Testimony of Michael Herz

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Before the

United States Senate

Committee on Homeland Security and Governmental Affairs

Subcommittee on Regulatory Affairs and Federal Management

"Examining Agency Use of Deference, Part II"

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Chairman Lankford, Ranking Member Heitkamp, Members of the Subcommittee, it is an honor to appear before you today. My name is Michael Herz. I am the Arthur Kaplan Professor of Law at Yeshiva University's Cardozo School of Law. I have been teaching and writing about administrative law and related subjects for almost three decades. My published scholarship includes several articles on the topic of today's hearing, the so-called "*Chevron* doctrine." I am also a former chair of the ABA's Section of Administrative Law and Regulatory Practice and a Public Member of the Administrative Conference of the United States.

When the Supreme Court's decision in *Chevron U.S.A., Inc. v. NRDC*[1] was yet young, I wrote an article entitled *Deference Running Riot*.[2] The title borrows from Justice Cardozo's famous concurrence in the *Schechter Poultry* case, which was pretty much the last, and almost the first, time that Supreme Court held that a congressional statute was an unconstitutional delegation. Distinguishing the statute in question from others the Court had upheld, Justice Cardozo objected: "This is delegation running riot."[3] Congress had a constitutional responsibility to legislate, and here it had handed that authority over, lock stock and barrel, to the executive branch and members of the regulated industry.

Chevron contains the seeds of a similar handover of constitutionally assigned responsibility. Just as Congress is to legislate, so the courts are to interpret, apply and enforce Congress's decisions in the context of litigated disputes. That is both the constitutional arrangement and the directive of the Administrative Procedure Act.[4] Were a court simply to throw up its hands and say, "we find this statute confusing, so we leave it to the agency to interpret it," that would indeed be deference running riot. My concern in 1992 was that *Chevron* was being read to impose that sort of abdication of the essential judicial role. I argued for a measured understanding of *Chevron*. On this reading, the task of enforcing Congress's decisions belongs

[1] 467 U.S. 837 (1984).

[2] Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under* Chevron, 6 Admin. L.J. Am. U. 187 (1992).

[3] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[4] 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms oaf an agency action.").

emphatically to the courts, but the task of making policy where Congress has *not* made a decision belongs to agencies.

As things have turned out, my title was misplaced, a sort of sensationalist fear-mongering. Deference has not run riot. While the doctrine is messy and inconsistently applied, in fact there is nothing to fear about *Chevron*. In this testimony I will explain why. If Senate testimony had titles, mine would be "What *Chevron* Is Not." The following sections discuss various possible but unfounded objections to *Chevron*.

So, *Chevron* is not . . .

1. Judicial Abdication

One challenge in discussing *Chevron* is that the doctrine is somewhat contested. Of course, it is easy to repeat the two-step test; the *Chevron* formulation is almost nauseatingly familiar: in situations when the case applies (itself a confusing question), the court must first determine whether Congress has spoken to the question at issue; if it has, there the matter ends; if it has not, and the statute's meaning is unclear, then the court must accept any reasonable agency interpretation. But how this over-familiar admonition actually plays out is much debated and the thousands of decisions are not all perfectly consistent with one another.

The actual impact of *Chevron* and the extent to which it shifts power from the judiciary to the agencies depends on (a) how often it applies, (b) how capacious step one is, and (c) how hard a look the agency interpretation gets in step two. Thus, were *Chevron* to apply any time there is an authoritative agency interpretation of a statute, and were courts to abandon their own efforts to determine the statute's meaning in the face of any ambiguity, and were step two to be a pure rubber stamp, then *Chevron* would be consequential indeed. That was the approach to *Chevron* I feared in 1992. But it is not in fact the reading *Chevron* has generally received.

First, the Supreme Court has developed a complicated set of doctrines, commonly referred to as "*Chevron* step zero," that control when *Chevron* kicks in at all. The mere existence of an agency interpretation does not trigger *Chevron*. The seminal case is *United States v. Mead Corp.*,[5] which holds that *Chevron* applies only when Congress has delegated authority to make rules with the force of law and the agency has acted pursuant to that authority. That test has been a source of confusion and complexity from the outset.[6] Moreover, *Mead* does not exhaust the circumstances where *Chevron* does or does not apply. Sometimes *Chevron* applies even though the *Mead* test is not met,[7] and sometimes it does not apply even though it is. The most prominent recent example of the latter is last Term's Affordable Care Act case, *King v. Burwell*,[8]

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[5] 533 U.S. 218 (2001).

[6] See Adrian Vermeule, Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 347 (2003) (describing lower court application of *Mead* as "flawed or incoherent" and tracing those defects "to the flaws, fallacies, and confusions of the *Mead* decision itself").

[7] See, e.g., Barnhart v. Walton, 535 U.S. 212, 217-22 (2002) (applying *Chevron* to an agency rule adopted without notice and comment).

[8] 135 S. Ct. 2480 (2015).

where the Court found *Chevron* inapplicable, without even mentioning *Mead*, because the question at issue was so consequential. This is a messy and frustrating body of doctrine and I do not mean to defend or explain it. The key point is that there are a large number of situations in which an agency has expressed an understanding of the meaning of a statute that is before a court and *Chevron* simply has no bearing.[9]

Second, courts should take a fairly capacious view of step one. That is, they should *not* flee to step two as soon as any ambiguity was found. Statutory texts are often unclear, judges are used to wrestling with ambiguous statutes, and any litigated case will involve one. After all, most applications of a statute don't give rise to disputes, most disputes don't become lawsuits, and most lawsuits are not litigated to judgment. If a matter gets that far, there will almost always be two (or more) plausible readings of a statute. If that alone dictated deference, every *Chevron* case would be a step two case. But, as the author of *Chevron*, Justice Stevens, later admonished: "The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference."[10] Courts should take that admonition to heart, lingering in step one, so to speak. I am not aware of any comprehensive empirical work that actually counts to see what percentage of *Chevron* cases is decided under step one and what percentage under step two.[11] But in a sizeable portion, the judges are sufficiently confident that they know what Congress actually decided that they uphold, or set side, the agency action in step one.

Third, step two is not a complete rubber stamp. To be sure, it is *something* of a rubber stamp. Agencies almost always prevail in step two, and of the three steps it is here that the "running riot" version of *Chevron* is closest to reality. But that does not mean that here the courts have handed *the judicial role* over to agencies. To the contrary. The reason that strong deference is appropriate in step two is that the issues are not legal ones. Courts get to step two when law gives out. As Justice Stephens wrote in *Chevron* itself, strenuous efforts to determine what Congress had decided yielded nothing; law had given out. It was impossible to say that the bubble policy either did or did not violate the Clean Air Act. At that point, the business of *interpretation*, the business of judges, was over. As Justice Stephens wrote:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges--who have no constituency--have a duty to respect legitimate policy choices made by those who do.[12]

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[9] See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L. J. 1083 (2008) (reviewing over 1000 Supreme Court cases decided between 1984 and 2005 that involved agency interpretations of federal statutes and finding that the Court applied *Chevron* in only 8.3% of those decisions).

[10] Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting).

[11] A study of court of appeals decisions in 1995 and 1996 found that 38% of cases were resolved in step one and 62% in step two. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Court of Appeals*, 15 Yale J. on Reg. 1, 30-31 (1998). My guess is that in more recent years those numbers have shifted somewhat toward step one.

[12] *Chevron*, 467 U.S. at 866.

On this understanding, *Chevron* does not transfer judicial authority to the agencies. Rather, it preserves judicial authority to interpret congressional commands, but also insists that courts respect the statutory allocation of policymaking authority to agencies.

Let's retreat to first principles for one minute. The Constitution anticipates the creation of a federal bureaucracy, but it does not itself create any departments. Agencies are creatures of statute. Accordingly, they only have whatever authority Congress has given them, and they must comply with whatever restrictions Congress has imposed. Numerous mechanisms are in place to ensure that agencies operate within those restrictions, including the existence of agency General Counsels, the opportunity to get an opinion from the Department of Justice, and congressional oversight. But the most important, of course, is judicial review of agency action. It is the essential function of the courts to ensure that agencies operate within congressionally established limits. If the courts abandoned that role, it would be cause for serious concern.

But that is not what *Chevron*, properly understood, requires. As long as Congress has in fact decided something, it is the duty of the judiciary to abide by and enforce that decision. That is step one. There can be a tendency to conclude that because Congress has not decided everything, it has not decided anything. That temptation should be resisted; it is the obligation of the courts to respect and enforce what Congress has actually done. But for many and familiar reasons, Congress always and necessarily leaves some things undecided. In executing congress's laws, the agency must fill in some gaps. Of course, courts *could* fill in those gaps, and could pretend they were "interpreting" a statute when they did so, but that would be a function. Precisely because *Chevron* step two kicks in when law gives out, the decisions here are ones of policy rather than interpretation. The court will determine what the statute must mean, and what it cannot mean; with the range of permissible interpretations between those two boundaries, the decision is best made by agencies rather than courts, for just the reasons Justice Stevens gave in *Chevron*.

2. **Unconstitutional**

The foregoing makes quite clear that *Chevron* does not involve the unconstitutional shifting of judicial power to the executive branch. In the more than three decades since the decision was handed down, very few have argued that it is constitutionally problematic. But at least on very prominent voice recently took exactly that position: Supreme Court Justice Clarence Thomas. Concurring in *Michigan v. EPA*,[13] Justice Thomas asserted that the *Chevron* doctrine violates either Article I or Article III. With regard to the latter, he objected that *Chevron* "wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive."[14] Viewed as an allocation of "interpretive authority," *Chevron* deference "precludes judges from exercising" the constitutionally required "'independent judgment in interpreting and expounding the laws.'"[15] For constitutional purposes, and in reality, that just is not happening.

[13] 135 S. Ct. 2699 (2015).

[14] *Id*. at 2713 (Thomas, J., concurring) (quoting Marbury v. Madison)

Courts retain primacy in *interpretation*, they have the final word on what it is Congress has actually decided; the agency's views matter but are not dispositive and thus the judicial power has not been ceded to another branch. Where courts must defer is when the agency is making a policy decision within the scope of its delegation, within its *Chevron* space.[16] That is not a judicial task.[17]

3. Out of control

Section one set out an understanding of the *Chevron* doctrine in which courts continue to fulfill their essential task without giving away the store. One might still ask whether courts *in fact* are doing so, whatever the "right" understanding of the decision is. In general, the answer is that *Chevron* has not worked a major shift of decisionmaking authority from the courts (or from Congress via the courts) to administrative agencies. There have of course been individual decisions applying *Chevron* in which a court has been too deferential (as there have been decisions where courts have been not deferential enough). Any legal doctrine will vary in its application. But overall, it is striking how little impact *Chevron* has had. We simply have not seen a major shift in outcomes. The courts are not as deferential to agencies as all the fuss about *Chevron* would make it seem.

This is emphatically true at the Supreme Court level. Scholars have repeatedly confirmed that the Supreme Court has not been more deferential to agency interpretations since *Chevron* was decided than it was before. Often the Court cites *Chevron*, but stays within step one and does not defer; sometimes it does not cite *Chevron* at all, even when upholding the agency; sometimes it cites *Chevron* and gives lip service to deference, but interprets the statute completely on its own.[18]

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[15] *Id*. at 2712 (Thomas, J., concurring) (quoting Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015).

[16] On the idea of "*Chevron* space," see Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 Colum. L. Rev. 1143 (2012).

[17] In fact, Justice Thomas seems to agree with this understanding of what is going in *Chevron* step two:

> In reality, . . . agencies "interpreting" ambiguous statutes typically are not engaged in acts of interpretation at all. Instead, as Chevron itself acknowledged, they are engaged in the "'formulation of policy.'" Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.

Michigan v. EPA, 135 S. Ct. at 2712-13 (Thomas, J., concurring). Of course, for Justice Thomas this avoids the Article III objection but smacks squarely into the Article I objection. That is, he contends that for the agency to regulate private conduct on the basis of its own understanding of sound policy make legally binding rules on the basis of its own policy judgments is a usurpation of legislative authority, and for Congress to authorize its doing so is an unconstitutional delegation of power constitutionally reserved to Congress. That is a matter beyond the scope of my testimony. Suffice it to say that Justice Thomas's views on the nondelegation doctrine represent a pole and find support from no other Supreme Court Justice, current or past.

[18] See Eskridge & Baer, *supra* note 9.

The lower courts present a less clear picture, and it would not be surprising if the Supreme Court—given the nature of its docket and its position in the judicial system—were less deferential than the lower courts. But many people have looked to find a significant *Chevron* effect, an indication of judicial abdication, and been unable to find it.[19] More than that, and rather astonishingly, a growing body of empirical work concludes that standards of review have very little effect on actual outcomes, period. These studies find that courts at all levels of the federal judiciary uphold agency actions about 70% of the time, regardless of the standard of review--*Chevron*, *Skidmore*, arbitrary and capricious, substantial evidence, or de novo.[20]

Notwithstanding this work, I am not quite ready to say that scope-of-review doctrine does not matter. I think *Chevron* probably has some impact, both direct and indirect. The direct effect is that the essential message is one of deference in the face of statutory uncertainty and at least some of the time some judges take that seriously. The indirect effect is more subtle and impossible to measure. But one might predict that *Chevron* would embolden agencies, and there is some empirical evidence to suggest that it has done so.[21] If agencies are taking more aggressive positions than they otherwise would, but are being upheld at the same rate as before *Chevron*, then that means that there has been an actual *Chevron* effect even if agency won/lost rates are unchanged.

Even if those effects are being felt, however, *Chevron* has not transformed the actual practice of judicial review in a fundamental way. It is often honored in the breach or ignored altogether, and courts do frequently conclude that the answer is sufficiently clear to resolve the matter in step one, in which the court is doing all the work.

Finally, it should come as no surprise that *Chevron* is not out of control. As I have recently discussed in print,[22] the *Chevron* doctrine is an instance of self-regulation. It is a judicially imposed limitation on judicial authority, a doctrine through which those in the judging business constrain the activities of the members of their own industry. Accordingly, *Chevron* is heir to the shortcomings and risks that generally bedevil self-regulation: a lack of transparency, the failure to evaluate or monitor performance, and the absence of meaningful penalties for noncompliance. Judges, like most human beings (especially successful human beings holding prestigious positions, possessed of high self-regard, surrounded by sycophants, and blessed with matchless job security), will only go so far in ceding authority. Of course, this or that individual judge may be too deferential, may overregulate, so to speak. But as an overall tendency, judges generally, federal judges in particular, and Supreme Court Justices most of all, simply are not going to be *too* constrained.

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[19] The literature, and the challenges in attempting to measure the decision's impact, are summarized in John Manning & Matthew Stephenson, Legislation and Regulation 772– 75 (2d ed. 2013).

[20] For a summary and discussion, see Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77 (2011).

[21] See Christopher Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703 (2014).

[22] Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867 (2015).

4. The source of the problem (if problem there is)

If *Chevron* in fact creates a problem, it is a problem that Congress is in a position to cure. The cure is not in legislatively over-riding *Chevron*. To eliminate *Chevron* deference would not advance Congress's interests, for it just shifts discretionary policymaking from the agencies to the courts. That would be a step backwards. Courts lack both the expertise and the democratic mandate to justify policymaking. Furthermore, courts are less subject to congressional oversight than are agencies. And courts can get things wrong—indeed, the premise of a statutory override would be that they got *Chevron* wrong! There would be something ironic were Congress to say that it trusts courts more than agencies and therefore it is rejecting this judicially developed doctrine.

Furthermore, it is inconceivable that the courts would ever wholly abandon the idea that agency interpretations have some weight, that they count. That is an old, old idea. Deference in some form will always be with us. (It is also a sensible idea, but my point here is entirely descriptive rather than normative: one could not get courts to completely ignore agency views even if wanted to.)

Rather, an appropriate congressional response would come in the form of more careful legislation. Of course, for well-known reasons Congress will never write utterly pellucid statutes that anticipate every interpretive problem and possible application. But the foundation of *Chevron* is an honest acknowledgement of how much decisionmaking Congress leaves to agencies, how much it leaves unsaid and undone. If that is a problem, the solution lies with Congress. It is no answer to have *courts* invent statutory meaning rather than having agencies do so. At the end of the day, the best way that Congress can control things is not by attempting to restrict or limit the activities of other players, but by doing its own job well.[23]

5. The cause of irreversible errors

A, perhaps the, central concern about *Chevron* is that courts are too quick to defer. This surely does happen, and when it does the result is that agency policymaking has trumped congressional policymaking. That is undeniably a problem. But it is important to understand that the misstep is not irreversible. The point is not simply that because these are statutory cases Congress can always override any decision. That is true. But it is true more in theory than in practice and in any event applies to any regime of statutory interpretation. Rather, the point is about the peculiarly non-binding nature of an agency win in step two.

Outside of *Chevron* (or in step one, which is the same thing), a judicial interpretation is definitive; unless and until amended, the statute means what the court says it means. When a

[23] Many have argued that one salutary effect of *Chevron* is that it creates an incentive for more precise statutory drafting. See, e.g., Laurence H. Silberman, Chevron – *The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 824 (1980) ("Congress, now aware of the *Chevron* rule and perhaps distrustful of executive branch interpretation, is thereby led to greater specificity in drafting. Such specificity is all to the good. *Chevron* thereby induces more concrete reconciliation of differing policy views during the legislative process, without recourse to the almost moribund unconstitutional delegation doctrine.").

court upholds an agency in step two, however, it is not definitively interpreting the statute. It is merely saying that the statute allows the agency to do what it did. The agency can change its position as circumstances, or administrations, change. That was the situation in *Chevron* itself, and what was implicit in the original decision became explicit in *Brand X*.[24] Thus, *Chevron* lowers the stakes. A win is not so great; a loss not so devastating.

The most recent example of why this matters is *King v. Burwell*.[25] There the Court ruled that health care exchanges established by the Department of Health and Human Services pursuant to the Affordable Care Act were "exchanges established by the state" and therefore someone who purchased health insurance from a federal exchange qualified for tax credits. The Chief Justice's opinion did not rely on *Chevron*; strikingly, it did not merely resolve the issue at step one, it held that *Chevron* simply did not apply. This ruling surprised many people. The relevant statutory provision was in the Internal Revenue Code;[26] the statute granted the IRS authority to write all necessary regulations to implement the provision;[27] the IRS had, through notice-and-comment rulemaking and in express reliance on that authority, issued a regulation directly addressing the legal question in the case.[28] Under *Mead*, this looked like a *Chevron* case. Yet in two succinct paragraphs, the Chief Justice concluded that *Chevron* simply did not apply—the issue was of such "economic and political significance" that it was inconceivable that Congress would simply have left it to the IRS to resolve. So the Court decided the meaning of the statute itself. The result was a definitive interpretation that cannot be changed except by statutory amendment. Had the Court instead applied *Chevron* and upheld the IRS position in step two, the *immediate* outcome would have been the same: federal exchanges would count as state exchanges. But the *long-term* outcome could change; a later administration could almost certainly reverse the rule. Given the high political salience of the ACA and of this decision, and the universal opposition of the Republican presidential candidates to the ACA, were a Republican president elected, Justice Stevens type arguments from accountability would powerfully legitimate such a shift in interpretation.

The point is not that *King* was rightly or wrongly decided, and the highly contested politics around the ACA perhaps make it a special case. The point is only that *Chevron* lowers the stakes in the cases in which it matters, i.e. step two cases. It leaves room for agency change and adjustment. That is not necessarily a bad thing. And, again, this does not mean that either courts or Congress are cut out of the picture; where a court is confident that Congress has in fact decided the matter, its job, *Chevron* or no *Chevron*, is to enforce the congressional decision.

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[24] See National Cable and Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (holding that a decision upholding an agency under step two, and even a judicial decision that *would have been* under step two had there been an agency interpretation to consider, leaves the agency free later to adopt just the opposite position).

[25] 135 S. Ct. 2480 (2015).

[26] I.R.C. § 36B (2012).

[27] Id. § 36B(g) (authorizing IRS to "prescribe such regulations as may be necessary to carry out the provisions of this section"). The IRS already had authority to "prescribe all needful rules and regulations for the enforcement of this title." Id. § 7805(a).

[28] Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).

6. Ideologically skewed

In recent years, doubts about *Chevron* have been stronger on the right than on the left. (Justice Scalia was an important exception, though, as he himself pointed out, his strident support for *Chevron* was made possible in part because he was relatively undeferential in his actual decisionmaking). This hearing itself demonstrates a different ideological valence. That is not a surprise. During a Democratic administration, one would expect Republicans to worry about the effects of *Chevron*; during a Republican administration, one would expect Democrats to worry about *Chevron*.

Though not surprising, the current array of *Chevron* skeptics and *Chevron* enthusiasts is more than a little ironic. In *Chevron*'s early years, in the middle of a 12-year run of Republican presidents, enthusiasm for *Chevron* was high among Republicans. The doubters were almost all Democrats who thought *Chevron* freed Republican administrations to act in ways that the courts would not otherwise have allowed. *Chevron* itself was an example, a Reagan deregulatory measure that had been considered and rejected by Jimmy Carter's EPA. Consider just one example of the partisan array of 30 years ago. In 1986 the ABA Section of Administrative Law hosted a panel to discuss *Chevron*.[29] Professor Ronald Levin, who has testified before this subcommittee, moderated, and two speakers supported *Chevron* and two opposed it. Then head of the Meese Justice Department's Civil Division, Richard Willard, and Judge Kenneth Starr were the *Chevron* enthusiasts; Professor Cass Sunstein and Naderite attorney Alan Morrison the skeptics.[30] This was typical of the debate at the time.[31]

Times have certainly changed. It is impossible to say how much of this shift is the result of short-term ideological preferences. What is important, however, is that an ideological approach to *Chevron* is shortsighted and pointless. "What goes around comes around." *Chevron* increases agencies' freedom of movement. Whether that is good for one side or another in the partisan wars depends largely on who is in the White House, to a lesser extent who is in the judiciary, and at least in part on the political tendency of congressional legislation. In 1984, *Chevron* worked in favor of deregulation; in 2016 it works in favor of greater regulation. We do not know how it will work in 2017. But it would be a mistake for members of either party to embrace or reject *Chevron* on the basis of the policy outcomes it produces.

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[29] Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 Admin. L. Rev. 353 (1987).

[30] *Id*.

[31] Examples of suspicion from the left include William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 Geo. L.J. 523, 548 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 456 (1989); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987). In contrast, enthusiastic endorsements of a strong reading of *Chevron* from the right include Silberman, *supra* note 23; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511; Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 Yale J. Reg. 283 (1986); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L.J. Am. U. 269 (1988).

In the 1986 panel quoted above, Cass Sunstein observed:

> It is important to keep in mind that there is only a contingent historical association between the current deference to administrative agencies and conservatism. And opposing deference to administrative agencies and being liberal is a contingent position. The institutional judgment ought to be decided, I think, on some ground other than the political one.[32]

That comment remains wholly correct.

[32] Panel Discussion, *supra* note 29, at 379.