACIAL?: RACE AND POLITICS IN THE OBAMA ERA 1-10 (2016) (describing how President Obama presided over "most-racial" political era which contributed to "vitriolic political atmosphere" of his presidency); Cox & Rodríguez, *supra* note 241, at 176; Vincent N. Pham, *Our Foreign President Barack Obama: The Racial Logics of Birther Discourses*, 8 J. INT'L & INTERCULTURAL COMMC'N 86, 101 (2015) (concluding that "Birthers" who questioned the legitimacy of Obama's presidency by claiming his birth certificate was falsified drew upon "post-racial thinking and complicated

This Part draws complex conclusions from a record that is necessarily incomplete. Unlike pro-*Chevron* support during the 1980s, anti-*Chevron* opposition is a dynamic story that remains in progress. The Justices who oppose *Chevron* have not explained why their stance changed, nor have conservative leaders offered an authoritative account.[365] On the contrary, most conservatives have ignored the historical schism altogether, thereby obscuring a significant shift under ostensibly timeless rhetoric. This Article highlights two potential causes that will need attention as *Chevron*'s crisis unfolds: conservative faith in federal courts, and attacks on bureaucratic governance that have been called "deconstruction of the administrative state."[366]

A. *Transforming Federal Courts*

To attack *Chevron* not only reduces administrative power, it also increases judicial authority. Presumably, one reason that modern conservatives perceive *Chevron* differently is the emergence of an increasingly conservative federal judiciary. Republican appointees have changed the political calculus underlying *Chevron*,[367] and Trump's judicial selections will continue to inspire or normalize anti-*Chevron* criticism for decades to come. Just as old-originalist support for *Chevron* lasted almost forty years, new-originalist opposition to *Chevron* might be comparably resilient.

When Scalia analyzed administrative deference in the 1980s, he faced an institutional choice between Reagan's deregulatory officials and appellate judges who were almost two-thirds Democratic appointees.[368] For example, Scalia hypothesized that Reagan's FTC might reinterpret "unfair or deceptive

logics to reconfigure and re-inscribe racist across racial groups"); Ilya Shapiro, *President Obama's Top Ten Constitutional Violations of 2015*, NAT'L REV. (Dec. 23, 2015, 9:00 AM), https://www.nationalreview.com/2015/12/obama-violate-constitution-top-ten-2015/ (arguing that DAPA is unconstitutional).

[365] For example, Justice Thomas's entire attempt to grapple with his prior pro-*Chevron* opinions is as follows: "Although I authored *Brand X*, 'it is never too late to "surrende[r] former views to a better considered position."'" Baldwin v. United States, 140 S. Ct. 690, 690 (2020) (Thomas, J., dissenting from the denial of certiorari) (alteration in original) (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring)); *see also supra* notes 221-23 (discussing Thomas's majority opinion in *Brand X*).

[366] Beckwith, *supra* note 7. Many possible explanations cannot be discussed here. For example, some readers might think that conservatives' political ambivalence about Trump explains the persistence of anti-Obama critiques. The influence of "never Trump" Republicans, however, has been unstable over time, and their ambivalence cannot explain why President Trump and his confidants pushed especially hard for administrative deconstruction.

[367] *See supra* Section II.A.

[368] DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 29-32 (2000); *see also* Scalia, *Regulatory Reform*, *supra* note 121, at 13; Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1258-74.

trade practices" to reduce the economic costs of prior agency interpretations,[369] similar to Anne Gorsuch's bubble definition of the statutory term "source."[370] Scalia argued that curtailing administrative deference in the early 1980s would mean that "one of the 250 federal judges recently appointed by Jimmy Carter" could "prevent the change" and overturn Reagan bureaucrats' deregulatory interpretations.[371] For the vast majority of circumstances, Scalia believed in agency deference as a way to circumvent liberal judges.

That appraisal made sense given Scalia's professional biography, which was the opposite of new originalists like Justice Gorsuch.[372] When Scalia graduated from law school in 1960, Earl Warren was Chief Justice, federal courts undermined conservative policies, and Republicans' typical response was to minimize judicial power.[373] It was impossible to foresee the transformative influence that conservative Republicans would gain through presidential elections and judicial appointments.[374] One conservative judge explained: "Many of us came of age concerned about the excessive activism of the Warren and Burger courts. We lamented judicial attempts to preempt democratic choices . . . . The lines of debate in the 1960s and 1970s seemed clearly drawn."[375]

By contrast, Gorsuch graduated from law school in 1991. By then, federal appellate judges were almost two-thirds Republican appointees—the opposite of Scalia's generation—and conservatism in the legal community was much stronger than it had been.[376] Gorsuch worked as a law student for the Federalist Society's official publication, the *Harvard Journal of Law & Public Policy*, but neither that journal nor the Federalist Society was conceivable in the 1960s.[377] As a prominent conservative reflected, "I remember, not long ago, . . . the Democrats would raise this idea of the Federalist Society, as if it was some kind of secret handshake club . . . . But now, it's an anomaly not to be a member. . . . And it's amazing how even in a short ten-year period, how much

[369] Scalia, *Regulatory Reform*, *supra* note 121, at 13.

[370] *See supra* notes 99-104.

[371] Scalia, *Regulatory Reform*, *supra* note 121, at 13-14. Scalia argued that appellate judges might have an outsized impact—as they do today—because the Supreme Court could "review only a handful of these cases." *Id*. at 14; *see also* Jason Zengerle, *Bench Warfare: How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG., Aug. 26, 2018, at 30, 35 (describing how the Trump Administration selected judges who were "originalists and textualists" that were "disinclined to defer to executive-branch agencies").

[372] See Elliott, *supra* note 2, at 704-15, for useful biographical evidence concerning Gorsuch and Scalia.

[373] *See* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 848-49 (2007).

[374] *See* TELES, *supra* note 278, at 24-35.

[375] Wilkinson, *supra* note 194.

[376] *See* MAYER, *supra* note 175, at 14-36, 100-25.

[377] *See supra* notes 278-83 and accompanying text (describing the Federalist Society's historical emergence).

has turned around."[378] Conservative public interest law firms also emerged, mimicking litigation strategies from the ACLU and NAACP in what one historian called "the *other* rights revolution."[379]

The most important sign of legal conservatives' influence concerned judges. Gorsuch clerked for Justice Kennedy, and before that he clerked for "one of the most conservative judges" on the D.C. Circuit, Judge David B. Sentelle.[380] Scalia headlined a group of prominent conservatives including Robert Bork, Richard Posner, Alex Kozinski, Harvie Wilkinson III, and Diarmuid O'Scannlain, all of whom developed and promoted earlier ideas from William Rehnquist and Lewis Powell.[381] The transformative moment was 1991, when Clarence Thomas succeeded Thurgood Marshall.[382] During the next fifteen years, many high-profile cases split five-four, with Reagan-appointed Justice Sandra Day O'Connor as the decisive vote.[383] By today's standards, the Court in that era might seem moderate, yet it was a large rightward shift from what existed before.

After Gorsuch's graduation, the Supreme Court's conservatism increased almost continuously, especially following the retirements of O'Connor in 2006 and Kennedy in 2018. The Supreme Court produced important conservative outcomes concerning George W. Bush's election and gun rights, along with new restrictions on abortion, affirmative action, voting rights, and campaign finance laws.[384] Thirteen of the last seventeen Supreme Court Justices were appointed

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[378] *Don McGahn on Judicial Selection*, C-SPAN, at 14:30 (Jan. 26, 2019), https://www.c-span.org/video/?457107-2/don-mcgahn-judicial-selection.

[379] JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 27 (2016) (emphasis added); *see also* Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1700-03 (2018).

[380] Lawrence Lessig, *How I Lost the Big One*, LEGAL AFFAIRS, Mar.-Apr. 2004, at 57, 59.

[381] *See* TELES, *supra* note 175, at 8-20. Bork retired from the bench in 1988. *See* Al Kamen & Matt Schudel, *Iconic Conservative Judge and Lightning Rod*, WASH. POST., Dec. 20, 2012, at A1.

[382] *See* A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1412 (1994).

[383] *See* Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1291, 1304 (2005) (studying Justice O'Connor's role as the median justice).

[384] *See* Bush v. Gore, 531 U.S. 98, 109-10 (2000) (invalidating Florida's recount during the 2000 election); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (establishing individual rights to possess and use certain firearms); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (applying Second Amendment rights to state firearm regulations); Gonzales v. Carhart, 550 U.S. 124, 145-68 (2007) (upholding the federal government's Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-25 (2007) (invalidating the use of racial classifications to allocate slots in public schools); Shelby Cnty. v. Holder, 570 U.S. 529, 542-57 (2013) (striking down parts of the Voting Rights Act of 1965, 52 U.S.C. § 10101); Citizens United v. FEC, 558 U.S.

by Republican Presidents, and 54% of judges on the courts of appeals were Republican appointees.[385] For the Gorsuch generation, perhaps conservative legal victories seemed like a righteous struggle or natural evolution. Either way, federal courts emerged as strong partners in conservative government, not just adversaries, and they are increasingly perceived that way by nonlegal conservatives as well.[386]

The biographical experiences of Scalia and Gorsuch reflect generational assumptions that made a large difference for *Chevron*'s constitutional status. Conservatives in Scalia's era tried to shield deregulatory Presidents and bureaucrats from the activism of liberal judges. But younger conservatives understood that conservative judges themselves could wield political power, especially by using flexible ideas about constitutional structure. As one conservative leader explained, "I was drawn to the Federalist Society because [the membership] . . . understood that 'it's the structure, stupid. . . .' Scalia used to say this all the time."[387] One law professor was more explicit: "What . . . the Federalist Society mean[s] when they talk about 'structure' is limiting . . . regulatory power . . . . For decades, judges thought it was permissible to fill in the gaps left by the ambiguities in the . . . laws. But the current conservatives have an activist agenda to peel back the power of government."[388]

Maybe Scalia's support for administrative deference seemed attractive because statutory interpretation by conservative bureaucrats was preferable to

310, 322-29 (2010) (invalidating a congressional ban on nonprofit corporate political speech). For an earlier group of conservative decisions, see, for example, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212-31 (1995) (holding that all racial classifications, whether intended to help or harm people of color, must be analyzed under strict scrutiny); and United States v. Lopez, 514 U.S. 549, 567 (1995) (invalidating a federal law concerning firearm possession in school zones); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (applying newly restrictive standards for constitutional abortion rights).

[385] *See* Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS: FIXGOV (Jan. 28, 2020), https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/ [https://perma.cc/6B76-LERC].

[386] *See, e.g.*, Donald J. Trump, U.S. President, Remarks by President Trump on Judicial Appointments (Sept. 9, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-judicial-appointments/ [https://perma.cc/J4FX-7KUW] ("Over the next four years, America's President will choose hundreds of federal judges, and, in all likelihood, one, two, three, and even four Supreme Court justices. The outcome of these decisions will determine whether we hold fast to our nation's founding principles or whether they are lost forever.").

[387] *See* Jeffrey Toobin, *Full-Court Press*, THE NEW YORKER, Apr. 17, 2017, at 24 (quoting Leo Levin, Executive Vice President of the Federalist Society).

[388] *Id.* (quoting Samuel Issacharoff, Professor of Constitutional Law at New York University School of Law).

statutory interpretation by liberal judges.[389] But agency leaders often come and go with different Presidents.[390] Today's conservatives have adopted a longer-term perspective with correspondingly higher stakes. A new "both-and" approach that integrates conservative judges and bureaucrats has displaced Scalia's "either-or" tactics of one versus the other. Scalia's contemporaries decried judicial decision-making as elitist, uninformed, inexpert, and inconsistent with democratic judgments. Yet new originalists understand that conservative judicial precedents can last for decades if they invoke timeless principles and draw support from long-tenured judges. The new regulatory game is being played for judicial decisions and constitutional precedents, not just bubble regulations about smokestacks. Such large ambitions fit together with prevalent theories of legal fundamentalism, textualism, and originalism because those schools of thought—which Scalia's generation helped to create—have made it possible to endorse transformative legal change as a "radical conservative."[391]

In periods of legislative gridlock, courts can be especially important for deregulatory policies, and that is why judicial minimalism and institutional deference seem out of touch for modern conservatives. As one reporter explained, "The conservative legal movement's long-held devotion to judicial restraint" recently "began to founder."[392] A conservative professor said that in modern times "the situation has reversed itself. . . . The originalism side, and invalidating laws if they're unconstitutional, has the upper hand."[393] Attention to judicial power reached extraordinary heights during Trump's presidential campaign, with a central unifying theme to nominate judges that the Federalist Society endorsed. One observer mused that "[Trump] has made as good a selection of judges as any Republican president in my lifetime," while a Federalist Society leader said that "[t]his administration . . . is trying to hit as many triples and home runs as possible."[394]

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[389] *See supra* notes 125, 144-47, 368-71 and accompanying text (documenting Scalia's views in detail).

[390] For complex analysis of regulatory changes, see Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 91 (2018).

[391] *See* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 662 (2008); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 734 (2010).

[392] Zengerle, *supra* note 371, at 34.

[393] *Id*. (quoting Randy Barnett, Professor of Constitutional Law at Georgetown University Law Center).

[394] *Id*. at 33 (first quoting Randy Barnett; and then quoting Leonard Leo); *see also* Remarks by President Trump on Federal Judicial Confirmation Milestones (Nov. 16, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-federal-judicial-confirmation-milestones/ [https://perma.cc/B5BE-FLB8] ("Well, Mr. President, I'm reminded of Election Night . . . . So we got a chance to set the agenda, just an opportunity to move the ball in the right direction. What's the most important thing? Clearly, it was the Supreme Court." (statement of Sen. Mitch McConnell)); *id*. ("[President Trump] ran on a

Judicial appointments became one of the Trump Administration's signature achievements.[395] In addition to Justices Gorsuch, Kavanaugh, and Barrett, the Senate has confirmed federal court nominees at a remarkable rate, with consequences that will endure for decades.[396] The judiciary was a powerful election theme again in 2020,[397] including the confirmation of Justice Amy Coney Barrett just days before the election.[398] Fights over judicial appointments are not—as they were in Scalia's era—mainly efforts to slow liberal expansions of equality, privacy, and federal power. Judges appointed by the Trump Administration were chosen to innovate, not merely to stop innovation, as conservative judges offer new opportunities for precedential reversals through constitutional reinterpretation.[399]

The key official in Trump's judicial strategy was White House Counsel Don McGahn, who "exercised an unprecedented degree of control over judicial appointments."[400] McGahn graduated from law school in 1994, and his voice is

platform that no other President has run on, to tell the type of people that you were going to put on the Supreme Court. And name 20 or 25 people, and that list is still out there, and it's made up of just the kind of people that Mitch McConnell has talked about . . . people that are constitutionalists." (statement of Sen. Chuck Grassley)); *cf. id.* ("I've always heard, actually, that when you become President, the most — single most important thing you can do is federal judges." (statement of President Donald Trump)).

[395] *See* Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *Trump Stamps G.O.P. Imprint on the Courts*, N.Y. TIMES, Mar. 15, 2020, at A1 ("As Mr. Trump seeks re-election, his rightward overhaul of the federal judiciary—in particular, the highly influential appeals courts—has been invoked as one of his most enduring accomplishments.").

[396] Carl Hulse, *President Celebrates Leaving His Mark on the Courts*, N.Y. TIMES, Nov. 7, 2019, at A20 ("[T]he judicial nominees the White House is putting forward are on average younger . . . and deemed to be more conservative than past nominees even compared with those put forward by previous Republican presidents. Court observers say that the effect of Trump's appointments in making decisions is already being felt."); Lindsay Wise & Jess Bravin, *Amy Coney Barrett Sworn In as Supreme Court Justice*, WALL ST. J. (Oct. 27, 2020, 8:22 AM), https://www.wsj.com/articles/amy-coney-barrett-set-to-be-confirmed-as-supreme-court-justice-11603721947; *see also* Donald F. McGahn II, *A Brief History of Judicial Appointments from the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105, 106 (2019) ("[T]he media coverage of the President's influence on the federal judiciary isn't just hype, these are real numbers that are going to have a lasting impact.").

[397] *See* Deanna Paul, *How Republicans Are Leaving Democrats in the Dust on Judicial Confirmations*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/politics/2019/06/04/how-republicans-are-leaving-democrats-dust-judicial-confirmations/.

[398] Jordain Carney, *GOP Senate Confirms Trump Supreme Court Pick to Succeed Ginsburg*, HILL (Oct. 26, 2020, 8:06 PM), https://thehill.com/homenews/senate/522867-gop-senate-confirms-trump-supreme-court-pick-to-succeed-ginsburg [https://perma.cc/E2AB-2WEH].

[399] *See supra* Section III.B.4 (describing precedential changes concerning administrative deference).

[400] Zengerle, *supra* note 371, at 32.

uniquely credible in describing the judicial ideals that motivated and emerged from Trump's political victory. McGahn described a new focus on nominees who might be "kind of too hot for prime time . . . . [P]robably people who have written a lot, we really get a sense of their views . . . . [T]he kind of people that, you know, make some people nervous."[401] Half-joking, McGahn said, "Our opponents . . . claim the President has outsourced his selection of judges. That is completely false. I've been a member of the Federalist Society since law school—still am—so frankly it seems like it's been insourced."[402] Judicial nominations were highly integrated with conservative politics, and McGahn said with sentimental candor: "Everyone that worked for me in the White House Counsel's Office was a member of the Federalist Society . . . . I am you, and you are me."[403]

More important than the fact of Republican discipline in judicial appointments is administrative law's role as an ideological target. McGahn claimed that "[t]he greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and *the most effective bulwark against that threat is a strong judiciary*."[404] Despite McGahn's view that unelected judges should intervene in political life, he also criticized one "edifice of the modern administrative state" as the "misguided notion that independent experts rather than our elected representatives are best suited to govern the nation's affairs."[405] Reagan-era conservatives used to believe the opposite about the relative democratic authority of judges and bureaucrats, but McGahn's new approach explained "why regulatory reform and judicial selection are so deeply connected. . . . [T]hey are the two greatest legal issues that this Administration will address."[406]

Canvassing decades of judicial appointments, a journalist wrote that almost "anyone nominated . . . by a Republican president [has] had to pass an unspoken litmus test — usually on abortion . . . [or other] divisive social issues."[407] The Trump Administration's striking development was its "new litmus test: reining in what conservatives call 'the administrative state.'"[408] McGahn confirmed that

[401] The Federalist Society, *17th Annual Barbara K. Olson Memorial Lecture*, YOUTUBE, at 10:29 (Nov. 18, 2017), [hereinafter *Barbara K. Olson Memorial Lecture*], https://www.youtube.com/watch?v=aDmpafPYIqg (statement of Don McGahn).

[402] *Id*. at 40:50.

[403] *Don McGahn on Judicial Selection*, *supra* note 378, at 35:50.

[404] *Barbara K. Olson Memorial Lecture*, *supra* note 401, at 13:42 (emphasis added).

[405] *Id*. at 14:26.

[406] *Id*. at 19:00.

[407] Jeremy W. Peters, *New Litmus Test for Trump's Court Picks: Taming the Bureaucracy*, N.Y. TIMES, Mar. 28, 2018, at A1; *see also* Robert Barnes & Steven Mufson, *Kavanaugh Heralded as Skeptic on Regulation*, WASH. POST., Aug. 13, 2018, at A1 ("[T]here is no more important issue to the Trump administration than bringing to heel the federal agencies and regulatory entities that, in Kavanaugh's words, form 'a headless fourth branch of the U.S. Government.'").

[408] Peters, *supra* note 407, at A1.

"this is something that the president has a great focus on" and that "one of the things we interview is [a judge's] views on administrative law."[409] One reporter summarized the new reality: "With surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have [under *Chevron*] to interpret laws and enforce regulations . . . ."[410] Consistent with other conservatives, McGahn emphasized that there is "a coherent plan," in which "judicial selection and the deregulatory effort are really the flip side of the same coin."[411] When the Trump Administration "thought through how to really make a systemic change," McGahn stressed that they "*spent a lot of time thinking about Chevron*."[412] Echoing Scalia's words from a bygone era, one conservative professor celebrated new attention to administrative issues as "an important shift . . . . The court's not going to overturn *Roe*. . . . *So let's go somewhere you can put some points on the board*."[413] As the "game" of regulatory reform changed once again, its modern dynamics led modern conservatives to promote Scalian deregulatory policies through anti-Scalian institutional arrangements.[414]

Conservative attention to judicial appointments and the administrative state has paid large dividends. Republican appointees rejected immigration policies during President Obama's second term,[415] and one crowning achievement of Senator Mitch McConnell's career was blocking then-Judge Merrick Garland's nomination to Supreme Court and filling judicial vacancies.[416] Trump was elected to realize new institutional goals, and one of his campaign promises in 2020 was to do more of the same.[417] As electoral results have become unpredictable, new conservatives might adopt a new motto: "In Courts We

[409] *A Conversation with Don McGahn*, *supra* note 15, at 7:17, 7:47.

[410] Peters, *supra* note 407, at A1.

[411] *A Conversation with Don McGahn*, *supra* note 15, at 8:15.

[412] *Don McGahn on Judicial Selection*, *supra* note 378, at 29:56 (emphasis added).

[413] Peters, *supra* note 407, at A13 (emphasis added) (quoting Josh Blackman, Associate Professor of Law, South Texas College of Law Houston).

[414] *See* Scalia, *Regulatory Reform*, *supra* note 121, at 15.

[415] *See* Texas v. United States, 787 F.3d 733, 759 (5th Cir. 2015) (holding that government immigration policies are not shielded from judicial review), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

[416] Charles Homans, *Opportunity Cost*, N.Y. TIMES MAG., Jan. 27, 2019, at 35; Jeffrey Toobin, *Why Mitch McConnell Outmaneuvers Democrats at Filling the Supreme Court*, NEW YORKER (Jun. 1, 2019), https://www.newyorker.com/news/daily-comment/why-mitch-mcconnell-outmaneuvers-democrats-at-filling-the-supreme-court (noting that Democrats are much less motivated to fill Supreme Court seats than Republicans); *see also* Mark E. Owens, *Changing Senate Norms: Judicial Confirmations in a Nuclear Age*, 51 PS 119, 121 (2018) (discussing the tumultuous dynamics surrounding modern court appointments).

[417] *See* Jennifer Haberkorn, *GOP Moves to Appoint Judges Even Faster*, L.A. TIMES, Apr. 3, 2019, at A7; Tessa Berenson, *For Donald Trump, Courts Are Another 2020 Battleground*, TIME (July 9, 2019, 2:21 PM), https://time.com/5622706/trump-supreme-court-census-obamacare-2020/.

Trust."[418] Although Trump did not win reelection, the current group of federal judges—including six conservative Supreme Court Justices—will apply anti-administrative theories with renewed vigor to restrict the Biden Administration's liberal administrative policies, with risks that extraordinarily disruptive constitutional results might become normalized.[419]

B. *Transforming American Government*

A second factor in the rise of anti-*Chevron* critiques is Trump's anti-administrative agenda, which was manifest inside and outside of federal courtrooms.[420] Consider Steve Bannon, who was Trump's chief campaign executive and White House Chief Strategist.[421] In 2017, Bannon was on the cover of *Time* magazine amid suggestions that he might be the "most powerful man in the world" except for the President.[422] Interviewed at the Conservative Political Action Conference ("CPAC"), Bannon explained that Trump's top leaders were "maniacally focused" on three issues: national security, economic nationalism, and "*deconstruction of the administrative state*."[423] The third drew especially loud cheers and applause from CPAC's crowd of activists.[424]

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[418] *Cf.* JACOBS & ZELIZER, *supra* note 5, at 59 ("As Reagan adviser and attorney general Edwin Meese understood, getting the 'right judges' appointed would ensure that the 'Reagan Revolution . . . can't be set aside, no matter what happens in future elections." (alteration in original)). One contrast with modern circumstances is that Meese's "right judges" were supposed to defer to agency interpretations, not invalidate them as a matter of constitutional law.

[419] *See generally* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1444, 1446-47 (2001) ("[T]he question of whether a legal argument is 'on the wall' or 'off the wall' is a matter of social practice and convention. . . . [And as] soon as each of those new Supreme Court decisions is handed down, dozens of bright young constitutional lawyers busily begin to rationalize it, showing how it is, after all, completely consistent with the text, structure, original intention, values, and traditions of the American Constitution. For these legal scholars, opinions [that once seemed utterly indefensible] . . . are not off the wall. They *are* the wall.").

[420] *See* Metzger, *supra* note 2, at 4.

[421] *See* Philip Rucker & Robert Costa, *Bannon Presses 'Deconstruction,'* WASH. POST, Feb. 24, 2017, at A1 (referring to Bannon as "[t]he reclusive mastermind behind President Trump's nationalist ideology and combative tactics"); *see also* David E. Sanger, *Trump Administration Defends Bannon's Role on Security Council*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/politics/stephen-bannon-security-council.html. Although Bannon eventually fell from power, his ideas about the administrative state remained prominent throughout the Trump Administration, partly through officials like Stephen Miller, who was Bannon's political ally and partial successor. *See* Paul Schwartzman & Josh Dawsey, *Trump Aides Face Derision in District*, WASH. POST, July 10, 2018, at B1.

[422] David Von Drehle, *The Second Most Powerful Man in the World?*, TIME, Feb. 13, 2017, at 24.

[423] Beckwith, *supra* note 7 (emphasis added).

[424] *Id.*

Bannon is not a lawyer, and his "deconstruction" certainly was not limited to *Chevron* and judicial appointments. That peculiar choice of words reflected a multipart attack on administrative governance as an analytical category. Ignoring conservatives' earlier successes with deregulatory bureaucracy, Bannon criticized "the way *the progressive left runs* . . . . [I]f they can't get [something] passed, they're just gonna put it in some sort of regulation . . . in an agency. That's all gonna be deconstructed, and . . . that's why this regulatory thing is so important."[425] For some part of Trump's coalition, deconstruction was not just economic policy; it was a mix of partisan advantage, ideological faith, and sociological theory. Experts were viewed as not only elite but also dismissively scornful; statements of science and truth were not just obstacles but hoaxes and "fake news";[426] government not merely costly but also a treasonous "deep state."[427] Bannon's rhetoric implied that appropriate reactions might include demolition and resistance alongside rollbacks and revisions. From this perspective, Trump's presidency was not just a time for steering the federal governmental wagon rightward; it was also time to dismantle and destroy the government's component parts. Efforts to "drain the swamp" and burn the administrative state to ashes were political touchstones for many Trump

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

[426] Brad Plumer & Coral Davenport, *Trump Eroding Role of Science in Government*, N.Y. TIMES, Dec. 29, 2019, at A1 ("In just three years, the Trump administration has diminished the role of science in federal policymaking while halting or disrupting research projects nationwide, marking a transformation of the federal government whose effects . . . could reverberate for years."); Michael M. Grynbaum & Eileen Sullivan, *In Attack, Trump Aims 'Enemy of the People' Directly at the Times*, N.Y. TIMES, Feb. 21, 2019, at A14 (discussing Trump's condemnation of major news outlets); *see also* Rose McDermott, *Psychological Underpinnings of Post-Truth in Political Beliefs*, 52 PS 218, 220-21 (2019) (noting that individuals sometimes treat opinions and feelings as fact, that this is exacerbated by the political environment, and that it reinforces distrust of authority).

[427] *See* Peter Baker, *Alarm in Capital as Axes Swing in Growing Post-Acquittal Purge*, N.Y. TIMES, Feb. 12, 2020, at A1; Evan Osnos, *Only the Best People: Donald Trump's War on the "Deep State,"* NEW YORKER, May 21, 2018, at 56. For the origins of the term "deep state," see Ryan Gingeras, *Last Rites for a 'Pure Bandit': Clandestine Service, Historiography and the Origins of the Turkish 'Deep State,'* PAST & PRESENT, Feb. 2010, at 151, 152-54 ("The deep state, or *derin devlet* in Turkish, . . . generally refers to a kind of shadow or parallel system of government in which unofficial or publicly unacknowledged individuals play important roles in defining and implementing state policy."). *See also* David J. Remnick, *First as Tragedy*, NEW YORKER, Mar. 20, 2017, at 29 ("Trump's most ardent supporters . . . us[e] 'the Deep State' to describe a nexus of institutions—the intelligence agencies, the military, powerful financial interests, Silicon Valley, various federal bureaucracies—that, they believe, are conspiring to smear and stymie a President and bring him low.").

supporters.[428] Fears and predictions from so-called legal experts only provided more encouragement.[429]

Congressional divisions made it impossible to achieve conservative policy goals by revising statutes. Instead, mimicking the "progressive left"—or more historically the Reagan-era right—the Trumpist deconstruction itself was implemented by bureaucrats.[430] Bannon explained that "the consistent [reason], if you look at these Cabinet appointees, they were selected for a reason and that is the deconstruction."[431] Trump and Bannon used a diverse range of informal mechanisms. Agencies were undermined through hostile rhetoric, including the allegedly "corrupt" FBI and DOJ,[432] alongside suggestions that career diplomats and civil servants formed an anti-American conspiracy.[433] Another technique

[428] *See* Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. PA. L. REV. 861, 868-69 (2018) ("We live at a time when attacks on government bureaucracy are at a fevered pitch[, with] a presidential administration committed to 'deconstruct[ing] the administrative state,' with the fomenting of fears of a subversive 'Deep State,' and with calls to 'drain the swamp' . . . ." (second alteration in original) (footnotes omitted) (first quoting Rucker & Costa, *supra* note 421; then quoting Jon D. Michaels, *Trump and the "Deep State*," FOREIGN AFFS., Sept.-Oct. 2017, at 52, 52; and then quoting James Freeman, Opinion, *Could Trump Really Be Draining the Swamp?*, WALL ST. J. (June 30, 2017, 3:17 PM), https://www.wsj.com/articles/could-trump-really-be-draining-the-swamp-1498850264)). Similarly extreme rhetoric is evident from commentatary across the political spectrum. *See, e.g.*, Ian Millhiser, *Two Cases Show the Astounding Breadth of the Supreme Court's War on Democracy*, THINKPROGRESS (Jun. 6, 2019, 12:34 PM), https://archive.thinkprogress.org/the-two-most-important-supreme-court-cases-youve-never-heard-of-5a86a9dbf201/ [https://perma.cc/5MED-TDUP] (describing "a Gorsuchian crusade to burn down the EPA and dance on its ashes"); Ned Ryun, *Don't Reform the CFPB: Burn It Down, Salt the Earth*, AM. GREATNESS (Nov. 29, 2017), https://amgreatness.com/2017/11/29/dont-reform-the-cfpb-burn-it-down-salt-the-earth/ [https://perma.cc/GQ2G-XV99] ("The entire Progressive administrative state should be dismantled, and the CFPB is an excellent place to start: it should be pulled apart, piece-by-piece until it ceases to exist. . . . Mulvaney should . . . kick the entire staff to the curb, burn the building to the ground, and salt the earth so that the CFPB may never rise again. An empty dirt lot would be more valuable to the American people . . . .").

[429] This Article recognizes the existence of those dynamics without seeking to foster or endorse them.

[430] *See* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954 (2016); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1656 (2018).

[431] Beckwith, *supra* note 7.

[432] John Solomon & Buck Sexton, *Trump Says Exposing 'Corrupt' FBI Probe Could Be 'Crowning Achievement' of Presidency*, HILL (Sept. 18, 2018), https://thehill.com/hilltv/rising/407335-exclusive-trump-says-exposing-corrupt-fbi-probe-could-be-crowning-achievement [https://perma.cc/P2B4-R8TU].

[433] *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 153 (2018); *see also* Katie Benner, Charlie Savage, Sharon LaFraniere & Ben Protess, *U.S. Lawyers Fear Removal of a Guardrail*, N.Y. TIMES, Feb. 13, 2020, at A1

was to starve agencies through inattention, understaffing, furloughs, and funding decisions.[434] One journalist wrote that "Trump's first budget eliminated . . . [a] spectacularly successful $70 billion loan program. It cut funding to the national labs[,] . . . laying off of six thousand of their people. It eliminated all research on climate change. It halved the funding . . . to secure the electrical grid from attack or natural disaster."[435] Trump's proposals slashed funding to agencies including the State Department, the EPA, and the Department of Education.[436] The Administration "disbanded working groups of distinguished scientists – the

(describing the Trump Administration's remarkable interference with Justice Department prosecutors); Julie Hirschfeld Davis, *'It's a Disgrace What's Happening in Our Country,' the President Says*, N.Y. TIMES, Feb. 3, 2018, at A14 (describing President Trump's criticism of the Justice Department and FBI); Nicholas Fandos & Catie Edmondson, *G.O.P. Has Little to Say as Post-Impeachment Trump Pushes the Limits*, N.Y. TIMES, Feb. 13, 2020, at A20 ("[L]awmakers in his party have watched as he has purged key players in the case against [Trump], including the ambassador to the European Union and two White House National Security Council aides, and . . . others he considers insufficiently loyal."); Gideon Rachman, Opinion, *Team Trump's 'Deep State' Paranoia*, FIN. TIMES, May 22, 2018, at 11 (reporting on President Trump's use of the term "deep state" to undermine investigations of himself and allies).

[434] *See* MICHAEL LEWIS, THE FIFTH RISK: UNDOING DEMOCRACY 80 (2018) [hereinafter LEWIS, FIFTH RISK].

[435] *Id.*; *see also* MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R42633, THE EXECUTIVE BUDGET PROCESS: AN OVERVIEW 1 (2012) ("[T]he budget is one of the President's most important policy tools.").

[436] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 17, 33, 41 (2017); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS, FISCAL YEAR 2018, at 42 (2017) (listing budget cuts by department); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, FISCAL YEAR 2019, EFFICIENT, EFFECTIVE, ACCOUNTABLE: AN AMERICAN BUDGET 39, 79, 103 (2018); *see also* BRANDON DEBOT, EMILY HORTON & CHUCK MARR, CTR. ON BUDGET & POL'Y PRIORITIES, TRUMP BUDGET CONTINUES MULTI-YEAR ASSAULT ON IRS FUNDING DESPITE MNUCHIN'S CALL FOR MORE RESOURCES 1 (2017) ("[T]he Administration's 2018 budget proposal *cuts* IRS funding by an additional $239 million, bringing the total decline since 2010 (after adjusting for inflation) to 21 percent." (footnote omitted)); Damian Paletta, *Trump Budget Expected To Seek Historic Contraction of Federal Workforce*, WASH. POST (Mar. 12, 2017), https://www.washingtonpost.com/business /economy/through-his-budget-a-bottom-line-look-at-trumps-new-washington/2017/03/12/29739206-05be-11e7-b9fa-ed727b644a0b_story.html (reporting that Trump's proposed budget would represent the largest cuts "since the drawdown following World War II"); Kim Soffen & Denise Lu, *What Trump Cut in His Agency Budgets*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/graphics/politics/trump-presidential-budget-2018-proposal/ (reporting that various agencies were cut to fund Trump's defense, school voucher, and border wall payments).

Interior department alone has shut down the work of more than 200 such groups – and bullied those career experts protected against at-will termination."[437]

A combination of dysfunction, alienation, and fear damaged the government's transsubstantive capacities for "project management."[438] Trump picked agency heads who were uninformed about or hostile toward the agencies that they have managed.[439] For example, Secretary of Education Betsy DeVos "referred to public education as . . . a 'dead end.'"[440] Former Secretary of Energy Rick Perry once advocated for the Department's elimination and forgot the agency's name during a presidential debate.[441] Former EPA Administrator Scott Pruitt "built his career on lawsuits against the agency he would eventually lead,"[442] while "[h]is antipathy to federal regulation . . . in many ways defined his tenure as Oklahoma's attorney general."[443]

Anti-governmental techniques changed bureaucratic norms, routines, and traditions while also damaging public esteem for diplomacy, intelligence, and law enforcement.[444] Deconstruction also undermined human resources, amid

[437] Jon Michaels, *How Trump Is Dismantling a Pillar of the American State*, GUARDIAN (Nov. 7, 2017, 8:36 AM), https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state [https://perma.cc/5BD8-49VH] (citation omitted).

[438] *See* LEWIS, FIFTH RISK, *supra* note 434, at 68-80.

[439] James P. Pfiffner, *The Contemporary Presidency: Organizing the Trump Presidency*, 48 PRESIDENTIAL STUD. Q. 153, 159 (2018).

[440] *Id*. at 160 (quoting Valerie Strauss, *The Long Game of Education Secretary Betsy DeVos*, WASH. POST (June 1, 2017, 3:16 PM), https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/01/the-long-game-of-education-secretary-betsy-devos/).

[441] *See* Michael Lewis, *The 5th Risk*, VANITY FAIR, Sept. 2017, at 192, 240 ("Perry is of course responsible for one of the [Department of Energy]'s most famous moments—when in a 2011 presidential debate he said he intended to eliminate three entire departments of the federal government. Asked to list them he named Commerce, Education, and . . . then hit a wall." (second alteration in original)).

[442] Coral Davenport, Lisa Friedman, & Maggie Haberman, *Mired in Scandal, Pruitt Is Forced to Exit E.P.A. Post*, N.Y. TIMES, July 6, 2018, at A1.

[443] Eric Lipton & Coral Davenport, *Choice for E.P.A. a Frequent Ally of the Regulated*, N.Y. TIMES, Jan. 15, 2017, at A1; *see also* Jonathan Blitzer, *Why Are Undocumented Minors Spending So Much Time in Custody*, NEW YORKER (Mar. 8. 2018), https://www.newyorker.com/news/daily-comment/why-are-undocumented-minors-spending-so-much-time-in-custody (reporting on the Office of Refugee Resettlement's appointment of Scott Lloyd, who focused on preventing refugees in custody from receiving abortions and restricted the ability of unaccompanied minors to receive refugee status); Coral Davenport, *E.P.A. Chief Voids Obama-Era Rules in Blazing Start*, N.Y. TIMES, July 2, 2017, at A1 ("Mr. Pruitt, a former Oklahoma attorney general who built a career out of suing the agency he now leads, is moving effectively to dismantle the regulations and international agreements that stood as a cornerstone of President Barack Obama's legacy.").

[444] *See* Lewis, *Deconstructing*, *supra* note 361, at 779-80 (listing historically unique ways that Trump has "depict[ed] the permanent government as corrupt, disloyal, and unprofessional," which have "consequences for the federal government's ability to recruit,

reports of governmental turnover and diminished expertise.[445] The quantity and stature of affected agencies was remarkable, and McGahn's theme of undermining "independent experts," such as scientists, engineers, and lawyers, could affect the lasting desirability of federal employment, with unpredictable results.[446] As one extreme example, some analysts suggest that midcentury

motivate, and retain" its personnel); *id*. at 783 ("[T]he president's actions undercutting federal agencies may permanently damage agency reputations and human capital. The president's public attacks on law enforcement agencies have clearly reduced support among some groups and polarized their support in the public."); *id*. ("The breakdown of the historically neutral and effective public service will likely be the longest lasting effect of the Trump approach."); *id*. ("The president's symbolic actions denigrating the public service . . . hurt the federal workforce. . . . If the federal government cannot hire, train, and keep the best talent, the performance of the federal workforce will suffer and so will agency performance."); *see also* Philip Bump, *An Increasing Number of Americans See the FBI as Biased Against Trump*, WASH. POST (Apr. 17, 2018, 10:46 AM), https://www.washingtonpost.com/news/politics/wp/2018/04/17/an-increasing-number-of-americans-see-the-fbi-as-biased-against-trump/ ("A new poll released by NPR, PBS NewsHour and Marist University shows that about 3 in 10 Americans think that the FBI is biased against the Trump administration . . . ."); Susan Milligan, *Wanted: Public Servants*, U.S. NEWS (Mar. 9, 2018, 6:00 AM), https://www.usnews.com/news/the-report/articles/2018-03-09/with-trump-in-the-white-house-public-service-takes-a-hit ("Barely more than a year into his presidency, Trump has experienced a turnover rate of 43 percent – nearly three times that of former President Barack Obama at the end of his second year in office, and 16 percentage points higher than the turnover rate former President George W. Bush experienced during that period . . . ."); Michael D. Shear & Katie Benner, *Trump Assails Legal System, Eroding Trust*, N.Y. TIMES, Aug. 26, 2018, at A1 (quoting constitutional law professor Leah Litman, opining that Trump's attacks on federal law enforcement officers could lead to "a general lack of concern for any compliance with the law, or adherence to basic norms of democratic legitimacy"); Michael D. Shear & Eric Lichtblau, *Civil Servants Sense 'Dread' in Trump Era*, N.Y. TIMES, Feb. 12, 2017, at A1 ("Across the vast federal bureaucracy, Donald J. Trump's arrival in the White House has spread anxiety, frustration, fear and resistance among many of the two million nonpolitical civil servants who say they work for the public, not a particular president."); Michael Wines, Katie Benner & Adam Litpak, *Justice Dept. Replaces Lawyers Defending Census Citizenship Question*, N.Y. TIMES, July 8, 2019, at A13 (reporting that lawyers' dismissal from the census case "strongly suggested that the department's career lawyers had decided to quit a case that at the least seemed to lack a legal basis, and at most left them defending statements that could well turn out to be untrue").

[445] Evan Halper, *Frozen Out of Work on Climate*, L.A. TIMES, Oct. 5, 2017, at A1; Ellen Mitchell, *State Department's Top UN Envoy Steps Down: Report*, HILL (Aug. 27, 2017, 5:54 PM), https://thehill.com/policy/international/348200-state-departments-top-un-envoy-steps-down-report [https://perma.cc/8GY6-EPHK]; Annie Sneed, *State Department Science Envoy Explains Why Trump Drove Him to Resign*, SCI. AM. (Aug. 24, 2017), https://www.scientificamerican.com/article/state-department-science-envoy-explains-why-trump-drove-him-to-resign/.

[446] *See Barbara K. Olson Memorial Lecture*, *supra* note 401, at 14:30 (decrying the "misguided notion that independent experts rather than our elected representatives are best suited to govern the nation's affairs"); *supra* note 405 and accompanying text (discussing

efforts to purge State Department experts and officials worsened American involvement in the Vietnam War.[447] Similar dysfunctions are possible with respect to modern problems including climate change, cybercrime, global health, and foreign policy.[448] One commentator used a vivid metaphor for administrative deconstruction, acknowledging that some Americans "might have good reason to pray for a tornado, whether it comes in the shape of swirling winds, or a politician. . . . You imagine the [tornado] doing the damage that you would like to see done, and no more," but in such desperate circumstances, "[i]t's what you fail to imagine that kills you."[449]

McGahn's view that elected officials should determine policy rather than unelected experts); *see also* Michael Lewis, *Made in the U.S.D.A.*, VANITY FAIR, Dec. 2017, at 151 (detailing Trump appointees who, at the insistence of food industry lobbyists, rolled back U.S.D.A. programs that were designed by career experts); Michaels, *supra* note 437 ("Among the administration's preferred tactics to cow that last group of career employees into submission or, better yet, to push them out, has been to cancel, defund, or ignore their programs." (citations omitted)); Pfiffner, *supra* note 439, at 159 ("In contrast to his predecessors, President Trump appointed to most domestic departments cabinet secretaries who were opposed to their departments' traditional missions.").

[447] Benjamin Wallace-Wells, *Worst and Dimmest*, NEW REPUBLIC, Aug. 12, 2009, at 10, 10. *See generally* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972) (detailing the Vietnam War's escalation during the Kennedy and Johnson Administrations).

[448] *See, e.g.*, Jessica Donati, *Pompeo Faces Department Outcry*, WALL ST. J., Nov. 12, 2019, at A6; Joseph Marks, *Nielsen's Departure Leaves Expertise Gap*, WASH. POST, Apr. 9, 2019, at A16; Robbie Gramer, *Pompeo's Silence Creates a 'Crisis of Morale' at State Department*, FOREIGN POL'Y (Jan. 16, 2020, 2:44 PM), https://foreignpolicy.com/2020/01/16/pompeo-impeachment-yovanovitch-crisis-of-morale-state-department-former-top-diplomat-says-trump-ukraine-lev-parnas-surveillance-robert-hyde/.

[449] LEWIS, FIFTH RISK, *supra* note 434, at 219; *see* Lewis, *Deconstructing*, *supra* note 361, at 768 ("The consequences for failed bureaucratic infrastructure can be severe. . . . [A]ll segments of society are potentially implicated in that failure. Veterans may die waiting for health care. Poor kids will not be enrolled in programs that keep them fed and teach them to read. People on terrorist watch lists may be allowed to fly to the United States and eligible visitors unfairly kept out. Federal employees will waste hundreds of millions of dollars on poorly managed procurement processes. The government will not stop a dangerous pandemic before it spreads to millions.").

President Trump's response to COVID-19 was a central issue during his campaign for reelection, as was his relationship to scientific and bureaucratic expertise. *See generally* Victoria Smith & Alicia Wanless, Unmasking the Truth: Public Health Experts, the Coronavirus, and the Raucous Marketplace of Ideas 3 (July 2020) (unpublished manuscript) https://carnegieendowment.org/files/05_20_Smith_Wanless_Truth.pdf [https://perma.cc/W99K-7YSL] ("The U.S. Centers for Disease Control and Prevention (CDC) later updated their guidelines and recommended that people wear cloth face masks when outside their homes. U.S. President Donald Trump . . . long emphasized the voluntary nature of the CDC recommendation and long said that he would not wear one . . . ."); *id.* at 6 ("[Dr. Anthony] Fauci faced the greatest challenges in terms of political support. He has had to tread a difficult path between asserting public health information and not directly contradicting Trump's estimated more than 250 false or misleading claims related to the

This Article cannot estimate the full practical consequences of such anti-governmental crusades. The point is simply to locate anti-*Chevron* critiques in their political context. The modern era was not produced exclusively by Reaganite deregulation or pre–New Deal enthusiasm for business. All of those historical dynamics were mixed together with a newly ascendant radicalism that matched the nonlegal biographies of Steve Bannon, Stephen Miller, and President Trump more than Don McGahn, Justice Gorsuch, or Justice Thomas. Unorthodox extralegal figures worked through and with "establishment" leaders in order to accomplish political goals, even as legal figures advocated structural reforms that were politically dependent on an anti-governmental "tornado."

The diverse range of political attacks on administrative governance directly affected legal doctrine in surprising ways. Anti-*Chevron* critiques are the most important example, but *Lucia v. SEC* also illustrates how administrative deconstruction affected precedent, practice, and constitutional structure all at once.[450] *Lucia* concerned the meaning of governmental "Officers" versus employees for purposes of the Appointments Clause.[451] If the SEC Administrative Law Judges ("ALJs") in *Lucia* qualified as "inferior officers"

coronavirus in March alone."); *id*. ("On April 12, Trump retweeted a call for Fauci to be fired for telling CNN that more could have been done to stop the spread of the virus . . . ."); *id*. at 7 ("The United States demonstrates what can happen when there is disunity, disinformation, and inconsistency in official messaging in a crisis situation."); *id*. at 11 ("Trump's misinformation has downplayed the severity of the virus, overstated the impact of his own policies, blamed others for perceived failures, rewritten the history of his response, and made unfounded claims about potential treatments. Of these, perhaps the most dangerous are his claims of imminent vaccines and treatments [and] his public endorsement of untested treatments that has led to deaths. . . . The high levels of conflicting information have opened the doors wide for conspiracy theorists." (footnote omitted)); ANITA DESIKAN, TARYN MACKINNEY & GRETCHEN GOLDMAN, UNION OF CONCERNED SCIENTISTS, LET THE SCIENTISTS SPEAK: HOW CDC EXPERTS HAVE BEEN SIDELINED DURING THE COVID-19 PANDEMIC 4 (2020), https://ucsusa.org/sites/default/files/2020-05/let-the-scientists-speak.pdf [https://perma.cc/6URE-ZKV5] ("Despite the severity of the COVID-19 epidemic, the public has heard less from top federal scientists at the CDC compared with previous epidemics. The resulting lack of up-to-date scientific information directly threatens public health and safety. The Trump administration must reverse its current approach and provide unfettered access to government experts during this epidemic and beyond.").

Other recent efforts at "deconstruction" include the removal of various Inspectors General, *see* David E. Sanger & Charlie Savage, *A Post-Watergate Reform Under Pressure by Trump*, N.Y. TIMES, May 23, 2020, at A19, and changes in DOJ procedures for investigating elections, *see* Matt Zapotosky & Devlin Barrett, *Barr Clears Justice Department To Investigate Alleged Voting Irregularities as Trump Makes Unfounded Fraud Claims*, WASH. POST (Nov. 9, 2020), https://www.washingtonpost.com/national-security/trump-voting-fraud-william-barr-justice-department/2020/11/09/d57dbe98-22e6-11eb-8672-c281c7a2c96e_story.html.

[450] Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018).

[451] *Id*.; *see also* U.S. CONST. art. II, § 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

under the Clause, they had to be chosen by SEC Commissioners instead of agency staff.[452]

At the time, ALJs in the SEC and elsewhere were screened through a competitive examination process at the Office of Personnel Management ("OPM").[453] There were "nearly 1,600 federal ALJs," who had to be "licensed attorneys, [with] seven years' litigation experience in courts or administrative agencies . . . , and pass an [OPM] examination . . . . The goal of this OPM-led process [was] to render the appointments nonpolitical."[454] OPM ranked applicants' credentials and sent the top three candidates for the agency to make a final choice. SEC staff members made that decision, using authority delegated to them since the 1960s.[455] For fifty years, ALJs conducted preliminary adjudicative hearings without any problems under the Appointments Clause. ALJs followed quasi-judicial procedures, but they produced "initial decisions" that the SEC could reject, endorse, or revise.[456] Consistent with practice and precedent, the D.C. Circuit upheld the SEC's ALJs as "employees" who were not governed by the Appointments Clause.[457]

As late as May 2017, the DOJ defended the validity of the SEC's ALJ appointments.[458] Yet the Trump Administration switched sides in the Supreme Court, arguing for the first time in history that SEC ALJs were unconstitutionally appointed "Officers."[459] The Supreme Court invited a nongovernmental amicus to defend the SEC,[460] but the government's acquiescence made the result predictable. Justice Elena Kagan's narrow majority opinion invalidated ALJ appointments for the SEC without mentioning any other agency or providing any constitutional definition of "Officer[]" for other governmental contexts.[461]

Separate from the Appointments Clause, the government also claimed—as *Lucia*'s original litigants did not—that ALJs throughout the government might violate Article II because agency adjudicators are improperly shielded from removal.[462] Under the APA, ALJs can only be fired "for good cause established and determined by the Merit Systems Protection Board on the record and after opportunity for a hearing before the Board."[463] Since at least 1953, the Supreme

[452] *Lucia*, 138 S. Ct. at 2051.

[453] Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654 (2016).

[454] *Id*.

[455] Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. § 3106).

[456] *Lucia*, 138 S. Ct. at 2049 (listing powers delegated to SEC ALJs by agency regulations).

[457] *Id*. at 2050.

[458] *Id*.

[459] *Id*.

[460] *Id*. at 2050-51, 2051 n.2.

[461] *Id*. at 2049-56.

[462] *Id*. at 2050 n.1.

[463] 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211(a) (2020); *see also* Brief for Respondent Supporting Petitioners at 45, *Lucia*, 138 S. Ct. 2044 (No. 17-130) (discussing the good cause

Court described that statutory protection as ensuring ALJs' "independence and tenure within the existing Civil Service system."[464] In *Lucia*, however, the government argued—again for the first time—that protecting ALJs from removal raised "serious separation-of-powers concerns."[465] According to the government's brief, "[a]gency heads" themselves "must be able to remove ALJs *who refuse to follow agency policies*."[466] All of those arguments were self-conscious departures from established practice, and they threatened ALJs in every federal agency. The *Lucia* Court repeatedly declined to consider the government's removal arguments,[467] and none of the Justices mentioned the OPM's preselection examination process because, among other reasons, that entity's participation was never discussed or challenged at any time in the litigation.

A concurring opinion by Justice Thomas, which Justice Gorsuch joined, sought to redefine "Officer[]" in order to invalidate thousands of current appointments alongside tens or hundreds of thousands of appointments throughout the United States's history.[468] Yet the truly shocking episode occurred after the Supreme Court's decision, when President Trump issued an Executive Order "Excepting Administrative Law Judges from the Competitive Service."[469] With absolutely no basis in fact, the Order said that *Lucia* raised "questions about . . . *whether* [*the OPM's*] *competitive examination and competitive service selection procedures* are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs."[470] Trump's Executive Order said that "conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ."[471] Decades of governmental practice were swept away without further comment.

President Trump's new system meant that ALJs throughout the government were not evaluated by objective standards, comparative credentials, or external decision makers.[472] ALJs were whoever a particular agency head might prefer, thus increasing risks of patronage and favoritism.[473] Two members of Congress speculated that the Executive Order would "give politically-appointed agency

requirement in connection with its Article II argument).

[464] Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 132 (1953).

[465] Brief for Respondent Supporting Petitioners, *supra* note 463, at 39 (emphasis omitted).

[466] *Id*. at 47 (emphasis added).

[467] *Lucia*, 138 S. Ct. at 2050 n.1.

[468] *Id*. at 2056 (Thomas, J., concurring).

[469] Exec. Order No. 13,843, 3 C.F.R. 844-47 (2019).

[470] *Id*. at 845 (emphasis added).

[471] *Id*.

[472] On the contrary, the only requirement is that ALJs "must possess a professional license to practice law." 5 C.F.R § 6.3(b) (2020).

[473] *See* Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1344-45 (1992).

heads nearly unlimited discretion to stack the ALJ corps with partisan individuals."[474] And the American Bar Association's President wrote that the order could "politicize the appointment and interfere with the decisional independence of ALJs. . . . Nothing less than the integrity of the administrative judiciary is at issue here."[475] A law professor warned that the "constitutional crisis faced by the judicial arm of our administrative state" after *Lucia* might "eventually destroy the administrative judiciary" as a whole.[476]

Lucia illustrates the President's power to damage governmental institutions from the inside. The government's litigation strategy helped produce a destabilizing judicial decision, then the President mischaracterized the Court's ruling in order to justify a sweeping revision of how ALJs are chosen, who they are, and how they operate. As with other examples of administrative deconstruction, the consequences for administrative adjudication are profoundly uncertain and potentially large, but that is what one should expect when structures of administrative law are suddenly scrambled and remade. The quality and morale of government servants will be diminished, and the implications for tens of thousands of administrative stakeholders will be hard to measure.[477]

In the final analysis, this Part is about causation and consequences.[478] On the one hand, new conservative confidence in federal courts represents a long-term phenomenon that will continue to increase. As recent judicial appointments interact with disciplined professional organizations, anti-*Chevron* critiques will remain a strong public signal of what it means to be a legal conservative—analogous to increasing gun rights and limiting abortion.[479]

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[474] Press Release, Rep. Gerald E. Connolly, Ranking Member, Gov't Operations Subcomm. & Rep. Elijah E. Cummings, Ranking Member, House Comm. on Oversight and Gov't Reform, Cummings-Connolly Request Oversight Hearing on Trump Administrative Law Judges EO (July 16, 2018), https://oversight.house.gov/news/press-releases/cummings-connolly-request-oversight-hearing-on-trump-administrative-law-judges [https://perma.cc/5TFY-2JNN].

[475] *ABA President Hilarie Bass Asks Congress to Halt Change in Hiring of Administrative Law Judges*, AM. BAR ASS'N (July 16, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/07/aba_president_hilari/ [https://perma.cc/C297-9HVT] (summarizing Hilarie Bass's letter to the House Subcommittee on Rules).

[476] Manning Gilbert Warren III, *The Deconstruction of the Administrative Judiciary*, 45 SEC. REG. L.J. 369, 383 (2017).

[477] One example of *Lucia*'s indirect consequences is *Cirko ex rel. Cirko v. Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), which allowed litigants to challenge ALJ appointments without satisfying exhaustion requirements. *Id.* at 152. District courts have paused current lawsuits concerning that issue while awaiting the Third Circuit's decision, and all of these Social Security cases will now be remanded for adjudication by ALJs who were properly appointed.

[478] Some readers might speculate that political forces created relevant legal arguments, or perhaps vice versa, yet the most likely scenario given their chronology is that transformative shifts in conservative politics and legal theories reinforced one another.

[479] *See supra* notes 407-13 (discussing administrative law's role as a "litmus test").

On the other, President Biden's slogan "Build Back Better" represents, among other things, an ambition to reconstruct institutions and norms that have been harmed or contested.[480] Some of that rebuilding can happen quickly through Executive Orders, official appointments, and public messaging.[481] Other aspects will depend on Congress and funding, while most policies will involve administrative agencies—just like a century of past American Presidents.[482] The vital question is whether new conservative judges will allow established patterns of administrative activity, political change, and democratic activity to be restored. To overrule *Chevron* on constitutional grounds—along with revitalizing the nondelegation doctrine and undermining independent agencies[483]—would be a dangerous departure from governmental structure and existing practice, with serious implications.

V. CONSTITUTIONAL IMPLICATIONS

Attacks on *Chevron* deference are not front-page news, but students of constitutional governance cannot look away. The suddenness, scope, and impact of overturning *Chevron* would be unprecedented in the field of constitutional structure. The closest comparison is the transformation sparked by the eighty-year-old *Erie Railroad v. Tompkins*.[484] This Article has thus far shown that changes in constitutional law and politics have influenced one another. This Part concludes with a few theoretical issues embedded in *Chevron*'s political history, as well as the practical consequences of overruling *Chevron* on constitutional grounds.[485]

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[480] *See generally* Adam Forrest, *Build Back Better: Who Said It First — Joe Biden or Boris Johnson?*, INDEPENDENT (Nov. 5, 2020, 11:05 AM), https://www.independent.co.uk/news/uk/politics/biden-boris-johnson-build-back-better-b1613419.html (tracing the phrase back to United Nations tsunami relief in the early 2000s).

[481] *See supra* Section IV.B (discussing efforts at governmental "deconstruction" through similar mechanisms).

[482] *See supra* Part II (discussing the Reagan Administration's use of administrative agencies to achieve conservative policy objectives).

[483] *See supra* notes 325-29 (discussing modern efforts to revive the nondelegation doctrine). A case from last term shows the Court's willingness to undermine independent agencies. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (declaring the CFPB's single-director structure violative of the separation of powers and thus unconstitutional); *id.* at 2212-19 (Thomas, J., concurring in part and dissenting in part) (questioning the constitutional status of independent agencies).

[484] 304 U.S. 64 (1938); *see also* Robert H. Jackson, *The Rise and Fall of* Swift v. Tyson, 24 A.B.A. J. 609, 609 (1938) (calling *Erie* "one of the most dramatic episodes in the history of the Supreme Court"); Green, *Turning the Kaleidoscope*, *supra* note 12, at 390-425; Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 598 (2008); Craig Green, Erie *and Constitutional Structure: An Intellectual History*, 52 AKRON L. REV. 259, 260–64 (2019).

[485] This Article still cannot predict whether *Chevron* will be overruled, *see supra* note 7 and accompanying text, except to say that the result almost certainly depends on the combined opinions of Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett. Kavanaugh and

A. *Challenging New Originalism*

Chevron debates represent an unacknowledged conflict between old originalists and new originalists. There is no circumstance in American history in which mainstream legal conservatives have altered their constitutional prescriptions so quickly and categorically.[486] *Chevron*'s transformation happened in less than a decade, and the failure to identify that historical change has also obscured the urgent need to explain it. Originalists are often explicitly enthusiastic about reversing judgments and precedents from nonoriginalist judges.[487] However, when one generation of mainstream originalists attacks

Roberts have publicly criticized deference and administrative governance, at least under some circumstances. *See* sources cited *supra* note 358 (discussing Kavanaugh's record); *supra* notes 298-308 and accompanying text (discussing Roberts's record). Yet, it is also possible that commitments to institutional values will stop those two from joining extreme anti-*Chevron* arguments from Justices Thomas and Gorsuch. *See* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057-67 (2019) (Kavanaugh, J., concurring in the judgment) (pursuing a middle ground concerning deference); Kisor v. Wilkie, 139 S. Ct. 2400, 2424-25 (2019) (Roberts, C.J., concurring in part) ("[T]he cases in which *Auer* deference is warranted largely overlap with the cases in which it would not be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."); *supra* note 319 and accompanying text (discussing Robert's opinion in *Kisor*). *But see* Gundy v. United States, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J.) (resurrecting the nondelegation doctrine); *supra* notes 325-29 and accompanying text (discussing *Gundy*).

For Justice Barrett's perspective and significance, see generally Nicholas Fandos, *Barrett Sworn In to Supreme Court After a 52-48 Vote*, N.Y. TIMES, Oct. 27, 2020, at A1; Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. ON REG.: NOTICE & COMMENT (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/ [https://perma.cc/B437-7446] ("Any effort to predict how [Justice] Amy Coney Barrett would approach pressing questions of administrative law . . . faces two substantial obstacles. First, then-Professor Barrett didn't write much about administrative law while at Notre Dame Law School. Second, [then]-Judge Barrett [didn't] writ[e] an opinion in any major administrative law case while on the Seventh Circuit Court of Appeals."); Jeff Overley, *Chevron Deference's Future in Doubt if Barrett Is Confirmed*, LAW360 (Oct. 23, 2020, 11:11 PM), https://www.law360.com/articles/1318381/chevron-deference-s-future-in-doubt-if-barrett-is-confirmed. Prior to joining the Supreme Court, Barrett's only opinions discussing deference are *Meza Morales v. Barr*, 973 F.3d 656, 664-67 (7th Cir. 2020) (applying *Auer* deference but rejecting the agency's interpretation); and *Ruderman v. Whitaker*, 914 F.3d 567, 572-73 (7th Cir. 2019) (applying *Chevron* and holding that the agency's interpretation was not "too unreasonable to merit deference").

[486] Modern conservatives have also challenged some of Scalia's constitutional judgments entirely separate from *Chevron*. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (statement of Alito, J., respecting the denial of certiorari) (suggesting that the Court should revisit *Employment Division v. Smith*, 494 U.S. 872 (1990) (Scalia, J.)).

[487] Nonoriginalist conservative decisions have been more candid about reversing or revising judicial decisions of earlier conservatives. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S.

precedents from their equally originalist precursors, specific justifications become more important, especially when the shift cannot be traced to newly discovered eighteenth-century evidence.

The stakes for originalism could not be higher, including basic claims about law's stability and its autonomy from politics. Many conservative originalists promise stable doctrinal results—after nonoriginalist underbrush is cleared away—as originalism helps constitutional law become forever what it always should have been.[488] By contrast, anti-*Chevron* critiques exemplify a peculiar risk of originalist instability that might be even worse than other jurisprudential methodologies. Many kinds of legal theory have attacked precedents made by their opponents but not their allies. For example, nonorginalist liberals might recognize new rights by overruling *conservative not liberal decisions*, while nonoriginalist conservatives might narrow constitutional liberty or equality by overruling *liberal not conservative decisions*. Contrary to those patterns, modern originalists have shown a tendency to disregard precedents altogether, including decisions from prior originalists and conservatives.[489]

A related feature of originalism is its hope that emphasizing constitutional formalities might escape from the dynamics of legal realism and politics.[490] By contrast, mainstream originalists' dramatic shift about *Chevron* deference has closely followed political dynamics, notwithstanding the prevalence of apolitical rhetoric. This Article *emphatically does not offer* a standard narrative of legal realism, where one partisan group overcomes another and doctrinal outcomes change to fit the new group's preferences. Because *Chevron*'s shift occurred exclusively through the efforts of mainstream originalists—with equally sincere conservatives on both sides at different times—this Article's political history offers a counterexample to some of originalism's core aspirations.

Against that backdrop, this Article also presents new kinds of challenge for *Chevron*'s critics. Existing scholarship has largely disputed anti-*Chevron* critiques on their own terms, as though administrative deference were a legal issue of timeless and apolitical substance.[491] By contrast, this Article suggests that the tactic of invoking timeless arguments might itself be ideological politics dressed in legal vocabulary, voiced by a generation of legal conservatives who have been allowed to ignore their own political and doctrinal history.

529, 552 (2013) (rejecting Justice O'Connor's late twentieth-century holding in *Lopez v. Monterey County*, 525 U.S. 266 (1999), because its legal result was no longer supportable by "current political conditions").

[488] *See* Baumgardner, *supra* note 237, at 805-07; Sawyer, *supra* note 237, at 198.

[489] *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring) ("Our judicial duty to interpret the law requires adherence to the original meaning of the text. For that reason, we should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous.").

[490] *See* Baumgardner, *supra* note 237, at 793; Sawyer, *supra* note 237, at 202.

[491] My own participation in existing doctrinal and theoretical struggles is described elsewhere. *See* Green, Chevron *Debates*, *supra* note 4, at 694-729.

B. *Practical Consequences*

Overruling *Chevron* on constitutional grounds would transform the administrative state. Abolishing administrative deference would increase authority for a generation of judges who are the most politically conservative since 1937, and who may be the most transformatively conservative across an even longer time period.[492] Hundreds of precedents that have relied on and applied administrative deference might be invalid, requiring courts to analyze statutory terms like "source," "public health," "safety," "student," and "unfair methods of competition" without regard for agencies' opinions.[493] For the first time, federal courts would have to interpret statutes that involve administrative agencies just like statutes that do not. That post-*Chevron* approach would also change the operation of bureaucratic institutions, eliminating Scalia's flexible policy making in favor of static statutory meanings and judicial precedents, which would endure until relatively improbable legislative or adjudicative changes happen.[494] Statutory requirements throughout administrative law would become less flexible, less expert, and less politically accountable.

Overturning an iconic decision like *Chevron* also would confirm new vulnerabilities of established legal precedents outside the context of *Roe v. Wade*, affirmative action, and other hot-button issues. Some cynical observers might expect courts to regularly overrule bedrock precedents for political reasons.[495] Yet, most lawyers expect strong justifications for doctrinal reversals, and those standards are what law itself and legal precedents are supposed to mean.[496] No legal system can "retain [its] necessary stability" if foundational judicial decisions are politically up for grabs.[497] Nor can such a system remain credible for a professional community. Eliminating *Chevron* deference would

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[492] At least conservative judges during the early twentieth century were resisting pre–New Deal policies when such legislation still felt "new." Modern conservatives use similar arguments to unhorse New Deal governmental structures that are old and were established before anti-*Chevron* critics were born. *See* Metzger, *supra* note 2, at 4; Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1328 (2019).

[493] *See supra* notes 114-17 and accompanying text (discussing *Chevron*'s interpretation of "source"); *supra* notes 210-19 and accompanying text (discussing interpretations of terms "public health" and "safety"); *supra* notes 229-35 and accompanying text (discussing interpretations of word "student"); *supra* notes 369-71 and accompanying text (discussing interpretations of term "unfair methods of competition").

[494] *See supra* Part II (detailing the history and impact of *Chevron*).

[495] *Cf.* Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) ("Just last month, . . . [Justice Breyer] concluded: 'Today's decision can only cause one to wonder which cases the Court will overrule next.' Well, that didn't take long. Now one may wonder yet again." (citation omitted) (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting))).

[496] The Heritage Foundation, *2019 Bradley Symposium: The State of the Constitution*, YOUTUBE (May 8, 2019), https://www.youtube.com/watch?v=uhb6apfDFD4 (statement of Paul Clement).

[497] *Franchise Tax Bd.*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

send a dangerous signal about the authority of constitutional precedents, threatening a broader range of cases than most lawyers would accept. If long-standing and conventional precedents like *Chevron* can be precipitously reversed, then one must truly wonder "which cases the Court will overrule next," with corresponding skepticism that anything could qualify as binding doctrine or constitutional law.[498]

The institutional harms of overruling *Chevron* are not limited to judicial decisions' limited credibility and effectiveness. An anti-*Chevron* approach would also shift power away from future Presidents, requiring adherence to past judicial and bureaucratic interpretations that have not restricted other modern Presidents.[499] Nullifying administrative deference would invert the Reagan-era logic, lowering the significance of presidential elections, increasing the "dead hand" influence of past administrations, and preventing dynamic policy choices within the realm of statutory ambiguity. It would also hurt Congress, which has spent decades creating administrative agencies with interpretive authority outside the judicial branch.[500] Overturning *Chevron* would weaken existing administrative historical institutions, while removing future legislators' power to design similar entities to confront new public needs. Generations of Americans have accepted agencies with interpretive authority as a tool for implementing diverse visions of expertise, political accountability, and the public good. To categorically reject *Chevron* would invalidate all of those governmental mechanisms—past, present, and future. Even though anti-*Chevron* critics might characterize radical change as salutary or beneficial, efforts to destroy administrative deference have failed in Congress for almost fifty years.[501] Most theories of democratic government suggest that drastic anti-administrativism should not prevail until it can win national political contests, maybe more than once.[502]

The practical implications of overruling *Chevron* are uncertain and potentially large. One likelihood is a substantive shift to the right, incorporating the kind of pro-business deregulatory sentiments that have united Reaganites, Trumpists, and other conservatives for decades.[503] Conservative judges might use new interpretive authority to implement their own versions of bubble rules, increasing flexibility and autonomy for private business and corporate power.[504] Yet judges who are generally anti-administrativist might also grant deference to agencies and to the President—as sometimes they have—in cases about immigration, civil rights, national security, or tariff decisions, at least when

[498] *Id*.

[499] *See supra* Part II (detailing the history and impact of *Chevron*).

[500] *See* Green, Chevron *Debates*, *supra* note 4, at 681-94 (collecting examples of administrative deference); Manning, *supra* note 23, at 467-68.

[501] *See supra* Sections III.A.3, III.B.3.

[502] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 3-33 (1991).

[503] *See* MAYER, *supra* note 175, at 3-33.

[504] *See supra* Section II.A (analyzing impact of conservative judges and justices).

desirable conservative goals are at stake.[505] Without further elaboration, it is clear that overruling *Chevron* could transform institutions that implement administrative law, judicial precedents that underlie that administrative system, and substantive norms in diverse regulatory contexts.

The *Chevron* regime has consistently confirmed that elections have consequences for everyone across the political spectrum.[506] That is how Reagan's technocratic bureaucracy, cost-benefit social science, and political muscle achieved deregulation through appointed bureaucratic officials.[507] By contrast, limiting administrative government through constitutional law is dangerous—like using a meat cleaver for surgery or an axe handle to play pool. Interpretations of constitutional structure are supposedly built to last, existing separate from changeable facts and values that are not constitutional in nature. Administrative governance is almost entirely the opposite, dominated by practical and dynamic circumstances that are contested and resolved by each generation through the political mechanisms of controversy and compromise.

Given those historical and institutional realities, modern efforts to declare *Chevron* unconstitutional seem exceedingly rigid and imprecise.[508] Nothing can turn the clock back to the New Deal or the Constitution's ratification.[509] When new conservatives draw analogies between modern circumstances and such a distant past, the temporal gap sidelines and ignores present-day Americans' views about safety, policy, liberty, and government. That is not a necessary implication from the Constitution's text, history, or structure, nor is it a satisfactory way to compose a government. If politicians and the public believe that the federal government is large or oppressive, then Congress, the President, and agencies should make pertinent changes. By contrast, if constitutional law is wrenched too far and too quickly in the service of Trump-era conservatism, the results could decimate federal institutions and displace American democracy, while also undermining the credibility of constitutional decision-making itself.[510]

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[505] *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., concurring in part and dissenting in part) (criticizing the majority for "question[ing] the sincerity of the agency's otherwise adequate rationale"); Trump v. Hawaii, 138 S. Ct. 2392, 2415 (2018) (Roberts, C.J.) (upholding immigration restrictions on Muslim-majority countries against any challenge to the Administration's motives).

[506] *See* Fix & Eads, *supra* note 72, at 318.

[507] *See* SUNSTEIN, COST-BENEFIT REVOLUTION, *supra* note 152, at 3-21, 94-95, 210-11.

[508] Green, Chevron *Debates*, *supra* note 4, at 694-732 (criticizing constitutional arguments against *Chevron* in extensive detail).

[509] *Cf.* HAMBURGER, *supra* note 273, at 1-31 (citing even older English practice).

[510] Even if constitutional objections were substantively solid, this Article would interpret the triumph of *Chevron*'s radical critics as a regrettable necessity. However, constitutional objections to administrative deference are at best controversial, *see* Green, Chevron *Debates*, *supra* note 4, at 676-732, and invalidating *Chevron* deference on that basis would be an extraordinary mistake.

One of this Article's goals was to suggest that modern conservatives can reject constitutional attacks on *Chevron* without having to endorse big government, broad regulations, or living constitutionalism. Scalia and his generation proved that much. Correspondingly, liberals must realize that modern fights about *Chevron* and the administrative state involve deeper issues than particular policies and desirable outcomes. Such disputes could also produce a transformative deconstruction of American government and constitutional law.