WRITTEN STATEMENT OF ROBERT R. GASAWAY

Kirkland & Ellis LLP

REVIEWING INDEPENDENT AGENCY RULEMAKING

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SUBCOMMITTEE ON REGULATORY AFFAIRS & FEDERAL MANAGEMENT,

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Chairman Lankford, Ranking member Heitkamp, members of the Committee:

Thank you for the opportunity to discuss issues surrounding the position of independent agencies within the administrative state; in particular, these agencies' compliance with statutory requirements, their compliance with Executive Orders 12866 and 13563, and my suggestions for improvements.

Before delving into specifics, I begin with the observation that today's problems of the administrative state and rule of law are deeply rooted. They are rooted so deeply, in my view, that they can be resolved only through advances in constitutional understandings. An implication is that legislative proposals for addressing today's administrative–law discontents may be divided into two sets — ones aimed at reform (ameliorants that leave current understandings intact) and ones aimed at furthering an administrative–law reformation built on sturdier constitutional foundations. My prediction is that in time, perhaps a very long time, a liberal, rule–of–law–based reformation will occur and today's discontents will be dispelled.

INTRODUCTION AND SUMMARY OF ANALYSIS

My background and perspective are those of a practicing lawyer with 23 years of experience at Kirkland & Ellis LLP. (Naturally, these comments reflect my views, not those of my firm or its clients.) Before attending law school, I worked as a management consultant and financial planning specialist and studied intellectual history and political theory at the Yale Graduate School. Since beginning practice, I've been blessed with diverse experiences and successes in the United States Supreme Court, federal trial courts, and state legislatures, and other forums. Drawing on graduate–school training, I've contributed writings to scholarly publications and participated in conferences in China, Europe, and this country.

My takeaways from these experiences include the following:

- The related problems of deference and delegation are at root of today's administrative–law discontents, and it is much more difficult to solve these problems than to detect them. In particular, the *Chevron* doctrine is unconstitutional and must, eventually, be uprooted. That said,

Chevron has been a great success on its own terms and extreme care should be taken in uprooting it.

- Competent economic analysis is a useful aid to decisionmaking; hence, independent agencies, like executive agencies, should be required to perform it. That said, the former consensus as to how best to perform economic analyses has fractured, making more difficult reliance on economic analysis as an aid to judicial review.

- To the extent Congress intends to try to solve, as opposed to ameliorate, today's administrative-law discontents, it will need, very delicately, to repudiate *Chevron* and then couple that repudiation with additional enactments.

  - Congress should consider legislation that classifies administrative proceedings in conformity with constitutional categories, thus easing the way to improving the Supreme Court's non-delegation test.

  - Congress should consider changing its internal rules to grant legislative agenda-setting power to the President.

ANALYSIS

This Committee has before it a number of viewpoints and proposals going to the reform or reformation of the administrative state. This testimony offers my perspectives on these exceptionally complex problems.

I. Chevron Should Be Uprooted, But Care Should Be Taken in Uprooting It.

The Committee is familiar with the *Chevron* test, and the case for and against repudiating it. Because the *Chevron* debate informs practically every issue the Committee has under consideration, I begin by briefly summarizing, commenting on, and extending perspectives found in previous testimony.

The constitutional case against *Chevron* is straightforward. To the extent *Chevron* requires judicial "deference" to executive–branch legal interpretations, *Chevron* violates Article III and the *Marbury* principle that it is the province and duty of judges to say what the law is.[1] To the extent *Chevron* says Congress may delegate administrative authority that permits agencies to change the terms of the law itself, depending on which reasonable interpretation is administratively

adopted from time to time, the case violates the principle of the *Chadha* decision, which holds that the making, unmaking, and remaking of laws may occur only through Article I, section 7's constitutionally prescribed means.[2]

Put succinctly, either the law "changes" in the process of administrative interpretation or it doesn't. If not, then *Chevron* is a doctrine of judicial "deference" to the Executive's view of a fixed body of law, *Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984), in which case *Chevron* violates Article III and *Marbury*. On the other hand, if laws do "change" (within boundaries) in execution, then *Chevron* is a doctrine of implied legislative "delegation," *id.*, and it violates Article I, section 7. Whichever way you look at it, *Chevron* appears constitutionally insupportable. Add in that *Chevron* was implanted in law "heedless of the original design of the APA"[3] and that it appears *Chevron* misinterpreted the precedent on which it relied,[4] and the case against *Chevron* begins to appear overwhelming.

Here, let me pause and say that I'm convinced by the arguments just sketched. At the same time, I recognize that the Committee has received Professor Herz's testimony and other testimony defending *Chevron*'s constitutionality.[5] For me, Professor Herz's response to the Article III objection outlined above underscores *Chevron*'s infirmities.[6] And while, in discussing the "non—delegation" objection to *Chevron*, Professor Herz rightly notes that Justice Thomas's recently articulated non—delegation views have, as yet, found expressed support from "no other Supreme Court Justice, current or past,"[7] the important point is that those views are not directly relevant to *Chevron*'s constitutionality. Rather, the rejoinder to the legislative prong of the argument in favor of *Chevron* rests on the settled proposition, under *Chadha* and progeny, that there is "no provision in the Constitution" that authorizes the President or other officials "to enact, to amend, or to repeal statutes."[8] It is this principle, not Justice Thomas's recent non—delegation opinions, that undermines the "implied delegation" defense of *Chevron*.

That said, there are good reasons for taking greatest care in uprooting *Chevron*. For one thing, my impressionistic assessment is that *Chevron* has worked quite well as a curb on judicial activism in administrative—law cases — the core of *Chevron*'s original justification. For another, there are vexing problems of draftsmanship involved in overturning via legislation any sweeping, judicially—crafted review doctrine, much less one as deeply rooted as *Chevron*.[9]

Above all, there is the question, what follows? As noted, Justice Thomas's recent opinions are not directly relevant to whether *Chevron* can be squared with the Constitution. But those opinions are highly relevant to what would replace *Chevron* in the event it were uprooted.[10] I turn to such questions below, in Part III of this testimony.

II. Independent Agencies' Should Be Required to Perform Economic Analysis Along Lines of That Required by Executive Orders 12866 and 13563.

Three traditional approaches to judicial review of agency decisionmaking correspond to various sub—provisions of section 706 of the Administrative Procedure Act.[11] These approaches include review under *Chevron* and related doctrines to ensure compliance with statutory directives,[12] step—by—step review of the agency's reasoning,[13] and substantive review of overall agency results.[14] Questions of applying orders requiring economic analysis, such as Executive Orders 12866 and 13563, fall under this third type of review.

The advantages and drawbacks of requiring economic analysis in connection with regulatory decisionmaking have been debated extensively in the context of environmental regulation. In that context, Mr. Frank Ackerman and Professor Lisa Heinzerling have strongly resisted almost any consideration of cost—benefit analysis.[15] Among their more fundamental contentions are objections that "voting is different from buying" (hence, we should not judge policies based on a cost—benefit calculus that views people as individuals, as opposed to community members) and that cost—benefit analysis is necessarily subjective and non—transparent (because, in their view, it "relies on a byzantine array of approximations, simplifications, and counterfactual hypotheses").[16]

Opposing such views, Edward Warren and Gary Marchant have encouraged broad use of cost—benefit analysis in environmental and other regulatory contexts.[17] Messrs. Warren and Marchant emphasize the ancient and common—sensical roots of the idea that one should do more good than harm; that idea's embodiment in a variety of legal doctrines; and the failure, in their view, of "unfocused," "ineffectual" judicial review that looks "almost exclusively at agencies' decisionmaking processes" as opposed to "whether an agency had reached a principled end result." Messrs. Warren and Marchant maintain that cost—benefit analysis provides a sensible, flexible, omnipresent, "presumptive" baseline against which Congress can legislate.

I endorse requiring independent agencies to perform cost–benefit analysis, such as those required by 12866 and 13563. While mindful of the Ackerman/Heinzerling point of view,[18] it seems to me that more information is a good thing and that fears of harm from such a step are easily dispelled by the experience of the agencies already required to perform these analyses.

A more complicated question is the wisdom of reforms that would require agencies (independent or not) to employ economic analysis as a cornerstone of the rulemaking process and then subject agencies' compliance with economic-analysis requirements to judicial review. This question is complicated in part because the former consensus as to how economic analyses should be performed has significantly fractured,[19] and, as a result, agencies often manipulate economic analyses in ways that are difficult to detect and address on review. Still, it may make sense to pursue such reforms. If pursued, the best approaches are those that simplify and make transparent the relevant economic calculus by employing a regulatory budgeting approach, or, what is much the same, requiring agencies to couple the promulgation of new regulations with equivalent revisions to (or repeals of) old regulations so that overall compliance costs remain stable.[20] A good starting point for this type of reform is S. 1944, the RED ("Regulations Endanger Democracy") Tape Act of 2015, sponsored by Senator Sullivan.[21]

III. Any Repudiation of *Chevron* Should Be Delicately Executed and Coupled with Steps for Implementing or Encouraging Improvements in Constitutional Understandings, Administrative Doctrines, and Legislative Procedures.

Today's administrative-law doctrines cover a bewildering array of agencies engaging in a bewildering variety of activities. Told there are problems with agencies being faithful, regular, and transparent in carrying out their responsibilities, and that today's doctrines appear unequal to the task of bringing them to heel, lawyers incline toward one or more items on the familiar menu of reform possibilities. Some suggest breaking the problem into parts and crafting better rules for specific agencies, agency activities, or substantive areas of law. Others support broad-based, high-level, substantive rules (such as cost–benefit analysis) or procedural innovations (such as the REINS Act).

In my view, conventional regulatory–reform initiatives, if well framed, can help ameliorate, but they cannot definitely resolve, the problems bedeviling our administrative state. The debate over judicial deference to agency interpretations

of law, whether under *Chevron* or other doctrines, has been engaged continuously for decades. That debate has seen remarkable turnabouts, including Justice Scalia's repudiation of his unanimous opinion in *Auer* and his coming to the verge of repudiating the Court's unanimous *Chevron* opinion, which Justice Scalia had zealously championed for almost his full Supreme Court tenure.

As the Committee's questions adumbrate, such oscillations are in one sense inevitable. Foundational issues of administrative law in general, and questions concerning *Chevron* in particular, are often framed in terms of trade–offs between effectively constraining lower federal courts (which *Chevron* does well) and effectively constraining administrative agencies (which it does poorly). Views on the proper balancing of such trade—offs predictably vary, across time and person, together with assessments of the relative magnitude the two dangers. My approach seeks to break free from this cycle and minimize these trade–offs. It is built on a suite of proposed improvements in constitutional understandings, administrative doctrines, and congressional procedures.

Improved Constitutional Understandings. Contrary to what is sometimes thought, the Constitution's separation—of—powers principles are not a barrier for constraining the size of government. They are a means of improving government at any scale, by furthering both administrative efficiency and administrative integrity. Administrative law is at bottom constitutional law, and republican governmental accountability, not generalized ideas about republican liberty, is its organizing principle. In thinking about this sub-species of constitutional law, several points have sometimes been overlooked by lawyers.

First, administrative law is grounded in the Constitution's separation-of-governmental-powers principle and that principle is in turn embodied, not in plain constitutional text — as was done in the influential Massachusetts constitution of 1781 — but in the logical relationships between and among the Constitution's three Vesting Clauses. ("All legislative Powers herein granted shall be vested in a Congress of the United States …; "The executive Power shall be vested in a President of the United States of America"; The judicial Power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish.") The beginning of all administrative law wisdom is found in these relationships, and, apart from an understanding of the relationships, there can be no escaping the indeterminateness of what otherwise seem like "majestic" constitutional generalities.[22]

Second, for better or worse, the logical relationships between and among the Vesting Clauses — the foundations of administrative law — are in part European, as well as British, in origin.[23] Although one school of American jurisprudence harbors suspicions about European theorists and their American admirers, at least this one line of continental thought is, like it or not, essential to the logical derivation of administrative law.

Third, administrative law doctrines can in fact be elicited from the Constitution, just as doctrines governing relations between the courts and Congress (as declared in cases such as *Marbury v. Madison* and *Plaut v. Spendthrift Farms*) have been elicited from constitutional structure and logic, not solely from text.[24] Contrary to what administrative-law academics sometimes believe, there is no basis for fears that our Founders failed to provide for an administrative state.

Fourth, administrative law, including the law of judicial review of agency action, matters and matters greatly. It has been contended that agency win–loss records in court remain relatively unaffected by variations in standards of review.[25] I do not think that this is the case. But even if it were the case, it would remain true that the fidelity of administrative agencies to governing law is greatly affected by courts' framing of, and explanations for, the standards used in judicial review of their actions. As Professor Herz emphasizes, *Chevron* employs a "completely infelicitous phrase" when it asks reviewing courts to "determine if Congress had an intent on 'the precise question at issue.'"[26] This phraseology sometimes propels administrators into flights of *Chevron*ist post–modernism — that giddy, unjustifiable regulatory over-confidence rooted in the syllogism that says all language is ambiguous; law is written in language; hence all laws are ambiguous and under *Chevron* enlightened regulators may do as they please.

Finally, it is unfair for courts and lawyers to put all blame for today's discontents on Congress. It is emphatically true that "Administrative Law without Congress" cannot work.[27] But it is equally true, as former Senator James L. Buckley reminds us, that congressmen and Senators are human.[28] Exhortations for Congress to do a better job are always welcome, and in any event always present. But Congress can actually begin to do its job only with co-operation from the courts, in the form of doctrinal improvements, and only with cooperation from the executive, in the form of non–adversarial collaboration in carrying out legislative improvements of the type outlined below.

Improved Administrative Doctrines. Our inherited administrative regime — elegant, sophisticated, worthy in its way — is neither totally implausible nor

totally unworkable. Under current doctrine, courts review administrative decisions by performing a deferential double-checking of each aspect of an agency's decision-making. In an archetypal instance, a court will deferentially analyze an administrative action, not only for adherence to proper procedures, but also for proper fact-finding,[29] policy-selection,[30] legal interpretation,[31] and explanation of "choices made."[32] Such thorough but deferential review often produces unpredictable outcomes and bewildered lawyers.

A better alternative would call for independent judicial interpretation of applicable laws coupled with sliding-scale scrutiny of overall judgments according to the constitutional context in which the administrative action was taken. Under this approach, courts would make their own legal determinations without deference to an agency's reading of the law. But courts would largely decline to retrace the administrative assessments underlying the various aspects of applying the law to individual circumstances. Instead, courts would assess the lawfulness of overall administrative actions, just as appellate courts review overall jury verdicts. Crucially, the intensity of judicial scrutiny would vary from one administrative context to the next according to constitutionally grounded distinctions.

Notably, administrative-law scholars have intuited many of the principles supporting such a rule-of-law reformation. Scholars already employ the concept administrative constitutional law.[33] And they have emphasized the importance of agency accountability, fidelity to statutory directives, and regularity in implementing those directives. What's mainly missing is appreciation that administrative proceedings can be classified according to constitutional distinctions and that these classifications can be employed to improve doctrines like *Chevron* deference and the intelligible-principle test.

Improved Legislative Procedures. A resolution of today's discontents will almost certainly require some rearrangement of the practical workings of Congress. Again, "Administrative Law Without Congress" does not work.[34] But getting Congress back into the lawmaking business will require more than exhortations. I propose, respectfully, that Congress bind itself to taking legislative action (even if the action is an affirmative decision not to act) in certain administrative law contexts. For instance, Congress might give "fast-track" legislative preference — ensuring prompt up-or-down votes and limited opportunities for amendments — to agency-submitted proposals to modify rules governing exercises of discretion within an agency's existing jurisdiction to confer private rights or issue regulatory licenses. Likewise,

Congress might give "fast-track" preference to executive proposals for responding to Supreme Court decisions holding statutes unconstitutional on non-delegation grounds.[35]

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The challenges posed by today's administrative state are daunting. Any proposed ameliorants for administrative practices quickly confront the sheer scope, scale, diversity, and complexity of the substantive determinations that federal administrators make day in and day out in discharging their responsibilities. Improved administrative—law doctrines must work smoothly and without bias in agency Model T factories and agency Faberge Egg workshops. They must be robust enough to withstand challenges by those with personal, financial, and ideological commitments to skewing what is right and fair and achieving what is advantageous and unjust. They must be rigorously adhered to, even though issues of procedure will be seen as secondary in practically every context in which they arise.

These hearings make clear the difficulty and depth of our challenges. Moreover, if you believe, as I do, that administrative law should guide but not fetter administration, problems entailed by any attempt to improve a wide, deep, diverse, law-encrusted body of practice multiply to the point where one might might get discouraged. I appreciate the opportunity to offer encouragement for the Committee's efforts — and my thoughts about how today's challenges should be confronted and perhaps even overcome.

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

[2] *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

[3]*Examining Agency Use of Deference, Part II: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Management of the S. Comm. of Homeland Security & Governmental Affairs,* 114th Cong. 10 (Mar. 17, 2016) (prepared testimony of Charles J. Cooper); *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (noting that the Supreme Court has been "[h]eedless of the original design of the APA" in developing an "elaborate law of deference to agencies' interpretations of statutes and regulations"); *see also* Charles J. Cooper, *Confronting the Administrative State*, National Affairs (Fall 2015).

[4] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, forthcoming in Yale Law Journal, available at http://papers ssrn.com/sol3/papers.cfm?abstract_id=2649445.

[5] *Examining Agency Use of Deference, Part II: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Management of the S. Comm. of Homeland Security & Governmental Affairs,* 114th Cong. 4-5 (Mar. 17, 2016) (prepared testimony of Michael Herz).

[6] Professor Herz contends that under Chevron courts retain "primacy in *interpretation*" and that "the agency's views matter but are not dispositive and thus the judicial power has not been ceded to another branch." The rejoinder to those arguments are, first, that mere primacy (as opposed to interpretive exclusivity) is not enough for Article III purposes, and, in any event, "the agency's views" are in fact dispositive under *Chevron* in each and every case where they make a difference; namely, all *Chevron* Step—2 cases in which the agency adopts an interpretation that differs from the interpretation that the court would have adopted in the absence of *Chevron* deference.

[7] Although they may be finding support from other distinguished judges. *See Gutierrez–Brizuela v. Lynch*, No. 14—9585, 2015 WL 4436309 (10th Cir. Aug. 23, 2016) (Gorsuch, J , concurring) ("There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit 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 of the framers' design. Maybe the time has come to face the behemoth.")

[8] *Clinton v. City of New York*, 524 U.S. 417. 438 (1998).

[9] *Examining the Proper Role of Judicial Review: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Management of the S. Comm. of Homeland Security & Governmental Affairs,* 114th Cong. 6-7 (Apr. 28, 2015) (prepared testimony of Ronald M. Levin). *Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regulatory Reform and Antitrust Law of the H. Comm. of the Judiciary*, 114th Cong. 3 (May 17, 2016) (prepared testimony of Jeffrey Bossert Clark, Sr.) (explaining problems with saying that anti-*Chevron* legislation now under consideration "modifies" the scope of judicial review of agency action).

[10] *See Examining Agency Use of Deference, Part II: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Management of the S. Comm. of Homeland Security & Governmental Affairs*, 114th Cong. 3-9 (Mar. 17, 2016) (prepared testimony of Neomi Rao).

[11] *See generally* Edward W. Warren and Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 Ecology L.Q. 379, 395 n.92 (1993).

[12] 5 U.S.C. § 706(2)(D).

[13] *Id.* § 706(2)(C).

[14] *Id* § 706(2)(A).

[15] *See* Frank Ackerman and Lisa Heinzerling, *Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection*, 150 U. Pa. L. Rev. 1553 (2002).

[16] *Id*. at 1576.

[17] *See* Warren & Marchant, *supra* note 11, at 379 n.1 ("While this article is limited to the regulation of environmental and safety risks, the principle that regulation should do more good than harm good can appropriately be generalized to all regulatory contexts.").

[18] *See* Ackerman & Heizerling, *supra* note 15, at 1583 ("Nor is it useful to keep cost–benefit analysis around as a kind of regulatory tag–along, providing information that regulators may find interesting even if not decisive.").

[19] Note in this regard the bi–partisan array of luminaries, including Cass Sunstein, Robert Crandall, and Christopher DeMuth, who reviewed and commented on the Warren/Marchant article before publication. *See* Warren & Marchant, *supra* note xii, at 1 n.aa1.

[20] These approaches are simpler than standard cost–benefit analysis because they eliminate the need to quantify benefits. They are more transparent than standard cost–benefit analysis because on the cost side of the equation what matters most is the relative costs of one regulatory program compared to other programs and because the final decisions about regulatory priorities are made by human officials, not an economic calculus.

[21] Note that agencies might attempt to evade such requirements by employing regulatory means other than notice–and–comment rulemaking, such as agency adjudications and regulation through interpretive rules and informal guidance documents.

[22] *Fay v. New York*, 332 U.S. 261, 282 (1947) (Jackson, J.). If polled, I suspect a majority of administrative lawyers and professors would agree with Professor Herz's doubts about the Article III arguments against *Chevron*'s constitutionality, not my embrace of those arguments. Part of the reason, I further suspect, is that I see definitive meaning grounded in constitutional logic where others perceive "majestic generalities."

[23] Justice Scalia repudiated his *Auer* opinion once he realized that he had overlooked Founding–era thinking rooted in Montesquieu. *See Decker v. Northwest Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J , concurring in part and dissenting in part); *see generally* John F. Manning, *Constitutional Structure and Judicial Defense to Agency Intrepretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); THE FEDERALIST No. 47, at 250-251 (Madison) (Carey & McClellan, eds., 2001) (quoting Montesquieu, "'There can be no liberty where the legislative

and executive powers are united in the same person, or body of magistrates, or, 'if the power of judging be not separated from the legislative and executive powers.'")]

[24] *Marbury v. Madison*, *supra* note 1; *Plaut v. Spendthrift Farm, Inc.*, 511 U.S. 211 (1995); *see also* THE FEDERALIST Nos. 78, at 404-05 (Hamilton) (Carey & McClellan, eds., 2001); and *id.* at No. 81, at 419-20 (Hamilton).

[25] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. __ (2017) (forthcoming). In this study, the authors analyzed 1561 circuit-court decisions involving judicial review of agency interpretations of law handed down between 2003 through 2013. They found that agency interpretations were more likely to prevail under *Chevron* (77.3%) than *Skidmore* (56.0%) than *de novo* review (38 5%). In other words, deference doctrines greatly matter in the circuit courts, whereas an earlier study by Eskridge and Baer concludes that deference doctrines do not matter very much in the Supreme Court (76.2% / 73 5% / 66.0%). *See id.* at nn. 10 & 21 (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124–25 (2008)). Memorably, Barnett and Walker refer to "Chevron Supreme" and "Chevron Regular" to denote that the application of *Chevron* matters much more to outcomes in federal appellate courts than in the Supreme Court.

[26] Herz, *supra* note 5, at 10

[27] Michael S. Greve and Ashley C. Parrish, *Administrate Law without Congress: Of Rewrites, Shell Games, and Big Waivers*, 22 Geo. Mason L. Rev. 501 (2015) (discussing problems of administrative law doctrines that are based on the notion that Congress can be expected to police instances of overreach by Executive Branch agencies).

[28] JAMES L. BUCKLEY, SAVING CONGRESS FROM ITSELF: EMANCIPATING THE STATES AND EMPOWERING THEIR PEOPLE 48-50 (2014).

[29] *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

[30] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut Auto. Ins. Co.*, 463 U.S. 29 (1983).

[31] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)

[32] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut Auto. Ins. Co.*, 463 U.S. 29 (1983).

[33] Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 931–34 (2016).

[34] Greve and Parrish, *supra* note 28.

[35] For an extended discussion of a more far–reaching proposal along these lines, *see* WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT–AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016).