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Richard J. Pierce Jr

George Washington University Law School, rpierce@law.gwu.edu

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Abstract

In this contribution to the annual administrative law symposium sponsored by Duke Law Journal, Professor Pierce explains why he has changed his position and is now urging the Supreme Court to replace the *Chevron* test with the *Skidmore* test. He supported the *Chevron* test for decades because it gives politically accountable agency heads, rather than politically unaccountable judges, the power to make policy decisions and because it increases the number of federal statutes that have the same meaning in all parts of the country.

Professor Pierce now believes that the country can no longer afford the cost of the *Chevron* test. In the conditions of extreme political polarity that now exist in the U.S., the *Chevron* test empowers each president to change the most important policies of the federal government every time that an election changes the party that controls the executive branch. As a result, citizens, corporations and prospective investors cannot make wise decisions based on their expectations of future conditions.

The multi-factor *Skidmore* test authorizes courts to uphold or reject agency policy decisions depending on the quality of the data and analysis the agency provides to support each decision. If a court upholds a policy decision through application of the *Skidmore* test, the policy remains in effect unless and until the agency can provide high quality data and analysis to support a change in policy.

The Combination of *Chevron* and Political Polarity Will Have Awful Effects

Richard J. Pierce, Jr.

In 1984, the Court issued its famous opinion in *Chevron v. NRDC*. The Court announced a new test applicable to agency interpretations of agency-administered statutes:

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

interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹

The Supreme Court instructed reviewing courts to reject an agency interpretation only if it conflicts with the clear meaning of a statute and to uphold the agency interpretation if it is a permissible interpretation of an ambiguous statute. Scholars and reviewing courts interpreted the Court's unanimous opinion as an instruction to lower courts to replace the multi-factor test that the Court had announced in *Skidmore v. Swift & Co.* with the simple, easy to satisfy *Chevron* test. Under *Skidmore*, reviewing courts were required to consider the quality of an agency's reasoning and the consistency of its interpretations in the process of deciding whether to uphold an agency interpretation:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.²

Chevron immediately attracted the attention of scholars. Some praised it, while others decried it. *Chevron* has become one of the most frequently cited and intensely debated opinions in history. By 2017, it had been cited in over 15,000 judicial decisions and 17,000 books and law review articles.³

The Advantages of *Chevron*

¹ 467 U.S. 837, 842-43 (1984).

² 323 U.S. 134, 140 (1944).

³ Christopher Walker & Kent Barnett, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 2 (2017).

I was one of the most enthusiastic supporters of *Chevron* for decades.⁴ I was greatly influenced by the reasons the Court gave in support of its new more deferential approach to judicial review of agency actions. Reviewing courts have always conferred considerable deference on agencies, but the prior tests were based primarily on comparative expertise, e.g., the Commissioners of the Nuclear Regulatory Commission, who understand nuclear reactors and attempt to make sense of the Atomic Energy Act on a daily basis, are in a better position to adopt a sensible interpretation of the statute they administer than are generalist judges, who know nothing about nuclear reactors and might have occasion to review an agency interpretation of the Atomic Energy Act once every few years. Given that basis for deference, the traditional tests include a reference to the quality of the data and analysis that the agency relied on as the basis for its interpretation. Thus, for instance, the *Skidmore* test instructs a reviewing court to consider “the thoroughness evident in [the agency’s] consideration, and the validity of its reasoning.”

Chevron was the first opinion in which the Court anchored judicial deference to agency policy decisions in constitutional allocations of decision-making power and the basic principles that underlie our constitutional democracy. The Court began by recognizing that, when Congress confers power on an agency in a statute and gives an agency clear instructions with respect to the meaning of the statute, it is the Court’s job to enforce the will of Congress and to keep the agency from straying outside the boundaries Congress created.⁵ Conversely, when Congress confers power on an agency in a statute and uses language that can bear more than one meaning, Congress has implicitly delegated the power to interpret the ambiguous statutory language to some other institution—either the agency or a reviewing

⁴ E.g., Richard Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988).

⁵ 467 U.S. at 842.

court.⁶ By interpreting the ambiguous language of the statute, that institution necessarily is making a policy decision on behalf of the government that Congress did not make.⁷

The Court found it easy to choose between courts and agencies in the context of policymaking.⁸ Judges are the least politically accountable government officials. If we dislike a policy decision made by a judge, we cannot change that decision except through the arduous process of persuading Congress to overturn the policy decision through legislative action. Because federal judges have life tenure and can only be removed through the impeachment process, they are more insulated from the views of the public than any other government official. That gives them the freedom to make policy decisions that reflect their personal preferences even if those decisions conflict with the views of the public. The multi-factor *Skidmore* test is malleable enough to allow judges to indulge their understandable tendency to make decisions that reflect their personal policy preferences. The simple two-step *Chevron* test reduced the discretion of judges to substitute their policy preferences for those of an agency.

By contrast, agency heads are accountable to the public through their relationship with the elected President. If we dislike a policy decision made by an agency, we can express our displeasure by voting against the president (or his political party) in the next election. It follows that agencies have a political incentive to make policy decisions that reflect the views of the public. Moreover, if agencies make policy decisions that the public dislikes, the next president can change those policies so that they are consistent with the views of the public.

My enthusiasm for *Chevron* increased when I read the article in which Peter Strauss linked *Chevron* to the geographic scope of federal statutes.⁹ The Strauss argument was simple and persuasive. It is highly

⁶ Id. at 843-44, 864.

⁷ The Court used policy decisions as a synonym for decisions to adopt an interpretation of an ambiguous statute in many places in its opinion. See, e.g., id at 843-44, 864.

⁸ Id. at 865-66.

⁹ Peter Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Actions, 87 Col. L. Rev. 1093 (1987).

desirable to have a legal regime in which federal statutes have the same meaning everywhere. By conferring more interpretative deference on agencies, *Chevron* increases the likelihood that a federal statute will be given the same meaning throughout the country. By contrast, the less deferential multi-factor *Skidmore* test conferred de facto discretion on judges to adopt different interpretations of statutes. Since the judiciary is organized by geographic circuits, and the Supreme Court lacks the resources required to resolve all conflicts among the circuits, the *Skidmore* test often produces a legal regime in which the law governing some important area of federal responsibility varies depending on the circuit in which each citizen lives.

I also applauded when the Supreme Court issued its decision in *NCTA v. Brand X*.¹⁰ The Court held that *stare decisis* does not preclude an agency from adopting a different permissible interpretation of an ambiguous statute after a court has upheld an inconsistent agency interpretation. The *Brand X* holding follows logically from the test the Court announced in *Chevron*. When a court upholds an agency interpretation of a statute through application of the *Chevron* test, it is necessarily holding only that the statute is ambiguous and that the agency interpretation is permissible. Both of those holdings are entirely consistent with a holding that the new agency interpretation of the ambiguous statute is also permissible even if it is inconsistent with the prior agency interpretation that the court upheld.

Recent studies have found that the *Chevron* test still has the political accountability advantages and national uniformity advantages that it had when the Court issued the opinion.¹¹ The political accountability advantages may actually have increased as a result of the series of opinions that the Court has issued since *Chevron* that increase the degree of control that the president can exercise over agency

¹⁰ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). I argued in support of the approach the Court took in *Brand X* in Richard Pierce, *Reconciling Chevron and Stare Decisis*, 85 *Geo. L. J.* 2225 (1988).

¹¹ Christopher Walker, Kent Barnett & Christina Boyd, *Administrative Law: Political Dynamics*, 71 *Vand. L. Rev.* 1463 (2018).

decision makers.¹² Yet, I have changed my opinion about the desirability of the *Chevron* test over the last few years. In the balance of this article I will explain why I have decided that we can no longer afford to bear the costs of the *Chevron* test.

***Chevron* and Political Polarity**

Political polarity has increased dramatically over the last twenty years. The election and impeachment of Donald Trump are symptoms of that political polarity. There is no reason to believe that the trend toward increased political polarity will stop any time in the foreseeable future. *Chevron* deference and high political polarity are incompatible. The Court should overrule *Chevron* and replace the simple *Chevron* test with the multi-factor *Skidmore* test.

Before I go any further I need to be clear that I am referring to the original version of the *Chevron* test. Over the decades in which the Court has applied the *Chevron* test, it has qualified the test in many ways.¹³ The test has now been qualified in so many ways that the Chief Justice recently suggested that there is “very little distance” between the *Chevron* test and traditional tests like the *Skidmore* test.¹⁴ My concerns about the adverse effects of continued application of the *Chevron* test are based on my belief that circuit courts are continuing to apply the test in roughly the same manner and with about the same results as they did when the Court first issued the *Chevron* opinion. I have two types of evidence to support that belief.

¹² See, e.g., *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) (holding that an officer of the United States cannot be insulated from presidential control by two or more layers of statutory “for cause” limits on the president’s power to remove the officer).

¹³ Scholars and courts consider the *Chevron* test and the test the Court announced for application to agency interpretations of agency rules in *Auer v. Robbins*, 519 U.S. 452 (1997), to be analogous. The Court has applied identical limits to each test over the years. See Kristin Hickman and Mark Thomson, *The Chevronization of Auer*, *Minnesota L. Rev. Headnotes* (Jan. 2019); Christopher Walker, *Attacking Auer and Chevron: A Literature Review*, 16 *Geo. J. L. & Pub. Pol.* 103 (2018). The Court described the limits it has applied on the *Auer* test in the majority opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410 (2019).

¹⁴ 139 S. Ct. at 2424 (concurring opinion of Chief Justice Roberts).

First, in by far the most comprehensive study of circuit court applications of *Chevron*, Kent Barnett and Chris Walker found that circuit courts uphold agency statutory interpretations twenty per cent more often when they apply *Chevron* than when they apply the traditional *Skidmore* test.¹⁵ Second, that finding is consistent with my analysis of some of the most important recent cases. I will illustrate my point by discussing the D.C. Circuit’s 2019 opinion in *Mozilla Corp. v. FCC*¹⁶—one of many opinions that illustrate the incompatibility between *Chevron* and political polarity.

In *Mozilla*, the D.C. Circuit had to decide whether to uphold or reject the FCC’s interpretation of the Communications Act of 1934. The FCC had interpreted the statute to exempt the internet from regulation.¹⁷ The over one hundred pages the court devoted to discussion of that question demonstrates the challenging nature of the issue before the court. The interpretative question was particularly difficult to resolve for two reasons. First, the court was required to decide whether internet service providers are “common carriers,” as that term is used in the Communications Act of 1934,¹⁸ when Congress could not possibly have contemplated even the existence of the internet when it enacted the statute eighty five years ago. Second, the FCC had been remarkably inconsistent with respect to this interpretative issue. It had resolved the issue four times over the prior fifteen years. On each occasion it reversed its prior interpretation.¹⁹

The court finally concluded that it had no choice but to uphold the FCC’s most recent interpretation notwithstanding the agency’s remarkable record of inconsistency with respect to both the interpretation and the agency’s reasoning in support of the interpretation.²⁰ The court concluded that it was bound to uphold the agency’s interpretation through application of the *Chevron* test, particularly because of the

¹⁵ Walker & Barnett, *supra*, note 3, at 28.

¹⁶ 940 F. 3d 1 (D.C. Cir. 2019).

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 17-18.

²⁰ *Id.* at 86.

Supreme Court's decision in *Brand X*.²¹ In that case, a circuit court held that a prior FCC interpretation of the same statute in the same context was arbitrary and capricious because the agency had previously adopted an inconsistent interpretation, a circuit court had upheld the prior inconsistent interpretation, and the FCC had then reversed its prior interpretation without providing adequate reasons.²² The Supreme Court reversed the circuit court and instructed it to apply *Chevron* on remand.²³ Not surprisingly, the circuit court upheld the FCC interpretation on remand notwithstanding its inconsistency with the FCC's prior interpretation.²⁴

The FCC's history of vacillation in this context and the decisions of the courts to uphold each of the FCC's inconsistent interpretations illustrate the likely effect of retaining the *Chevron* test in today's conditions of extreme and growing political polarity. The formal legal issue before the court in each of the cases in which it upheld the FCC's inconsistent interpretations of the Communications Act of 1834 was whether an internet service provider is a "common carrier" as Congress used that term in the Communications Act of 1934. In political parlance, the issue in each of those cases was whether the FCC should apply the principles of "net neutrality" to the internet. That is one of the hundreds of policy issues on which the two political parties are hopelessly divided. Democrats strongly support net neutrality, while Republicans oppose it with equal vigor. Not surprisingly, every time the White House changes hands, the newly-elected president appoints FCC Commissioners who dutifully reverse the interpretation adopted by their predecessors of the opposing party and adopt a new interpretation that reflects the policy preference of the party that elected the new president.

Whether net neutrality is a good or bad policy, we have chosen the worst possible policy in this context. Net neutrality discourages investment by internet service providers by subjecting them to strict

²¹ 545 U.S. 967.

²² *Brand X Internet Services v. FCC*, 345 F. 3d 1120 (9th Cir. 2003).

²³ 545 U.S. at 1003.

²⁴ *Brand X Internet Services v. FCC*, 435 F. 3d 1053 (9th Cir. 2006).

regulation, but it encourages investment by content providers by assuring them of equal access to the internet. Conversely, deregulation of the internet discourages investment by content providers because they cannot be confident that they will have access to the internet on fair and impartial terms, but it encourages investment by internet service providers by assuring them that they will have the freedom to use the assets in which they invest in ways that maximize the return on their investments.

Our policy of flip flopping between net neutrality and deregulation of internet service providers every time the White House changes hands discourages investment by both internet service providers and content providers. Policy uncertainty discourages investment.²⁵ Prospective investors hate uncertainty. They discount any potential return on investment significantly if they foresee a substantial risk that they will not be able to earn an adequate return on their investment because of the risk that the government will change its policies in ways that reduce or eliminate their return on that investment.²⁶ In the context of the internet, prospective investors must decide whether to make an investment in conditions in which they can be sure that the government policies that have a material effect on the return that they earn on their investments will change completely every time the White House changes hands. That is a policy environment that is far worse than either consistent application of the principles of net neutrality or consistent rejection of those principles.

The policy environment created by the combination of *Chevron* and political polarity will minimize the total amount of capital that is invested in the internet. I am confident that the internet can perform in a socially beneficial manner under either the policies preferred by the Democratic Party or the policies preferred by the Republican Party. I am also confident that the internet will perform poorly in the

²⁵ Hong Bo & Robert Lensin, Is the Investment-Uncertainty Relationship Nonlinear? 72 *Economica* 307 (2005).

²⁶ Mark Koetse, Henri de Groot & Raymond Florax, A Meta-Analysis of the Investment-Uncertainty Relationship, 76 *Southern Econ. J.* 283 (2009).

constantly changing policy environment that has been created by the combination of extreme political polarity and *Chevron*.

The powerful beneficial effects of policy certainty on investment were illustrated well by the changing position of electric utilities in the context of the EPA's decision to adopt a limit on emissions of mercury that cost utilities billions of dollars.²⁷ The utilities joined coal producers and coal producing states in opposing the limits at EPA and initially in litigation in both a circuit court²⁸ and the Supreme Court.²⁹ When the Supreme Court reversed the rule and remanded the case to the D.C. Circuit to decide whether to vacate the rule, however, the court refused to vacate the rule for a good reason.³⁰ All but one of the utilities had changed sides and urged the court to allow EPA to keep the emissions limit in effect to protect the investments the utilities had made in the pollution control technology that they had purchased and installed to comply with the emissions limit.

I was not surprised by that change of positions. I have attended many conferences in which utility executives said that, while they oppose the issuance of a strict limit on mercury emissions, they would much prefer issuance of such a limit to continued uncertainty. They explained that they did not know which of two alternative sets of major investments in generating technology they should make until they knew what EPA was going to do with respect to emissions of mercury. As a result, they were deferring many important investment decisions. The decision to defer important investments had the effect of creating a high risk that the utilities would be unable to meet the needs of their customers at a reasonable cost under either an EPA decision to adopt a strict limit on emissions of mercury or an EPA decision not to adopt such a limit.

²⁷ The Supreme Court discussed the process of issuing the limit and the ensuing litigation in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *White Stallion Energy Center v. EPA*, 2015 WL 11051103 (D.C. Cir. 2015) (unreported).

The same analysis applies in each of the hundreds of contexts in which Democrats and Republicans have opposing and uncompromising preferences with respect to policy issues on which investment decisions depend. Three other contexts—healthcare, immigration and climate change-- help to illustrate the scope and severity of the problems created by the combination of extreme political polarity and *Chevron*.

Democrats love Obamacare, while Republicans hate Obamacare. The Supreme Court is about to decide the fourth case in which an issue of statutory interpretation will determine the fate of Obamacare.³¹ I was delighted when the five-Justice majority that originally upheld the validity of Obamacare applied the major question exception to the *Chevron* doctrine.³² I hope that the Court continues to take that approach.

The nation can survive either a decision that upholds Obamacare or a decision that forces Congress to adopt an alternative to Obamacare. I am not at all sure that the nation can survive a decision that places Obamacare in the same situation as net neutrality—it is legal and in effect when a Democrat is President but it is illegal and void when a Republican is President. It is easy to predict that such a policy environment would minimize total investment in healthcare at great cost to the nation. It also would make it impossible for individuals to make wise decisions about the actions that they should take to be confident that they will have access to adequate healthcare.

Similarly, Democrats love DACA and DAPA, the two programs that President Obama adopted to protect “dreamers” and their families from the risk of deportation.³³ The Trump Administration has attempted to rescind DACA and DAPA, but states led by Democrat Governors are challenging that decision.³⁴ The Trump Administration argues that the challenge to the validity of that rescission decision is barred by a provision

³¹ See grant of writ of certiorari in *Texas v. California*, 140 S.Ct. 1262 (2020).

³² *King v. Burwell*, 135 S.Ct. 2480, 2488-89 (2015).

³³ The Fifth Circuit held that DACA and DAPA are illegal in *Texas v. U.S.*, 809 F. 3d 134 (5th Cir. 2015). An equally divided Supreme Court upheld the Fifth Circuit decision at 136 S.Ct. 2271 (2016).

³⁴ See *Regents of the University of California v. Department of Homeland Security*, 908 F. 3d 476 (9th Cir. 2018), cert. granted, 139 S. Ct. 2779 (2019).

of the Immigration and Naturalization Act.³⁵ The Supreme Court has a case before it this Term in which it will decide whether the Democrats' interpretation of that provision or the Trump Administration's contrary interpretation of the statute is valid.³⁶

However the Court decides that case, I hope that it does not rely on *Chevron* as the basis for a decision in which it holds that both the Trump Administration's interpretation and the Democrats' interpretation are permissible interpretations of the statute. It would make no sense to say that dreamers and their families are protected from deportation during a Democratic Administration but that they can be deported at any time during a Republican Administration. That kind of radical policy vacillation would make it impossible for Dreamers, their families and their employers to make decisions that are likely to further their interests in the future. Thus, for instance, the many hospitals that rely heavily on Dreamers to provide healthcare services during the pandemic³⁷ would have no way of knowing whether they will continue to have access to that valuable pool of talent.

Climate change is another important context in which the policy preferences of Republicans and Democrats differ completely. The Obama Administration issued an aggressive plan to mitigate anthropogenic climate change called the Clean Power Plan (CPP).³⁸ The CPP has never been the subject of any court opinion. The Supreme Court divided in the process of staying it without opinion,³⁹ and the Trump Administration withdrew it before any court had an opportunity to review it on the merits.⁴⁰ The

³⁵ See oral argument of the Solicitor General of the United States in Supreme Court Docket No. 18-587 (Nov. 12, 2019).

³⁶ U.S. v. Regents of the University of California, Docket No. 18-587.

³⁷ See Maria Sacchetti, Dreamers Serve on the Coronavirus Front Lines While Awaiting a Decision on Their Own Futures, *Washington Post* (Apr. 11, 2020).

³⁸ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,667 (Oct. 23, 2015).

³⁹ *North Dakota v. EPA*, No. 15A793 (Feb. 9, 2016).

⁴⁰ Repeal of the Clean Power Plan, 84 Fed. Reg. 32520 (July 8, 2019).

legality of the CPP is certain to come before the courts again, however, the next time a Democrat is elected President.

Emily Hammond and I wrote an article at a time when we thought that a court decision with respect to the legality of the CPP was imminent.⁴¹ We identified a difficult issue of statutory interpretation that a reviewing court must address in the process of reviewing the CPP.⁴² We expressed our support for a decision upholding the CPP, but we also urged a reviewing court not to apply the *Chevron* test in the process of reviewing the agency's interpretation of the statute.⁴³ We expressed our belief that a decision that upheld the legality of the CPP, but that did do so in a way that invited any Republican President to reject its validity, would be even worse than a decision in which a court held that the CPP and the statutory interpretation on which it is based are invalid.⁴⁴

A decision upholding the CPP through application of the *Chevron* test would have had the effect of discouraging electric utilities from making *any* of the hundreds of billions of dollars of investments in generating units that are required to provide adequate electricity at a reasonable cost. The expectation that the CPP will be in effect in the future would channel investment in one direction while the expectation that it will not be in effect in the future would channel investment in a different direction. Uncertainty about whether the CPP will be in effect in the future discourages investment of all types.

I have reached the conclusion that we can no longer afford *Chevron* with regret. The *Chevron* test continues to have two important beneficial effects. It increases political accountability for policy decisions, and it increases the number of federal statutes that have the same meaning throughout the country.⁴⁵ However, when *Chevron* is combined with extreme political polarity it has an effect that is even worse

⁴¹Emily Hammond & Richard Pierce, *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 *Geo. Wash. J. En. & Env. L.* 1 (2016).

⁴² *Id.* at 4-5.

⁴³ *Id.* at 6-7.

⁴⁴ *Id.* at 6-7.

⁴⁵ See Walker & Barnett, *supra*. n. 3; Walker, Barnett & Boyd, *supra.*, n. 11.

than either adoption of bad policies or uncertainty with respect to our most fundamental national policies. The combination of *Chevron* and political polarity makes it certain that government policies in many important contexts will change dramatically every four to eight years. That effect is intolerable. It makes it impossible for individuals, corporations, and prospective investors to make wise decisions.

The *Skidmore* Test Is Superior to the *Chevron* Test

The multi-factor *Skidmore* test⁴⁶ is a much better fit with an environment of extreme political polarity for two reasons. First, the test refers to an agency interpretation's "consistency with earlier and later pronouncements" as a factor a court should consider in deciding whether to uphold an agency interpretation of an ambiguous statute.⁴⁷ The *Skidmore* test places a high value on policy continuity. In many contexts, continuity is critically important to wise decision making. Individuals, corporations and prospective investors are often better off having to find ways of coping with a bad policy than trying to make wise decisions in an environment in which they can predict reliably only that government policy will change dramatically every four to eight years.

Second, by referring to "the thoroughness evident in its consideration [and] the validity of its reasoning"⁴⁸ the *Skidmore* test places a high value on the quality of an agency's reasoning in support of its interpretation of an ambiguous statute. There are many situations in which an agency can argue successfully that the language of a statute can support two or more interpretations, but in which the agency can support only one of those interpretations with data and analysis. The *Skidmore* test tells courts to focus on the quality of the data and analysis that an agency relies on as the basis for its interpretation and to uphold an agency interpretation only if it is supported by reliable data and analysis.

⁴⁶ *Skidmore v. Swift & Co.*, 323 U.S. at 140.

⁴⁷ *Id.* at 140.

⁴⁸ *Id.* at 140.

The *Skidmore* test combines the values of reasoned decision making and policy continuity to create a policy environment in which individuals, corporations and prospective investors can make wise decisions. If a court upholds an agency interpretation of an ambiguous statute based on its conclusion that the agency has supported its interpretation with adequate data and analysis, that court decision qualifies as *stare decisis*. A policy adopted by the agency and upheld by a court through application of the *Skidmore* test can only be changed if the agency uses data and analysis to persuade a reviewing court to uphold a change in policy.

That can happen either as a result of changes in the factual context to which a policy applies or changes in our understanding of that context. Thus, for instance, EPA’s decision to interpret the term “pollutant” in the Clean Air Act not to include carbon dioxide was supportable until it became clear that emissions of carbon dioxide are causing catastrophic changes in the earth’s climate.⁴⁹ The Supreme Court has endorsed the healthy way in which the *Skidmore* test blends the values of continuity and reasoned decision making in a long line of opinions.⁵⁰

Addressing the Deference Debate at Its Source

The lively debate about the propriety of conferring a high degree of deference on agency interpretations of ambiguous statutes is only one of many debates that have occupied the attention of scholars, courts, and politicians in recent years. Similar debates about the legitimacy of the administrative state have focused on whether to reinvigorate the nondelegation doctrine⁵¹ and whether to make it more difficult

⁴⁹ In *Massachusetts v. EPA*, 549 U.S. 497(2007), the Court held that EPA was required to interpret “pollutant” to include carbon dioxide because of its adverse effects on climate change. *Id.* at 528-31.

⁵⁰ Thus, for instance, in *Encino Motorcars v. Navarro*, 136 S.Ct. 2117, 2120 (2016), and in *FCC v. Fox Televisions Stations*, 556 U.S. 502, 515 (2009), the Court held that an agency decision to change its interpretation of a statute without providing an adequate explanation for the change is arbitrary and capricious. Courts could incorporate this requirement in applying step two of the *Chevron* test, but they rarely do so. See Christopher Walker, *Chevron Step Two’s Domain*, 93 *Notre Dame L. Rev.* 1441 (2018).

⁵¹ The Justices engaged in a lively debate about whether to reinvigorate the nondelegation doctrine in ____.

for agencies to change their policies by adding procedural hurdles to the rulemaking process or by requiring congressional ratification of agency rules.⁵² All of those controversies are rooted in concern that the president has too much power.

Conservative politicians, Justices and scholars spent the eight years of the Obama Administration criticizing President Obama's attempts to expand his power to regulate. Most progressives defended those exercises of presidential power until President Trump was elected. As they watched President Trump attempt to exercise unprecedented power to deregulate, progressives became the primary critics of presidential power. It has now become clear to everyone that presidential power has expanded dramatically in ways that give the president policy making discretion that is no longer subject to meaningful limits imposed by the other branches of government. As a result of that realization, scholars with widely varying ideological perspectives have joined to criticize the growing power of the president and to search for ways of limiting the exercise of that power.⁵³

Concern about the growing and increasingly unchecked power of the president has its roots in increased political polarity and in the legislative impotence that is spawned by political polarity. It is easy to see the relationships among political polarity, the growing power of the president, and legislative impotence by imagining that you are an advisor to a newly elected president in two different periods of time.

First, imagine that you are an advisor to a president who takes office in the 1960s. Your boss asks you how he can implement his policy agenda. Your answer would have focused primarily on the prospect of legislative action. In the 1960s it was realistic to expect that Congress would engage in the compromises required to enact a major piece of legislation with the votes of a bipartisan majority of the members of

⁵² The Center for the Study of the Administrative State sponsored a symposium to discuss the many congressional proposals to add procedures to the rulemaking process in Congress and the Administrative State: Delegation, Nondelegation and Undelegation (Feb. 22, 2019).

⁵³ See, e.g., Jerry Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers*, 35 *Yale J. on Reg.* 549 (2018) (criticizing both the Obama Administration and the Trump Administration for the excessive role that both presidents played in immigration and healthcare decision making).

both Houses of Congress. Thus, for instance, Richard Nixon was successful in implementing his environmental policy objectives by persuading large bi-partisan majorities of both Houses of Congress to enact the Clean Air Act and the statute that created the EPA.

Now imagine that you are an advisor to a president who is elected in 2020. You would have to begin by telling your boss that he has no realistic chance of persuading a bipartisan majority of the members of Congress to enact major legislation in any context. If he is lucky enough to hold office in some two-year period in which his party controls both the House and the Senate, he might be able to persuade Congress to enact one or two pieces of major legislation on straight party line votes. Thus, for instance, President Obama was able to get Congress to enact his signature healthcare legislation with no Republican votes and President Trump was able to persuade Congress to enact his signature tax cut Bill by relying entirely on Republican votes. If he is in the more common situation in which either the House or the Senate is controlled by the opposing party, the president has no realistic chance of persuading Congress to enact any major legislation.

In today's political environment you would have to advise your boss that a president has no choice but to rely on some combination of Executive Orders and agency actions to implement his policy agenda. Moreover, you would have to advise him that he will need to support those policy decisions as exercises of power that Congress delegated to the president or to agencies in statutes that were enacted thirty to eighty years ago. In most cases, the statutes were enacted to address problems that differ significantly from the problems that the nation faces today and in conditions that differ significantly from the conditions that exist today.

There is a broad consensus among scholars that we would be better off if we could return to a political environment in which a President could expect to be able to address major policy problems by working with Congress to craft bipartisan solutions that can be enacted in statutes. No one has yet identified ways

in which we can reverse the trend toward political polarity in the general public. However, we can change the methods we use to choose candidates for office and leaders of the House and Senate in ways that will reduce the adverse effects of political polarity on the ability of Congress to enact legislation.

We rely on party-based primaries as our most frequent method of choosing candidates for office. That method of choosing candidates maximizes the adverse effects of political polarity on the performance of Congress. Party-based primaries are low turn-out elections that favor candidates whose views lie at the ideological extremes of the range of views held by the members of their party.⁵⁴ The small group of voters who participate in party-based primaries consist disproportionately of highly partisan activists who support candidates with extreme views.⁵⁵

Reliance on party-based primaries also deters members of the House and Senate from engaging in the compromises that are essential in the process of persuading a bi-partisan majority to support a proposed statute. A large majority of the seats in the House and the Senate are “safe seats,” in the sense that the incumbent’s party is virtually certain to win all general elections for the foreseeable future.⁵⁶ Those seats are not “safe” in the context of a party-based primary, however.

The only realistic political risk that most members of the House and Senate face is the risk of losing a primary. For Republicans that risk comes mainly from the right. For Democrats the risk comes mainly from the left. Republicans who move toward the center to compromise on a Bill risk losing a primary to a candidate who is to their right. Democrats who move to the center to compromise on a Bill risk losing a primary to a candidate who is to their left. The only way that incumbents can protect themselves from being “primaried” out of office is to take extreme partisan positions and to avoid all compromises. Thus,

⁵⁴ Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Cal. L. Rev. 273, 284, 298-99 (2011). See generally, Elaine Karmack, *Primary Politics* (3d ed. 2018).

⁵⁵ See sources cited in note 54 supra.

⁵⁶ 2020 House Race Ratings, the Cook Political Report (Apr. 24, 2020); 2020 Senate Election Forecast Maps, 270toWin (June 1, 2020).

Democrat members have a powerful incentive to take positions on the far left and to avoid compromising on any issue, while Republican members have an incentive to take positions on the far right and to avoid compromising on any issue.

Members of the House and Senate must be willing to compromise in order to enact bi-partisan legislation. In today's conditions of extreme political polarity, it is impossible to put together a bi-partisan majority to enact a statute that has been created through the process of compromise. If we want to return to a political environment in which a bi-partisan coalition of members of Congress can enact, amend or repeal legislation, we must identify and implement an alternative to party-based primaries.

The two most promising alternatives are the peer-based systems that most democracies use to choose candidates for office and the bi-partisan primaries that some states are now using for that purpose.⁵⁷ Either of those alternatives is far more likely to produce candidates whose views are closer to the center of the range of views of the members of their party. Either will also produce members of the House and Senate who are far more willing to negotiate the compromises that are essential to successful enactment of statutes because they will not be in constant fear that they will be "primaried" out of office by more extreme and less compromising candidates.

We also use methods of choosing the leaders of the House and Senate that maximize the adverse effects of political polarity on the legislative process. The leaders of both Houses of Congress regularly refuse to allow the members to vote on legislation that is supported by a majority of members of the House or Senate and by a majority of the general public. They have no choice but to engage in that undemocratic pattern of conduct because they are elected by a majority of the members of their party.

⁵⁷ See sources cited in note 54, *supra*.

Thus, for instance, if Republicans control 51 Senate seats, 26 Republicans can successfully block a vote on a Bill that would be enacted by a vote of 74 to 26 if it was the subject of a floor vote. The Republican leader of the Senate knows that he would risk losing his leadership position if he angers a majority of the members of his party by allowing the Senate to vote to enact a statute that is opposed by a majority of Republican members of the Senate.

Similarly, if Democrats control 218 House seats, the Speaker of the House cannot allow a floor vote on a Bill that would be enacted by a vote of 325 to 110 if the 110 who oppose the Bill are members of the Democratic Party. The Democratic Speaker knows that she would risk losing her position of leadership if she angered a majority of the members of her party by allowing Congress to enact a statute that a majority of Democratic members of the House oppose. We can eliminate this undemocratic roadblock to legislation by requiring a two-thirds vote of each House of Congress to elect a leader of each. Such a leader would have an incentive to allow members to vote on any Bill that has the support of a majority of the members of the House and Senate and, presumptively, of the public

Some people will object to proposed changes of this type based on a claim that they are undemocratic. They will argue that all decisions should be made by majority vote in a democracy. That is a specious argument. It should be apparent to anyone who gives the question serious thought that our present methods of choosing candidates for office combined with our present methods of choosing the leaders of the House and the Senate produce undemocratic results. They allow a small minority of the members of each party to block the enactment of legislation that is supported by a large majority of the public.

Conclusion

I look forward to the day when we can reduce the level of controversy that surrounds the administrative state by returning to a political environment in which Congress is capable of enacting bi-partisan

legislation. Congress should be willing and able to enact statutes that empower agencies to implement solutions to the many serious problems that the nation confronts within judicially-enforceable boundaries. Until we are able to restore the capacity to legislate, courts must adopt and apply legal doctrines that produce acceptable results in an extremely polarized political environment. *Chevron* is not capable of producing acceptable results in today's political environment. The Court should replace the *Chevron* test with the *Skidmore* test.