The Politics of Deference

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Like so much else in our politics, the administrative state is fiercely contested. Conservatives decry its legitimacy and seek to limit its power; liberals defend its necessity and legality. Debates have increasingly centered on the doctrine of Chevron *deference, under which courts defer to agencies' reasonable interpretations of ambiguous statutory language. Given both sides' increasingly entrenched positions, it is easy to think that conservatives have always warned of the dangers of deference, while liberals have always defended its virtues. Not so. This Article tells the political history of deference for the first time, using previously untapped primary sources including presidential and congressional archives, statements by interest groups, and partisan media sources. It recounts how the politics of deference have varied over time, even though the issue is often framed in terms that resist evolutionary analysis. As the administrative state grew in the 1970s, conservatives in Congress sought to rein in deference, while liberals defended it. These positions reversed in the 1980s, as the Reagan Administration relied on flexible readings of statutes in service of its deregulatory efforts, including in the* Chevron *case itself. After a period of political détente, the 2010s witnessed a resurgence of conservative opposition to and liberal support for* Chevron*, driven largely by the ascendance of libertarian interests in the Republican Party and the increasingly central role of administrative policymaking to the Democratic Party's agenda.*

The Article then develops a framework for understanding the shifting politics of deference. It argues that the politics of deference are the politics of regulation: for nearly a half century, partisans and interest groups have viewed doctrinal debates as inexorably tied to interests in policy outcomes. Positions about Chevron *have varied based on which party controls the presidency and the ideological makeup of the federal courts. But the parties are also asymmetrically reliant on the administrative state, and thus on judicial deference. Liberals depend on deference to advance their regulatory goals in the*

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face of an often-gridlocked Congress, while conservatives have many paths to accomplishing their deregulatory ends. The conservative turn against the so-called "deep state" and Chevron*'s nonapplication in areas where conservatives most favor deference (such as national security) further exacerbate the partisan split on the doctrine. And, apart from its real-world impacts,* Chevron *has become a rhetorical cudgel in broader debates about the legality and legitimacy of the administrative state as a whole. Unless these dynamics change,* Chevron *deference will continue to have a political valence. And so long as the doctrine is understood to create winners and losers, partisans and interest groups will fight to ensure its survival or hasten its demise.*

INTRODUCTION

Like so much else in our politics, the administrative state—from its very existence to the appropriate scope of its authority—is fiercely contested. Critics on the Supreme Court have sought to bring independent agencies under presidential control[1] and revitalize the nondelegation doctrine.[2] Beyond the judiciary, Congress has persistently heard calls for new restraints on administrative power.[3] Immediately after taking office in 2017, the Trump Administration declared that "deconstruction" of the administrative state would be a top policy priority and made the issue a litmus test for judicial appointments.[4] "Eighty years on," one leading scholar has argued, "we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."[5]

The Supreme Court's decision in *Chevron v. NRDC*[6] has become a flash point in these debates. Under *Chevron*, courts defer to an agency's interpretation of a statute it administers when the statute is ambiguous as to the relevant issue and the agency's interpretation is reasonable.[7] Contemporary conservatives charge that *Chevron* deference violates the separation of powers and enables administrative overreach. One commentator recently went so far as to compare *Chevron* to the Supreme Court's abortion and gay marriage decisions, describing each as having "added horrific things to the laws that the people's representatives never put in there."[8] Liberals, in turn, maintain that *Chevron* is an important tool of effective, pragmatic governance, defending the decision with increasing fervor as the

1. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

2. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

3. *See infra* note 326 (citing over a half-dozen regulatory reform bills introduced in recent Congresses).

4. *See* Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html [https://perma.cc/Z5GK-BFPH]; *see also infra* notes 323–324 and accompanying text (discussing the Trump Administration's deregulatory agenda).

5. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017).

6. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

7. When a statute is "silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," *id.* at 843, not whether the "agency construction was the only one it permissibly could have adopted to uphold the construction," *id.* at 843 n.11.

8. Joy Pullmann, *Ruth Bader Ginsburg Goes from Leftist Hero to Has-Been in One Interview*, FEDERALIST (Feb. 12, 2020), https://thefederalist.com/2020/02/12/ruth-bader-ginsburg-goes-from-leftist-hero-to-has-been-in-one-interview [https://perma.cc/5BKT-T39B].

Democratic Party has become ever more reliant on regulatory policymaking in the face of congressional gridlock.

Given the increasingly entrenched—and at times overheated—nature of the conversation, it would be easy to think that liberals have always supported *Chevron* while conservatives have always opposed it. But that view is mistaken. Based on a half-century's worth of primary sources, this Article shows that what we call the *politics of deference* have varied over time. This is so even as both camps continue to cast the debate over deference in terms that resist evolutionary analysis. In fact, over the past five decades, neither liberals nor conservatives have adopted a fixed position on whether courts or agencies should have the final say in determining the meaning of ambiguous statutes. What explains this pattern? And what can attention to the fluctuating politics of deference teach us about both politics and deference?

To answer these questions, we provide the first detailed *political* history of *Chevron* over the past five decades, placing front and center several episodes that existing accounts typically relegate to a footnote or ignore altogether. Our approach focuses on a range of political actors: Democrats and Republicans in the executive branch and in Congress, and interest groups on both the left and right. We explore the political dynamics underlying each camp's evolving positions through a detailed examination of primary sources, including formerly confidential records from the White House, Justice Department, and Capitol Hill; transcripts of congressional hearings and floor debates; journalistic accounts; and other public and archival materials. This shift in focus allows us to trace in detail how contestation over the scope of the regulatory state has shaped fights about deference, often enabling us to go behind the scenes to observe relevant actors' candid thoughts about the political advantages (and disadvantages) of deference.[9]

Our historical and political approach represents a marked departure from existing legal scholarship on *Chevron*, which tends to emphasize judicial doctrine and its effects. Prior accounts focus on justifications for deference; analyze the conditions under which deference is appropriate, including how Congress signals that an

9. We recognize, of course, that courts use different standards of review in different circumstances, and *Chevron* is not the only way of operationalizing deference to agency decisionmaking. *See generally* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES (John Fitzgerald Duffy & Michael Herz eds., 2005). The distinctions between different forms of deference are important in many contexts, but they are not especially material to our analysis. In general, political actors' attitudes toward deference tend to wax and wane without regard to the particular doctrinal formula that applies to a given situation. For simplicity of exposition, therefore, we generally use the terms "*Chevron*" and "deference" interchangeably, and we expressly note the very few instances in which we discuss either judicial deference more generally or a different type of deference.

agency is entitled to deference and the actions an agency must take to receive it; examine the number of "steps" *Chevron* has and how they are operationalized; and explore the practical effects of deference. Valuable as this scholarship is, this Article takes a different approach by centering politics—and political actors, including elected officials, members of their staffs, and representatives of key interest groups.[10] While we make occasional reference to the Court's internal dynamics, this Article's focus is action in the elected branches and in the broader public domain.

There are several plausible points of departure for an examination of the politics of deference. One might profitably begin with the Republic's founding;[11] the establishment of the Interstate Commerce Commission, usually described as the first recognizable federal regulatory agency;[12] or the New Deal's expansion of the federal bureaucracy.[13] This Article begins instead in the 1970s. That period witnessed the maturation and growth of the administrative state, as newly created federal agencies—the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Products Safety Commission, to name only a few—claimed authority over domains like the environment and the workplace that had historically been left to states or private litigants.[14] At the same time, both the liberal public interest movement and its conservative counterpart began to take their contemporary forms, with the founding of institutions ranging from Public Citizen and the Natural Resources Defense Council on the left to the Heritage Foundation and the Federalist Society on the right. Of course, notwithstanding these discontinuities, this period shares some important commonalities with earlier eras in American history. Most importantly, as this Article shows, conservatives remained largely hostile to the federal government's regulatory activities, while liberals remained largely supportive.

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10. *See infra* Part I. Some recent administrative law scholarship has been attuned to political dynamics but has not been centered on *Chevron*. *See infra* notes 66–71 and accompanying text.

11. *See, e.g.*, Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (describing delegations of rulemaking authority at the founding).

12. *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 138–39 (1982) (describing the Interstate Commerce Act of 1887 as the country's "first national regulatory policy").

13. *See, e.g.*, Metzger, *supra* note 5, at 51–52 (arguing that the "period of greatest relevance to contemporary anti-administrativism . . . is the 1930s").

14. *See infra* Section II.A.

During this period, Congress on several occasions came close to enacting the "Bumpers Amendment." First introduced nearly a decade before the *Chevron* decision, the Amendment proposed to revise the Administrative Procedure Act to require judges to decide questions of law de novo, instead of deferring to agencies. The debates over the Amendment reveal clear political fault lines: conservative members of Congress and the business community largely supported the Amendment, while liberal members, environmental groups, and consumer groups largely opposed it.[15] The timeline of the Bumpers Amendment debates underscores a key theme we return to throughout the Article: namely, that the politics of deference have little do to with the doctrinal nuances of *Chevron* itself.

Political dynamics shifted rapidly during the Reagan years, however. Decided in 1984, the *Chevron* case was a major victory for the Reagan Administration's deregulatory agenda and a setback for environmentalists. Shortly after *Chevron* was decided, it was lauded by conservatives in the executive branch and criticized by liberal interest groups—precisely the opposite of the positions that had prevailed during the Bumpers Amendment debates.[16]

After two decades of relative quiescence in the 1990s and 2000s,[17] *Chevron* again became a partisan flash point during the Obama presidency. The Obama Administration pursued much of its policy agenda through agency action. This was true both when it came to implementing newly enacted statutes (as in the case of the Affordable Care Act) and asserting new applications of old statutes (as in the case of the Clean Air Act). In response, conservatives and regulated parties alleged administrative overreach—aided by *Chevron*. For the first time since the debate over the Bumpers Amendment, Republicans in Congress mounted a serious legislative effort to require de novo judicial review of statutory questions. Given the Reagan experience, one might have expected this anti-*Chevron* effort to recede when Republicans recaptured the White House. Instead, it reached a fever pitch during the Trump years. An increasingly ideological Republican Party, influenced by the Tea Party and Freedom Caucus and emboldened by a conservative Supreme Court, remained hostile to *Chevron* even when it controlled the White House.[18]

Situating debates over *Chevron* in this historical context allows us to identify three dynamics that together explain the changing politics

15. *See infra* Part II.
16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Part V.

of deference. First, partisans' positions on *Chevron* vary based on who controls key *levers of power*, including the White House, the judiciary, and Congress.[19] But this dynamic is tempered by a second one. Simply put, deference has a *bias*. In recent decades, Democrats have become more committed to regulation and correspondingly more reliant on the administrative state as a policymaking tool. This has made liberals more dependent on *Chevron* than conservatives, who have a wider variety of tools to accomplish their largely deregulatory aims. And layered atop these two dynamics is a third: independent of its real-world effects, *Chevron* has become a *rhetorical* cudgel in broader partisan debates about the legality and legitimacy of the administrative state as a whole.

Turning first to the levers-of-power dynamic,[20] we show that the politics of deference are shaped by alternations in the partisan control of the three branches of government—in particular, the executive and judicial branches. Start with the executive branch. Conservatives supported the Bumpers Amendment as a counterweight to regulatory growth in the 1970s, permitted and even encouraged *Chevron* at its inception as a means of buttressing the Reagan Administration's deregulatory agenda, and turned against *Chevron* when the Obama Administration aggressively employed the administrative state to further proregulatory ends. Conversely, liberals defended deference in the 1970s, grew skeptical of it during the Reagan years, and fiercely defended deference again under Obama.

Control of the courts also shapes partisans' views on *Chevron*. In the 1980s, deference provided conservatives with a principled way to circumvent the courts, especially the then-liberal U.S. Court of Appeals for the D.C. Circuit, while liberals much preferred decisionmaking by the courts over deference to the Reagan Administration. By the same token, *Chevron* deference was particularly important to the Obama Administration in the 2010s, given a conservative Supreme Court and a closely divided D.C. Circuit. Indeed, one reason for contemporary conservative opposition to *Chevron* deference is that the conservative-leaning federal judiciary—and especially the Supreme Court—is likely to be especially skeptical of large-scale bureaucratic innovation.

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19. Scholars have documented this dynamic across various other public law topics—including judicial review, federalism, separation of powers, and the Senate filibuster—but not *Chevron* deference. *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485 (2016); *see also* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019); Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149 (2004).

20. *See infra* Section VI.B.

Finally, Congress. With limited exceptions, Democrats dominated the first branch from the end of World War II to the Republican takeover in 1994. Throughout this period, however, they were divided over the merits of deference. Thus, while many conservative Southern Democrats, including Bumpers himself, sought to codify de novo review, more liberal party members opposed these efforts, believing they would unduly hobble administrative governance. Absent majority-party consensus, the action moved to the executive branch and the courts. In recent decades, however, the equilibrium has shifted, with majority control of both chambers passing from Republicans to Democrats and back again. But notwithstanding vigorous (if occasional) debate over deference, Congress as an institution has remained on the periphery. Increasing partisan polarization has led to legislative gridlock, enabled by parliamentary tools—most prominently, the Senate filibuster. For this reason, even as Democrats have lined up in favor of *Chevron* and Republicans in opposition, neither party is likely to be able to legislate its preferred view of deference (at least so long as the filibuster persists).

This account is powerful but incomplete. It misses a second dynamic, which one of us has elsewhere called the "structural biases" that can arise from institutional or doctrinal arrangements.[21] Today, Democrats' and Republicans' views about *Chevron* reflect a recognition that, in the aggregate, deference will tend to advantage Democrats while de novo review will tend to advantage Republicans.[22] Thus, even out of power, liberals will have a more favorable view of deference than similarly situated conservatives; so, too, liberals in power will advocate for a more muscular view of deference than their conservative counterparts. As we demonstrate, the historical record bears out this claim. Despite the reversals we trace, it is generally the case that over the past five decades liberals have favored deference while conservatives have opposed it.

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21. *See* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (on file with authors) (developing the idea of structural bias with a focus on constitutional arrangements in the United States). The idea that a policymaking process or an institutional design might be biased toward certain types of interests over others has a long lineage in several fields, including political science, political economy, and sociology. *See, e.g.*, CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977) (political science); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960) (same); Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962) (same); TORSTEN PERSSON & GUIDO TABELLINI, THE ECONOMIC EFFECTS OF CONSTITUTIONS (2003) (political economy); ALBERTO ALESINA & EDWARD L. GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE (2004) (same); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (sociology).

22. *See infra* Section VI.C.

This asymmetry arises from the pro- and antiregulatory postures of the Democratic and Republican parties in their current incarnations—a change from half a century ago, when each party contained both pro- and antiregulation factions. Now, Democrats have an ambitious regulatory agenda. But in the face of an often-gridlocked Congress, they have few tools at their disposal other than executive-branch policymaking. This makes them increasingly dependent on *Chevron* deference to achieve their regulatory goals. To be sure, as this Article describes, Republicans looking to shrink the domain of regulations can and sometimes do invoke *Chevron*. But they have plenty of other tools at hand. To name several: declining to enforce (or enforce aggressively) regulatory statutes, granting waivers to regulated entities, refusing to appoint or confirm agency officials, decreasing funding for agencies, or harnessing other areas of law to deregulatory ends. Republicans also have less to lose from *Chevron*'s possible demise. After all, courts have carved out of the doctrine national security and certain types of immigration proceedings—precisely those areas where some conservatives most favor deference. So, too, increasingly polarized opinions about *Chevron* mirror changes in the parties' attitudes toward the civil service: many liberals now see the doctrine as a means of safeguarding expert policymaking, while many conservatives believe it enables governance by the so-called "deep state."

Together, these factors mean that Democrats need *Chevron* more than Republicans do. To be sure, deference *can* aid either party in a given case, depending on who controls which institutions of government. But on balance, and over the long term, *Chevron* can be expected to be a more important regulatory tool for Democrats than deregulatory tool for Republicans. This asymmetry has become more pronounced in recent years given shifts in the coalitional composition of each party, the widening ideological gap between the parties, and changes in how the policymaking process itself operates.

Even beyond *Chevron's* practical effects, the parties' polarization over the administrative state as a whole—with Republicans attacking its legitimacy and legality and Democrats defending it from those attacks—has made attitudes toward *Chevron* a proxy for attitudes about the administrative state more generally. This means that, whatever its practical advantages for the core interests affiliated with either side, deference has become a politically resonant symbol in the parties' public messaging battles. Regardless of what they may actually think about the issue, Republicans who wish to signal their partisan bona fides to voters, activists, or donors must pledge fealty to the goal of eliminating deference; for Democrats, the same imperative pushes in the opposite direction.

Our examination of administrative law through the lens of political actors offers at least three lessons. In each instance, our account shows how a detailed and careful look at the real-life intersection of politics and law can provide support for some more general (if intuitive) principles.

First, partisans and interest groups often use doctrine to achieve substantive political ends. Administrative law helps determine how "resources, risk, and power" are distributed.[23] As a result, what may at times appear to be a set of neutral procedural rules is shot through with "political priorities."[24] If administrative law shapes who gets what, it is little surprise that partisan actors and their allies try to bend it to their specifications. And that is precisely what our account reveals: executive branch actors, members of Congress, and interest groups alternately supported or opposed deference to serve their policy objectives. In turn, the recognition that administrative law doctrines like *Chevron* are tools that partisan actors selectively deploy can deepen our understanding of the benefits and costs of doctrinal arrangements.

Second, and relatedly, debates about regulatory policy often take place under the guise of debates about administrative law. While deliberations about *Chevron* are replete with invocations of timeless values like the separation of powers, expertise, liberty, and democratic accountability, political actors regularly appeal to such values as a means to an end. Attending to the relationship between substantive policy preferences and legal doctrine helps to explain not only the relative ease with which both camps have shifted from attacks on deference to defenses of it, but also the changing rhetorical and doctrinal registers in which the parties have engaged the debate over deference. Doctrinal innovation can shape the character of political conflict, the language that is used, and the forums where it takes place. But doctrine does not repress political conflict. Neither *Chevron* nor any alternative doctrinal framework can avoid inevitable—and healthy—political contestation over what regulatory policy ought to look like.

Third, political fights over *Chevron* illustrate how structural biases can lurk behind seemingly neutral arrangements. On its face, deference does not have an obvious political valence. This has allowed commentators to justify it on apolitical grounds, arguing that agencies deserve the benefit of the doubt from reviewing courts because of their greater expertise or greater democratic accountability, as compared to generalist judges with life tenure. One leading administrative law scholar describes *Chevron* as "among the most politically neutral cases

23. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346 (2019).

24. *Id.*

the Supreme Court has ever decided."[25] And yet, closer examination of the battles over deference reveals a consistent pattern. Conservatives tend to favor de novo review, while liberals tend to oppose it. The reason for this alignment, we argue, is that, in the aggregate, deference advantages the forces of regulatory initiative while de novo review advantages the forces of regulatory inertia and deregulation.

In these ways, our intervention finds important affinity with work that emphasizes the politics of constitutional law. Scholars recognize the law's entanglement with political power,[26] partisan contestation,[27] and interest groups and social movements.[28] In particular, the constitutional law literature is rightly attuned to the fact that legal rules and doctrines take shape against a backdrop of conflict over politics and policy, making it impossible to fully make sense of constitutional law without taking politics into account.[29] We seek to bring this attention to the sometimes hidden politics of administrative law, using *Chevron* as a vehicle.[30] Situating *Chevron* deference in this

25. Paul R. Verkuil, *Properly Viewed,* Chevron *Honors the Separation of Powers*, HILL: CONG. BLOG (June 23, 2016, 3:45 PM), https://thehill.com/blogs/congress-blog/judicial/284643-properly-viewed-chevron-honors-the-separation-of-powers [https://perma.cc/MW69-X59J].

26. *See, e.g.*, Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016) ("[T]he focus of structural constitutional law—encompassing separation of powers, presidential power, federalism, and the administrative state—has been on how power is distributed between and among government institutions."); Mark Tushnet, *Saying and Doing in Comparative Constitutional Studies*, 64 AM. J. COMPAR. L. 201, 207 (2016) ("The field of comparative constitutional law has benefited tremendously from the infusion of concern about power (and culture, and economics, and strategy) into the examination of law.").

27. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315 (2006) ("This Article seeks to . . . reenvision[ ] the law and theory of separation of powers by viewing it through the lens of party competition."); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014) ("Attending to partisanship reveals that our contemporary federal system generates a check on the federal government and fosters divided citizen loyalties . . . because it provides durable and robust scaffolding for partisan conflict."); Gregory A. Elinson, Divided Parties, Separated Powers 3 (Mar. 10, 2021) (unpublished manuscript), https://ssrn.com/abstract_id=3751638 [https://perma.cc/997A-5X6X] ("[T]he fate of our constitutional system—for better, and often for worse—rests on whether (and how well) our parties stick together.").

28. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2068 (2002) ("[Identity-based social movements] were the key impulse supporting a global shift in the way the Supreme Court applied the Constitution in the twentieth century."); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees.").

29. *Cf., e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) (examining the difference "between the 'high' politics of political principle and the 'low' politics of partisan advantage" through the lens of the Supreme Court's intervention in the 2000 presidential election).

30. *Cf., e.g.*, Ganesh Sitaraman, Comment, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 355 (2020) (examining "why [*Seila Law*] might be considered a 'political'

broader context can demonstrate how debates over structural issues in public law are, more often than not, proxy debates for substantive values about the role of government in our lives.[31]

The remainder of this Article proceeds in six Parts. Part I briefly provides background on the *Chevron* decision and its treatment by scholars of administrative law. We then turn to how the politics of deference have developed over the past half-century, drawing on a broad range of primary sources. Part II shows how deference was polarized in the 1970s and early 1980s, focusing on conservative support for and liberal opposition to the Bumpers Amendment. Part III explores how, during the Reagan years, conservatives came to embrace deference over the skepticism of liberals. Part IV discusses a period of political détente over *Chevron* in the 1990s and 2000s. Part V considers the rise of the contemporary politics of deference, showing how strong conservative opposition and liberal support emerged during the Obama Administration and persist to this day. Part VI zooms out to explain the forces driving the politics of deference and discusses the lessons to be drawn from taking a political approach to understanding *Chevron* and administrative law more generally.

I. FRAMING THE INQUIRY

Why another article on *Chevron*? Existing literature on the doctrine is nearly endless. Yet little of that work puts politics front and center. Instead, most accounts proceed in a jurisprudential, doctrinal, empirical, or historical vein. They tend to spotlight courts, asking why, when, and how they do—and should—defer to agency interpretations of law. When political actors appear, they do so only in stylized form: Congress did or did not intend to delegate, agency accountability flows through the president, and so forth. Collectively, these efforts have made *Chevron* perhaps the best understood doctrine in public law. But a brief overview of the literature shows that our intentionally political

decision—in spite of the symmetrical first-order effects and limited consequences for the Consumer Financial Protection Bureau").

31. In this sense, our work also finds affinities with scholarship on how politics of constitutional doctrines change over time. Some shifts have been cyclical: liberals and conservatives twice in the last century traded positions on the appropriateness of strong-form judicial review and each political party embraces state and local autonomy when the other party controls the White House. *See* sources cited *supra* note 19. Other shifts involve doctrines that were once championed by one side of the ideological spectrum being co-opted by the other: consider the transformation of free speech from a left-wing cause in the 1960s to its current use as a tool of deregulation. *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; *see also, e.g.*, David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018) (describing the transformation of transparency law from a left-wing to a right-wing tool).

analysis occupies a lacuna in legal scholarship that has long gone unfilled.[32]

A first line of literature focuses on the justifications for deference: Why, given *Marbury v. Madison*'s pronouncement that courts have a duty to "say what the law is,"[33] should courts ever defer to agencies' interpretations of ambiguous statutes?[34] This discourse about justifications for *Chevron* tends to abstract away from politics, focusing instead on legalistic or technocratic values. The *Chevron* opinion itself notes that agencies are delegated the power to fill in gaps in a statutory scheme,[35] possess policy expertise that makes them well suited to resolving certain interpretive disputes,[36] and are more politically accountable than federal courts.[37] Elaborating on these rationales, legal scholars have developed other arguments in *Chevron*'s favor: it provides a useful background rule against which Congress can legislate,[38] enables flexible policymaking,[39] and limits judicial

32. Our focus in this concise tour of the literature is on legal scholarship, rather than political science work on the administrative state. To be sure, political scientists have long been attentive to the political dynamics of administrative law—including the importance of partisanship—though typically not with a focus on *Chevron*. *See, e.g.*, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (arguing that administrative procedures can help elected political officials control unelected bureaucrats); Rui J. P. de Figueiredo, Jr. & Richard G. Vanden Bergh, *The Political Economy of State-Level Administrative Procedure Acts*, 47 J.L. & ECON. 569 (2004) (tracing the role of partisanship in the enactment of state-level equivalents of the federal Administrative Procedure Act).

33. 5 U.S. (1 Cranch) 137, 177 (1803).

34. For early uses of this framing, see, for example, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513, noting that "on its face [*Chevron*] seems quite incompatible with Marshall's aphorism that '[i]t is emphatically the province and duty of the judicial department to say what the law is,' " (second alteration in original), and Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074–75 (1990), describing *Chevron* as "a kind of *Marbury*, or counter-*Marbury*, for the administrative state."

35. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (describing Congress as sometimes expressly and sometimes impliedly delegating interpretive authority to agencies).

36. *See id.* at 865 (noting that Congress may wish to delegate interpretive authority to agencies on the ground that "those with great expertise and charged with responsibility for administering the provision would be in a better position to do so" than Congress).

37. *See id.* (noting that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make [regulatory] policy choices").

38. *See, e.g.*, Scalia, *supra* note 34, at 517 ("Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, . . . not by the courts but by a particular agency, whose policy biases will ordinarily be known.").

39. *See, e.g.*, Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 313 (1988) ("[S]ince many statutory interpretation issues are actually issues of policy rather than issues of law, an agency should have the ability to change its prior 'interpretation' of a statutory provision."); *see also* Scalia, *supra* note 34, at 517–18 (arguing similarly).

discretion.[40] So, too, they contend that deference is entirely consonant with the logic and structure of both the Constitution[41] and the Administrative Procedure Act.[42] Critics of *Chevron* disagree with nearly all of these arguments. They have argued that *Chevron* deference lacks a theoretical foundation[43] and violates separation of powers principles,[44] Article III,[45] and the Administrative Procedure Act.[46] The presence of several *Chevron* critics on the current Supreme Court[47] means that these doctrinal debates are likely to persist.

A second type of scholarship considers how deference is—or should be—operationalized. Thus, scholars have considered how *Chevron*'s celebrated two-step inquiry works on the ground[48] and how it interacts with other principles of interpretation.[49] Some have suggested that *Chevron* in fact has only one step[50] or that there are intermediate steps between the two canonical ones.[51] Others have explored threshold questions about when *Chevron* even applies (or

40. *See, e.g.*, Pierce, *supra* note 39 ("[I]f courts apply the *Chevron* test universally, judges will have less room to infuse their personal political philosophies in the Nation's policy making process.").

41. *See, e.g.*, Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937 (2018) (arguing that *Chevron* is consistent with the separation of powers).

42. *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1615 (2019) ("[A]n investigation of the historical context shows that *Chevron* is not incompatible with the original meaning of the governing provision of the Administrative Procedure Act . . . .").

43. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795–809 (2010) (arguing that *Chevron* "was in tension in multiple ways with the principles, doctrines, and practices that had governed judicial review of agency legal conclusions up to that time").

44. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (arguing that the *Chevron* Court was "oblivious[ ] to the fundamental alterations it makes in our constitutional conception of the administrative state").

45. *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1206 (2016) (arguing that judges deferring to agency interpretations under *Chevron* "not only abandon their office as judges but also exceed the constitutional power of the courts").

46. *See, e.g.*, Beermann, *supra* note 43, at 788–95 (arguing that *Chevron* "appears inconsistent with the APA's judicial review provisions").

47. Metzger, *supra* note 5, at 24.

48. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255 (1988); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Pierce, *supra* note 39; Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012).

49. *See, e.g.*, Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64 (2008); Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359 (2018).

50. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

51. *See* Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339 (2017); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017).

should apply), an inquiry often called "*Chevron*'s domain"[52] or "*Chevron* Step Zero."[53] And prescriptive work has advocated changing how the doctrine operates. One approach suggests that courts should better account for how Congress works.[54] Others advocate calibrating deference based on who the interpreter is, arguing that greater deference should be due to executive rather than independent agencies,[55] or when the White House itself[56] or an agency head (rather than only line-level officials)[57] is involved in the decisionmaking process. Each of these contributions focuses on when and how courts practice deference.

Third, an empirical literature considers deference's real-world effects. Some have argued that *Chevron* makes agencies "more adventurous when interpreting and elaborating statutory law"[58] and changes the internal dynamics of agencies by empowering policy and technical experts at the expense of agency lawyers.[59] Quantitative work finds that, in the wake of the *Chevron* decision, agency win rates before the federal courts of appeals went up and the number of remands went down.[60] This work shows that, by contrast, the Supreme Court does not consistently apply *Chevron* deference, even in cases where black-letter doctrine dictates that it should.[61] This vein of research also

52. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

53. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). Another threshold question is whether courts should withhold deference for "major questions." *See, e.g.*, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2020).

54. Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009).

55. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001).

56. *See id.* at 2377–79.

57. *See* David J. Barron & Elena Kagan*,* Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

58. *See* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law,* 16 VILL. ENV'T L.J. 1, 3 (2005).

59. *See id.* at 11–13.

60. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1057–59 (noting a modest increase in agency win rate and a significant decrease in remand rate in regional circuit courts of appeals after *Chevron*, but not in the D.C. Circuit); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (finding that agency win rates were far higher when courts of appeals applied *Chevron*, but finding that *Chevron* had little effect on outcomes at the Supreme Court level).

61. *See* 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, 1120–36 (2008) (finding that the Supreme Court often declines to apply *Chevron*, based on an analysis of more than two decades of cases involving agency statutory interpretations); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1751–94 (2010) (finding that the Court generally does not give *Chevron* much precedential weight, based on the same sample of cases); Thomas W. Merrill, *Judicial Deference to Executive Precedent,* 101 YALE

demonstrates that *Chevron*'s impact is sometimes blunted by judicial ideology, with liberal and conservative jurists applying the doctrine differently.[62]

Finally, a fourth line of research provides historical perspectives on judicial deference. Thomas Merrill has written a detailed account of the *Chevron* litigation, including the Supreme Court's deliberations on the case.[63] Others have examined antecedents to *Chevron*,[64] looking to nineteenth- and twentieth-century practice to understand how judicial deference on questions of law emerged and evolved.[65] This historical work, like its more analytical and empirical counterparts, is heavily focused on legal doctrine and judicial decisionmaking.

Rich as they are, these literatures largely avoid politics (and especially partisan politics). Closer to our project is some recent administrative law scholarship that has centered on the relationship between doctrine and regulatory outcomes. Cass Sunstein and Adrian Vermeule have documented the rise of "libertarian administrative law" doctrine among some conservative jurists.[66] More broadly, Nicholas Bagley has argued that the proceduralism of modern administrative law itself "systematically favors" deregulatory outcomes.[67] These accounts work from the inside out, taking doctrine as their point of

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L.J. 969, 970 (1992) (finding that the Court uses the *Chevron* framework "in only about half the cases that [it] perceives as presenting a deference question," based on analysis of cases in the terms immediately following *Chevron*).

62. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998) (finding that D.C. Circuit judges are more likely to defer to agency decisions made by their copartisans); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–27 (2006) (finding that judges' ideology is strongly correlated with the probability that they will validate agency statutory interpretations); *see also* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1493–1518 (2018) (finding differences between decisions by liberal and conservative judges but arguing that *Chevron* reduces the role of ideology relative to alternative interpretive approaches).

63. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE (2022); *see also* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

64. Pre-*Chevron* cases operationalizing forms of deference on questions of law (or mixed questions of law and fact) include *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

65. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017); Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241 (2011); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125 (2021).

66. *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015).

67. *See* Bagley, *supra* note 23, at 368–69.

origin and exploring its political consequences.[68] By contrast, our approach works from the outside in, asking how shifts in control of political institutions and fundamental disagreement about the need for government regulation shape both liberals' and conservatives' views about existing doctrine and their efforts to change it—not through the courts, but through the elected branches. So, too, we explore important counterfactuals, including several failed attempts to enshrine antideference principles into law.[69]

Closer still is historical work on the politics of administrative law, most notably Gillian Metzger's work examining New Deal–era antecedents to contemporary conservative opposition to the administrative state.[70] Our analysis seeks to build on Metzger's, but it differs in two respects. First, while Metzger's historical reference point is the New Deal era, ours is the late twentieth and early twenty-first centuries. Indeed, as we will see in the next Part, beginning in the early 1970s, administrative law became far more politically salient than at any time since the New Deal. The reason is simple: the administrative state's ambition—and its corresponding penetration into the lives of all Americans—expanded greatly. In consequence, we argue that tracing the roots of our current political moment to this more recent period is critical. Second, while Metzger's discussion of *Chevron* focuses mostly on jurists and scholars,[71] we focus on synthesizing the debates that took place in Congress, in the executive branch, and among competing interest groups. Documenting both attacks on and defenses of the doctrine, by both conservatives and liberals alike, we aim to paint a comprehensive picture of nearly five decades' worth of political fights

68. Bagley does not discuss *Chevron*, *see id.*, while Sunstein and Vermeule argue that the doctrine "has neither a libertarian nor an antilibertarian tilt" because it applies regardless of whether agencies are regulating or deregulating, Sunstein & Vermeule, *supra* note 66, at 445. We agree with this conclusion as a doctrinal matter, but we show that as a practical matter *Chevron* is more important to those with pro-regulatory agendas than those with antiregulatory agendas. *See infra* Section VI.C.1. Separately, some recent work by political scientists has encouraged those who focus on regulatory politics to be attuned to the nuances of judicial doctrine. *See* Alan E. Wiseman & John R. Wright, Chevron*,* State Farm*, and the Impact of Judicial Doctrine on Bureaucratic Policymaking*, PERSPS. ON POL. (Dec. 8, 2020), https://politicalsciencenow.com/chevron-state-farm-and-the-impact-of-judicial-doctrine-on-bureaucratic-policymaking/ [https://perma.cc/VJ6H-YJNK].

69. Some have argued that such attempts to bar judicial deference will necessarily fail, reasoning that deference "will persist in roughly the same form" even without *Chevron*, because the doctrine "reflects an arrangement fundamental to our current structure of government." Lisa Schultz Bressman & Kevin M. Stack, Chevron *Is a Phoenix*, 74 VAND. L. REV. 465, 466, 479 (2021). We take no position on the merits of this contention but note simply that political actors on both sides of the aisle have invested considerable energy in either altering or preserving the status quo.

70. *See* Metzger, *supra* note 5.

71. *See id.* at 26–27, 32, 36.

about deference. With this background in mind, we now turn to the relevant history.

II. POLITICIZED DEFERENCE: THE BUMPERS AMENDMENT, 1975–81

Fears of unchecked administrative power have always had a political valence.[72] During the New Deal, "attacks on [Franklin] Roosevelt's substantive policies were intertwined with attacks on the administrative state that carried them out."[73] In subsequent decades, conservatives generally sought to curb agency power by interposing judicial supervision, while liberals generally sought to insulate agencies from interference by courts.[74] To be sure, this generalization has limits. Some prominent postwar liberals viewed the administrative state with deep skepticism, given the close relationship between federal agencies and the entities they were established to regulate.[75] Other left-oriented critics, scarred by the experience of unchecked state power during the McCarthy era, viewed courts as necessary checks on administrative power. Indeed, both groups endorsed the Warren Court's role in helping to weaken the South's repressive racial regime.[76]

Notwithstanding these exceptions, as this Part demonstrates, wide-ranging changes to the administrative state did little to alter the baseline politics of deference. It tells the story of the Bumpers Amendment, recounting a nearly decade-long effort in the 1970s and 1980s to eliminate—by statute—judicial deference to agencies on questions of law. The Amendment's proponents nearly succeeded in enacting a statutory change that would have obligated courts to make

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72. *See id.* at 69 ("Even if clothed in constitutional garb, judicial efforts to cut back on administrative governance will inevitably be seen in political terms, as part of an ongoing national struggle between conservatism and progressivism.").

73. JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 59 (2012).

74. *See, e.g.*, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 195–96 (1999) (noting that, in the late 1930s, the conservative American Bar Association commissioned New Deal opponent and former Harvard Law School Dean Roscoe Pound to draw up recommendations on ways to check the administrative state, including the creation of a new federal court to oversee federal agencies); GRISINGER, *supra* note 73, at 200 (noting that, in the 1950s, the National Association of Manufacturers—the nation's most powerful business group at the time—sought to "transfer" parts of the jurisdiction of the National Labor Relations Board to the federal courts).

75. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 56 (40th anniversary ed. 2009) ("Stated in the extreme, the policies of interest-group liberalism are end-oriented but ultimately self-defeating."); PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM, at xv (2021) (documenting a left-wing public interest movement in the 1960s and 1970s that "challenged traditional liberalism and its emphasis on federal agency discretion" and "disputed the legitimacy and trustworthiness of agency decision-making").

76. *See, e.g.*, LOWI, supra note 75, at 298 (discussing the concept of "juridical democracy").

decisions about questions of law "independently" and could have preempted the Court's *Chevron* decision. Yet, stymied by the difficulties of legislating in our famously veto-laden political system, opponents of deference fell short.

Our account underscores the politics underlying the deference debate during this period. The Amendment was championed by critics of the regulatory state, including congressional conservatives from both parties and powerful business groups—most notably the Business Roundtable, an ascendant lobbying organization of Fortune 100 CEOs formed in the early 1970s. Opponents, by contrast, tended to support more robust regulation, counting among their ranks both congressional liberals and their allies in the public interest community, including groups like Public Citizen. Notwithstanding these political alignments, however, we argue that this political story cannot be fully understood without attention to historical context and contingency. Indeed, both coalitions had some unexpected members, even after accounting for the fact that the parties had not yet fully aligned along the current liberal-conservative divide.[77] Understanding the politics of deference therefore requires a closer look at the politics of regulation more generally and at the actors who drove that politics.

A. The Bumpers Amendment

1. The New Politics of Regulation

The federal administrative state underwent a dramatic transformation in the late 1960s and early 1970s.[78] With the support of President Richard Nixon, Congress created an array of important new agencies—including the Environmental Protection Administration ("EPA"), the Occupational Safety and Health Administration ("OSHA"), and the Consumer Product Safety Commission ("CPSC")—"investing them with broad powers over a wide range of business decisions."[79] This new regulatory regime did more than simply expand the fourth branch

77. The literature on the postwar realignment of the two parties is vast, including a number of important recent contributions. *See, e.g.*, ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965 (2016); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

78. *See* BENJAMIN C. WATERHOUSE, LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 20 (2014) (describing the "political and economic restructuring" of the 1960s and 1970s).

79. DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 59 (2003); *see also* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 97 (2010).

of government; it fundamentally "restructure[d]" it.[80] Whereas New Deal–era reforms sought to govern "the things companies did to make money," the regulatory reforms that followed the Great Society instead "targeted . . . the 'externalities' of doing business," including "pollution, labor injustice, and racism."[81] Government no longer sought to control the *economic* behavior of a small subset of industries; rather, it sought to change the *social* behavior of American business as a whole.[82]

This shift in regulatory ambition engendered significant backlash. The deeper agencies penetrated into everyday business operations, the more it mattered what agencies were doing and how they were doing it. Though corporate interests initially did little to resist the regulatory state's expansion,[83] they soon came "to see [federal] agencies as obstacles."[84] "[E]nthusiastic agency staff members [were] enforc[ing] a set of rules that companies viewed as arbitrary and unrealistic," prompting business leaders to become vocal critics of the new regime.[85] At the same time, the American economy was changing. After nearly three decades of unprecedented growth, the country experienced three rapid shocks: the collapse of the Bretton-Woods financial system, the 1973 energy crisis, and increased competition from abroad.[86] As a result of these shifting economic winds, inflation and unemployment grew in tandem—a combination previously thought impossible.

In this challenging economic environment, regulatory momentum stalled and then reversed.[87] As the 1970s wore on, "government intervention began to be perceived less as the solution to the nation's economic difficulties and more as their cause."[88] Democrats, no less than Republicans, began to "embrace[ ] the argument that excessive regulation had become a serious curb on growth."[89] Under President Jimmy Carter (the first Democrat to hold the White House in nearly a decade), the transportation sector—including airlines, railroads, and trucking—was deregulated by statute, together with the

80. WATERHOUSE, *supra* note 78, at 20.

81. *Id.* at 32.

82. *See* VOGEL, *supra* note 79, at 13.

83. *See id.* at 60.

84. MARK S. MIZRUCHI, THE FRACTURING OF THE AMERICAN CORPORATE ELITE 143 (2013).

85. *See id.* at 144–45.

86. *See, e.g.*, VOGEL, *supra* note 79, at 113 ("[T]he performance of the economy after 1973 was significantly inferior to what it had been in the previous decade."); WATERHOUSE, *supra* note 78, at 34 (similar).

87. *See* VOGEL, *supra* note 79, at 114.

88. *Id.* at 150.

89. HACKER & PIERSON, *supra* note 79, at 99–100 (noting that "1977 and 1978 marked the rapid demise of the liberal era and the emergence of something radically different").

nation's communications and banking infrastructure.[90] Support for deregulation spanned the political spectrum, with even prominent consumer advocates attacking regulatory agencies as "arrogant and unresponsive."[91] Critics of the new regulatory state also charged that courts had failed to check agencies' rampant growth. They cast particular blame on the liberal-leaning D.C. Circuit. As one commentator suggested, what Chief Judge David Bazelon called a "fruitful collaboration" between agencies and courts was actually just an abdication of judicial responsibility.[92]

2. Senator Bumpers's Proposal

It was against this backdrop that Senator Dale L. Bumpers (D-AR) introduced a resolution to curb judicial deference to agency interpretations of statutes in the fall of 1975.[93] A lawyer by training, Bumpers was best known for unseating Arkansas governor and infamous segregationist Orval Faubus in 1970.[94] Captioning his proposal "[a] bill to improve the administrative process by making Federal agencies more responsive to the will of the people,"[95] Bumpers sought to amend section 706 of the Administrative Procedure Act, which details the responsibilities of Article III courts reviewing agency decisionmaking.[96]

What came to be known as the Bumpers Amendment fit neatly onto two printed pages. It proposed revising section 706 to clarify that courts were not to defer to agency statutory interpretations:

> To the extent necessary to decision and when presented, the reviewing court shall *de novo* decide all relevant questions of law, interpret constitutional and statutory provisions, and

90. *See, e.g.*, WATERHOUSE, *supra* note 78, at 185; VOGEL, *supra* note 79, at 169–72 (describing economic deregulation generally and airline deregulation in particular); *see also* ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED 110–35 (2008) (analyzing airline deregulation as a case of "sustainable" policy reform).

91. VOGEL, *supra* note 79, at 170.

92. Cornelius B. Kennedy, *The Bumpers Amendment: Regulating the Regulators*, 67 AM. BAR ASS'N J. 1639, 1641 (1981).

93. *See* S. 2408, 94th Cong. (1975) ("A Bill to Improve the Administrative Process by Making Federal Agencies More Responsive to the Will of the People as Expressed by Their Elected Representatives in Congress").

94. Michael H. Brown, *Dale Bumpers, Arkansas Politician and Barbed Wit of the Senate, Dies at 90,* WASH. POST (Jan. 2, 2016), https://washingtonpost.com/politics/dale-bumpers-arkansas-governor-and-senator-dies-at-90/2016/01/02/02973892-b17b-11e5-b820-eea4d64be2a1_story.html [https://perma.cc/4LY7-S7VB].

95. *See* S. 2408.

96. *See* 5 U.S.C. § 706 ("Scope of review"). Bumpers paired his proposal to amend section 706 with one to eliminate the defense of sovereign immunity in suits for specific relief against agencies or employees of the United States. *See Administrative Procedure Act Amendments of 1976: Hearings on S. 2408 Before the S. Comm. on the Judiciary*, 94th Cong. 155–56 (1976) (statement of Sen. Dale Bumpers (D-AR)) [hereinafter *Hearings on S. 2408*].

> determine the meaning or applicability of the terms of an agency action. *There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is clearly and convincingly shown.*[97]

Bumpers defended his Amendment on grounds of constitutional theory. Urging Congress to eliminate any "presumption in favor of the validity of agency rules and regulations," he emphasized that agencies "are the creatures of Congress, possessing only those powers given them by legislation."[98] And so it was not "enough" for "an administrative official to argue that no law prohibits his action, and that, therefore, the courts should not intervene."[99] Writing to his Senate colleagues, he expressed concern that granting agencies too much freedom to "determine[ ] the limits of [their] own authority" could license departures from "[t]he will of Congress as expressed in the law that created the agency."[100]

In addition to this principled rhetoric, however, Bumpers also viewed his Amendment as a corrective to excessive regulation. He

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97. S. 2408 (emphases added to show proposed changes from then-existing law). The Amendment added a caveat:

> *Provided*, *however*, That if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the burden of proof normally applicable in such actions.

Id. Although this Article focuses primarily on Bumpers's addition of the term "de novo" to the first sentence of section 706 (and later variations, including the suggested addition of the term "independently"), the Amendment's other proposed changes to the APA are worthy of attention in their own right. As a matter of Senator Bumpers's own thinking, he believed the "presumption of validity" language would, in concert with the requirement of "de novo" decisionmaking, help to guarantee that agencies were not exceeding the boundaries of their statutory authority. As he put it in his initial remarks on the floor in support of his proposed measure, eliminating "the presumption in favor of the validity of agency rules and regulations" would ensure that a reviewing court would need to be "clearly and convincingly persuaded" before it upheld a "given rule or regulation [as] within the power delegated by Congress." 121 CONG. REC. 29,957 (1975) (statement of Sen. Dale Bumpers (D-AR)). Commentators agreed that the "language would have constituted an even clearer mandate to the courts to override agency judgments on a wide range of matters that typically arise during judicial review." Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 6 (1985); *see also* David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 343 (1979) (suggesting that the language "would constitute a strong disincentive to rulemaking by federal agencies"). Critics, for their part, worried that the language would "delay severely the implementation of badly needed legislation where the Congress has of necessity given an executive agency authority to issue implementing regulations." *Hearings on S. 2408*, *supra* note 96, at 271 (statement of Stephen Kurzman, Assistant Secretary for Legislation, Department of Health, Education, and Welfare).

98. 121 CONG. REC. 29,958 (statement of Sen. Dale Bumpers (D-AR)).

99. *Id.*

100. Letter from Dale Bumpers, U.S. Sen., to Colleagues (Jan. 24, 1979) (Dale Bumpers Papers, Box 36, Folder 20, on file with the University of Arkansas Special Collections Library [hereinafter Bumpers Papers]).

charged on the Senate floor that "the initiative and enterprise of the American people . . . are being stifled by a mass of well-meaning but often misdirected regulation."[101] And he lamented the "sheer volume of new and proposed rules, interpretations, and regulations that pour forth each day from the Federal establishment."[102] Bumpers conceded that Congress had been right to insulate agencies from "strict judicial review" by courts "hostile to the [New Deal's] social legislation."[103] But times had changed. Courts had become *too* deferential to agencies,[104] he reasoned, so a "fundamental reexamination" of administrative law was necessary.[105]

B. The Amendment's Reception

1. Initial Skepticism

For several years, Bumpers's proposal made little headway.[106] President Gerald Ford's Administration expressed its opposition. The Department of Health, Education, and Welfare argued that Bumpers's proposal would "bog down the courts in endless litigation over the validity of agency rules,"[107] and the EPA suggested that "concerns about the wisdom or legitimacy of agency rulemaking [were] better addressed . . . by requiring improvements in rulemaking procedures."[108] In the judiciary, skepticism ran the ideological gamut: conservative Chief Justice Warren Burger warned that the Amendment would increase the workload of the federal courts,[109] liberal Judge Harold Leventhal cautioned that it "would impair the twin goals of fair

101. 121 CONG. REC. 29,956 (statement of Sen. Dale Bumpers (D-AR)).

102. *Id.*

103. *Id.* at 29,957.

104. *Id.* at 29,965 (criticizing courts for having "long since exceeded proper boundaries" of deference of the sort granted in *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944) (upholding an agency's statutory interpretation on the ground that it "had a reasonable basis in law")).

105. *Id.* at 29,956.

106. *See* Levin, *supra* note 97, at 5–6 (describing the history of the Bumpers Amendment); Carl McGowan, *Congress, Court & Control of Delegated Power*, 77 COLUM. L. REV. 1130, 1165 (1977) (discussing reasons why "little action" had been taken on Bumpers's proposal).

107. *Hearings on S. 2408*, *supra* note 96, at 271 (statement of Stephen Kurzman, Assistant Secretary for Legislation, Department of Health, Education, and Welfare).

108. *Id.* at 329 (statement of G. William Frick, General Counsel, Environmental Protection Agency).

109. *See* CHIEF JUSTICE WARREN E. BURGER, 1979 YEAR-END REP. (Bumpers Papers, *supra* note 100, Box 36, Folder 25); *see also* REP. OF THE JUD. CONF. COMM. ON CT. ADMIN. 31 (1980) (Bumpers Papers, *supra* note 100, Box 36, Folder 25) (similar).

and effective government,"[110] and moderate Judge Carl McGowan noted that it would "undo a relatively finely tuned system of shared judicial and administrative responsibility for interpreting and enforcing broadly delegative legislation."[111] Even potential allies generally supportive of Bumpers's aims, like the National Association of Manufacturers, found fault in the draft's text.[112]

The proposal's fortunes changed for the better in early 1979, however, when the American Bar Association's ("ABA") House of Delegates overruled the recommendation of the group's administrative law section and voted to endorse the Amendment.[113] Buoyed by the ABA's backing, Bumpers reintroduced his proposal, and ideological fault lines soon surfaced.

2. Divisions over Regulation

Both legislators and interest groups viewed Bumpers's proposal as a "tough[ ] expression of antiregulatory sentiment."[114] Southern Democrats, like Senator Lawton Chiles (D-FL), rose to defend the proposal on the ground that "drastic" surgery was necessary to counteract regulatory overreach.[115] "The paperwork, the rules, and the redtape [*sic*] have grown greatly," the Senator observed, criticizing regulators who do "not know anything about industry" and "do not have any concept of the cost, time, [and] inconvenience" associated with

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110. *Regulation Reform Act of 1979: Hearings on H.R. 3263 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 96th Cong. 418 (1979) (statement of Hon. Harold Leventhal) [hereinafter *Hearings on H.R. 3263*].

111. *See* McGowan, *supra* note 106, at 1166. *But see Improving the Administrative Process—Time for a New APA?* (pt. A), 32 ADMIN. L. REV. 287, 313–14 (1980) (panel remarks) (quoting then-Judge Stephen Breyer expressing ambivalence as to whether Bumpers's proposal was "desirable" but describing the Amendment as "a serious approach to the problem" of agency discretion).

112. *See Hearings on S. 2408*, *supra* note 96, at 689–70 (statement of National Association of Manufacturers) (criticizing, in particular, the use of the term "de novo" on the ground that "courts may already consider questions of law 'ab initio' and are not bound by agency decisions").

113. James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 751 (1980). The administrative law section's report expressed "serious[ ] doubt" about the wisdom of the Bumpers Amendment, insofar as it "would appear to make it unlawful for courts to rely on administrative expertise for guidance even in those circumstances where they have found it useful." SECTION OF ADMIN. L., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 10 (1979) (Bumpers Papers, *supra* note 100, Box 36, Folder 25). While the 1979 version of Bumpers's bill was largely identical to the version the Senator had initially proposed, Bumpers deleted the term "de novo" and replaced the "clearly and convincingly" standard with a preponderance of the evidence standard. *See* Ronald M. Levin, *Report in Support of Recommendation 79-6: Judicial Review and the Bumpers Amendment*, 1979 ADMIN. CONF. OF THE U.S. RECOMMENDATIONS & REPS. 565, 566.

114. *See* Merrill Brown, *Strong Anti-Regulatory Plan Is Alive, Kicking*, WASH. POST (June 16, 1980), https://washingtonpost.com/archive/business/1980/06/26/strong-anti-regulatory-plan-is-alive-kicking/bfee1516-d520-4fa4-8bdc-9c2081b75d60/ [https://perma.cc/SD5N-CDNS].

115. 125 CONG. REC. 23,487 (1979) (statement of Sen. Lawton Chiles (D-FL)).

regulation.[116] For these reasons, Chiles argued, Congress should force regulators to "come to the court and show that they knew what they are talking about."[117]

Many mainstream Republicans agreed. Senator Pete Domenici (R-NM), for instance, declared that the country had entered an "age of pervasive Federal regulation."[118] Accordingly, a "dramatic turnaround in the regulatory process" was necessary.[119] Abolishing deference promised to make regulators "more careful and less arbitrary."[120] Regulators would have to shoulder "a more significant burden of proving that they are right in the manner and method that they are regulating our citizens and carrying out the mandate of Congress."[121]

Recognizing the Amendment's deregulatory potential, business groups began to offer support. At the center of this effort was the Business Roundtable.[122] In testimony before the House, the group's representatives—including the CEOs of prominent companies like pharmaceutical giant Eli Lilly—supported the Amendment as a way to "put more effective constraints on agency abuses of statutory authority."[123] In private conversations with advisors to Carter, who had succeeded Ford in early 1977, however, the group acknowledged that a "modified" version of the Senator's proposal would be more appropriate.[124] Under the Roundtable's approach, the revised version of section 706 would "call for courts to construe regulatory statutes narrowly [and] direct courts to demand a clear statement from statutes before acceding to agency interpretations."[125] It would "also retain language to the effect that regulations are not to be presumed valid."[126] Nevertheless, even within the business community, the issue had more limited political salience compared to contemporary debates over *Chevron*. Illustrating the point, a senior U.S. Chamber of Commerce

116. *Id.*

117. *Id.*

118. *Id.* at 23,483 (statement of Sen. Pete Domenici (R-NM)).

119. *Id.* at 23,484.

120. *Id.*

121. *Id.*

122. *See* WATERHOUSE, *supra* note 78, at 189.

123. *Hearings on H.R. 3263*, *supra* note 110, at 1074 (statement of Richard D. Wood, Chairman and CEO, Eli Lilly & Co.).

124. Memorandum from Simon Lazarus, Assoc. Dir., White House Domestic Pol'y Staff (Nov. 5, 1979) (Stuart Eizenstat Papers, Box 269, Folder Regulatory Reform [CF, O/A 730][1], on file with the Jimmy Carter Presidential Library [hereinafter Eizenstat Papers]).

125. *Id.*

126. *Id.*

official told a House subcommittee in 1979 that his organization had yet to take a position on the issue.[127]

For the same reason that conservatives embraced the Amendment, liberals opposed it.[128] Senator Edward Kennedy (D-MA) conceded that some regulatory reform was appropriate but argued that there was "no demonstrable need for [Bumpers's] amendment."[129] For one, the proposal would eliminate "the needed flexibility of current practice: while courts may be fully capable of determining some questions of law without any reference to agency expertise o[r] experience, others necessarily require such resort."[130] For another, the Senator argued, it was not easy to separate out true questions of law from "mixed" questions of law and fact, "raising the spectre [*sic*] of retrial in the district courts and courts of appeals of numerous issues properly determined in the agencies."[131] Ultimately, Kennedy concluded, "[c]ourts should not ignore the judgment of the agency on matters of law."[132]

Other liberals issued even more dire warnings. The primary author of the Clean Air Act, Senator Edmund Muskie (D-ME), characterized Bumpers's proposal as "overwhelming in its sweep" and warned that it "could stop the Federal government in its tracks."[133] Senator John Culver (D-IA) offered no less gloomy a prediction, warning that Bumpers's proposal "would do away with the administrative process as we know it."[134]

Recognizing the Amendment's deregulatory potential, public interest groups and organized labor amplified these concerns. The AFL-CIO condemned the proposal as "an unwise transfer of power from the administrative agencies to the courts."[135] So, too, Public Citizen, which in less than a decade had become one of the nation's most prominent consumer groups, strongly opposed the measure. Describing it as "regulatory reform run amok," Public Citizen warned that eliminating

127. *Hearings on H.R. 3263*, *supra* note 110, at 401 (statement of Jeffrey H. Joseph, Director of Government and Regulatory Affairs, United States Chamber of Commerce).

128. *See* Brown, *supra* note 114.

129. 125 CONG. REC. 23,481 (1979) (statement of Sen. Edward M. Kennedy (D-MA)).

130. *Id.*

131. *Id.*

132. *Id.* at 23,482.

133. *Id.* at 23,488 (statement of Sen. Edmund Muskie (D-ME)).

134. *Id.* at 23,489 (statement of Sen. John Culver (D-IA)).

135. *Hearings on H.R. 3263*, *supra* note 110, at 411 (statement of Laurence Gold, Special Counsel, AFL-CIO).

deference would "give[ ] unusual power to unaccountable and unelected judges in what will become regulatory courts all around the country."[136]

Between these conservative and liberal poles lay the Carter Administration. Though a lifelong Democrat, Carter was not a traditional liberal.[137] He believed deregulation was critical to the country's economic health and viewed business groups—and the Roundtable in particular—as vital partners in that effort.[138] As one of his chief domestic policy advisors put it: "most of the important regulatory laws that President Carter will be responsible for will be laws to *de*regulate, laws to remove whole regulatory programs from the books, or to substantially reduce their scope."[139] As to Bumpers's proposal, however, the White House was unmoved by the Roundtable's entreaties. Although Carter's advisors privately conceded that the Senator's proposal "was not irresponsible, and might well . . . make very little difference" in practice, they nevertheless concluded that it would "be extremely inadvisable to push [it]."[140]

In the Carter Administration's view, Bumpers's proposal represented an unacceptable constraint on administrative latitude, threatening to "undermine" the fundamental principle "that the expert judgment of agencies . . . should be generally respected by reviewing courts."[141] In closed-door meetings with the business community, White House staffers emphasized three primary concerns. First, they argued, "giving policy authority to life-tenured judges" would not succeed in making "regulatory decision-making more accessible or responsive."[142]

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136. *Id.* at 354–55 (quoting Letter from Public Citizen to Jimmy Carter, President of the U.S. (Nov. 2, 1979)).

137. *See* KAI BIRD, THE OUTLIER: THE UNFINISHED PRESIDENCY OF JIMMY CARTER 14 (2021) (describing Carter's "fiscally conservative policies" and conflicts with liberal Democrats); JOHN A. FARRELL, TIP O'NEILL AND THE DEMOCRATIC CENTURY 442 (2001) (describing Carter as a "neoliberal"—a "southern moderate[ ] who rose along with . . . Arkansas governor William Clinton and senator Dale Bumpers").

138. *See* Louis M. Kohlmeier, *The Big Businessmen Who Have Jimmy Carter's Ear*, N.Y. TIMES, Feb. 5, 1978 (§ 3), at 1 ("[B]ig business has the ear of Jimmy Carter, Democrat, to a greater degree than was true of Richard M. Nixon and Gerald R. Ford, Republicans, and some of the business establishment leaders say they are getting along better with Mr. Carter than they did with his predecessors.").

139. Memorandum from Simon Lazarus to Stuart Eizenstat, Chief Domestic Pol'y Advisor (June 16, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [1]).

140. Memorandum from Simon Lazarus, *supra* note 124.

141. Letter from Alan A. Parker, Assistant Att'y Gen., to Edward M. Kennedy, U.S. Sen. (Sept. 7, 1979) (Bumpers Papers, *supra* note 100, Box 37, Folder 1); *see also* Memorandum from Alan A. Parker to Stuart Eizenstat (Oct. 30, 1979) (Bumpers Papers, *supra* note 100, Box 37, Folder 1) ("The amendment's weaknesses are fundamental.").

142. Memorandum from Simon Lazarus to Stuart Eizenstat, Talking Points for BRT Regulatory Reform Task Force Dinner (Nov. 29, 1979) (Eizenstat Papers, *supra* note 124, Box 269, Folder Regulatory Reform [CF, O/A 730] [1]).

Second, they predicted that Bumpers's proposal was unlikely to "make regulation less burdensome," noting that "many strict regulations and regulatory programs are put into effect as a result of activist judicial orders."[143] Finally, they suggested that while the measure would surely redound to the benefit of the legal profession, it remained "unclear" what other sectors of the economy stood to gain.[144]

The Senate floor debate on the Amendment largely fell along the ideological lines that we have described, but not entirely. Conservative stalwart Senator Bob Dole (R-KS) agreed with his liberal colleagues that the Amendment "would undermine the basic value of administrative agencies."[145] On the other side of the aisle, Senators Hubert Humphrey (D-MN) and George McGovern (D-SD), both liberal icons, voted with conservatives against a motion to table the measure.[146] In the end, Bumpers's proposal survived its first challenge; the motion to table failed, 27–51.[147] The measure was added as an amendment to a broader bill to reform the federal judiciary,[148] which passed the Senate, 56–33, in October 1979.[149]

C. The Amendment's Fate

Notwithstanding meaningful opposition, commentators recognized the Bumpers Amendment's momentum. It reflected the "strongly felt frustrations created by agency action."[150] Observers viewed it as a core "part of the emotional debate . . . over the supposed entanglement of America in too many rules and regulations."[151] Even a report prepared for the Administrative Conference of the United States, which highlighted the raft of difficult and unresolved questions that arose from the proposal, recognized the measure's consonance with the

143. *Id.*

144. *Id.*

145. 125 CONG. REC. 23,485 (1979) (statement of Sen. Robert Dole (R-KS)); *see also, e.g.*, *id.* at 23,490 (statement of Sen. Harrison Schmitt (R-NM)) (suggesting the measure would lead to a "usurpation" of Congress's power by the federal judiciary).

146. *Id.* at 23,499.

147. *Id.* The issue was not especially salient, as more than twenty senators were absent from the vote.

148. *Id.* at 23,504.

149. *Id.* at 30,100.

150. COMM. ON ADMIN. L., N.Y.C. BAR ASS'N, REPORT: AMENDMENT OF ADMIN. PROC. ACT WITH RESPECT TO PRESUMPTION OF VALIDITY (THE "BUMPERS AMENDMENT") 3 (Nov. 1979) (Bumpers Papers, *supra* note 100, Box 36, Folder 25).

151. *See* Ward Sinclair, *Stalled Regulatory Revision Bill Gets Boost in House*, WASH. POST., Sept. 19, 1980, at A2.

country's deregulatory "mood."[152] Bumpers, the report acknowledged, "has a point when he argues that significant segments of our society feel powerless and unable to make a meaningful contribution to the ever-evolving regulatory scene."[153]

To capitalize on the political moment, Bumpers revised the proposal over the winter of 1979–80, with the aid of the Business Roundtable and ABA.[154] These revisions were designed to address both "technical" and "substantive" criticisms, including concern that the Amendment effectively "call[ed] on the courts to make policy determinations."[155] To clarify the Amendment's scope, revisions focused on two key parts of section 706. As an initial matter, the section's prefatory sentence would be changed to provide for judicial review "without according any presumption of validity to any agency action in interpreting or applying any statute."[156] The other revision concerned section 706(2)(C), which then (as now) provided that reviewing courts must set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[157] The proposed Roundtable-ABA revisions would add language making clear that this determination would be made "[i]ndependently . . . by the reviewing court," which would narrowly construe agency authority "unless it concludes that the power to take such [challenged] action has been granted expressly or by clear implication."[158] Over the next six months, the draft text underwent several subsequent modifications;[159] the new version came to be known colloquially as "Baby Bumpers."[160]

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152. *See* Levin, *supra* note 113, at 567–98 ("Today a mood in favor of 'deregulation' is perceptible not only in the United States Senate but in a number of the agencies themselves."); *see also* McGowan, *supra* note 106, at 1165–68 (summarizing lines of critique).

153. *See* Levin, *supra* note 113, at 596. The Administrative Conference remained consistently opposed to the substance of the Amendment. *See* 1 C.F.R. § 305.79-6 (1979); 1 C.F.R. § 305.81-2 (1981).

154. *See* Memorandum, The Revised Bumpers Amendment (Feb. 20, 1980) (draft) (Bumpers Papers, *supra* note 100, Box 36, Folder 23).

155. *Id*.

156. Clarification and Perfection of the Bumpers Amendment, with ABA and BRT Concurrence (Dec. 1, 1979) (Bumpers Papers, *supra* note 100, Box 36, Folder 25).

157. 5 U.S.C. § 706(2)(C).

158. Clarification and Perfection of the Bumpers Amendment, *supra* note 156.

159. *See* A.B.A./B.R.T. Revision of Bumpers Amendment (Mar. 4, 1980) (Bumpers Papers, *supra* note 100, Box 36, Folder 25) (amending the preface to require the reviewing court to decide questions of law "independently and without according any presumption of validity to an agency rule" and amending subsection 706(a)(2)(C) to provide that "the reviewing court shall require that the agency's statutory jurisdiction or authority has been granted expressly or, in light of the statute and other relevant legal materials, by clear implication").

160. Memorandum from Simon Lazarus to Stuart Eizenstat (May 16, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]).

The business community then picked up its lobbying efforts, making clear that the proposal was "an essential element of meaningful regulatory reform."[161] Noting that the Roundtable had a "strong interest in seeing sound regulatory reform legislation enacted," the chairman of the group's regulatory reform task force urged Carter to support the revised Amendment.[162] So, too, the group tasked a prominent law firm with developing a point-by-point rebuttal of the Administration's criticisms of the proposal and communicating its findings to Bumpers.[163] Despite its earlier equivocation, the Chamber of Commerce also declared its support, telling members that the revised proposal was an "important safeguard against regulatory excesses."[164]

This pressure had a pronounced effect on Carter's staff.[165] Despite the Justice Department's belief that the Amendment would "generate an explosion of litigation and destabilize the law," the President's domestic policy advisors privately acknowledged that they "might not . . . be able to stop enactment."[166] What's more, they feared that, despite public opposition, prominent congressional liberals, including Kennedy and Culver, and key groups, including the AFL-CIO, were "soft on Bumpers."[167] Here, too, the Roundtable's influence was critical. As one advisor noted, Democratic members did not "feel they [had] paid any kind of a political price for giving in" to the Roundtable, which "radically increase[d] the chances for a damaging regulatory reform law."[168]

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161. Letter from Frank Cary, Chairman, IBM Corp., to Sam Nunn, U.S. Sen. (D-GA) (May 22, 1980) (Anne Wexler Papers, Box 49, Folder Regulatory Reform [2] (Clipping), on file with the Jimmy Carter Presidential Library).

162. Letter from Frank Cary to Jimmy Carter (Mar. 31, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [2]).

163. *See* Letter from George C. Freeman, Jr., Special Couns. to the Bus. Roundtable, to George Danielson, Chairman, Subcomm. on Admin. L. and Governmental Rels., House Comm. on the Judiciary (Mar. 11, 1980) (Bumpers Papers, *supra* note 100, Box 36, Folder 25); Letter from George C. Freeman, Jr.& Michael B. Barr, Special Couns. to the Bus. Roundtable, to Dale Bumpers (May 20, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]).

164. *Regulatory Reform: Another Carter Administration "Flip-Flop*,*"* 24 CONG. ACTION (U.S. Chamber of Com., Washington, D.C.), June 6, 1980, at 1 (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [2]); *see also Regulatory Reform: Delay Frightening, But Not Serious*, 24 CONG. ACTION (U.S. Chamber of Com., Washington, D.C.), Sept. 12, 1980, at 2 (Bumpers Papers, *supra* note 100, Box 36, Folder 23).

165. *See* WATERHOUSE, *supra* note 78, at 190 (noting that some of Carter's advisors "grew increasingly alarmed at the business community's lobbying offensive").

166. Memorandum from Simon Lazarus to Stuart Eizenstat, *supra* note 160.

167. Memorandum from Simon Lazarus to Stuart Eizenstat (May 21, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [2]).

168. *Id.* Consistent with this diagnosis, the President's team sought to cast the blame for Bumpers's success on the weakness of House Democrats. In draft talking points for a meeting with public interest and labor groups, Carter's advisors suggested that domestic policy staff tell allies

Given these concerns, Carter's team went so far as to contemplate a compromise with the Roundtable. In exchange for the group's commitment to oppose a then-pending proposal to permit legislative vetoes of agency rulemaking, the White House would accept Baby Bumpers, albeit with "some [new] modifications"—a prospect Carter's staff cheekily called "teeny Bumpers."[169] The political calculus was delicate, with the Administration willing to eliminate a presumption of deference[170] but concerned about the perception of supporting an overtly antiregulatory bill.[171]

In the spring of 1980, Bumpers's proposal narrowly failed to gain a majority in the House Judiciary Committee.[172] As the scene shifted back to the Senate, where a version of the Amendment received the backing of that chamber's Judiciary Committee in May,[173] negotiations over the proposal's operative language continued, with the AFL-CIO ultimately engaging in talks directly with the Roundtable.[174] By September, this process yielded a change to the first sentence of section 706, to require reviewing courts to "*independently* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action."[175] And in lieu of directly amending subsection 706(2)(C), the drafters

that the Administration simply "did not expect our friends on the Judiciary Committee to let a bill out of that committee with Business Roundtable amendments to expand judicial review." *Id.*

169. Memorandum from Simon Lazarus to Stuart Eizenstat (Apr. 11, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [2]).

170. Memorandum from Simon Lazarus to Stuart Eizenstat (June 27, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]).

171. Memorandum from Simon Lazarus to Stuart Eizenstat, *supra* note 169 (expressing concern about "be[ing] seen [as] dealing away the 'pro-regulator' portions of the bill" and evaluating the Amendment "as part of an overall settlement" on regulatory reform). The White House believed the Roundtable was amenable to this compromise. *See* Memorandum from Simon Lazarus to Small Group (May 21, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [2]) (suggesting that the Roundtable "would be interested in helping knock out [the] legislative veto, in exchange for acceptance of Bumpers").

172. *See* O'Reilly, *supra* note 113, at 762.

173. *Id.*

174. *See* Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 13, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]) (characterizing the negotiations as "close"); Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 22, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [1]). The White House believed that the AFL-CIO had accepted Bumpers's proposal subject to the legislative history being written in a way that would not require changes to existing practice. *See* Memorandum from Simon Lazarus to Stuart Eizenstat, Lloyd Cutler, White House Couns. & Jim McIntyre, Dir. Office of Mgmt. & Budget (June 2, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]); *see also* O'Reilly, *supra* note 113, at 765.

175. *See* The Bumpers Amendment as Revised 9-10-80 (Sept. 10, 1980) (Bumpers Papers, *supra* note 100, Box 36, Folder 23) (emphasis added to show proposed changes from then-existing law).

proposed a follow-on addition to clarify precisely how determinations under that clause would be made.[176]

After the House Judiciary Committee adopted the compromise language in September,[177] Bumpers again took to the Senate floor to reiterate many of the same antiregulatory arguments he had made in years past. The Amendment was necessary, he declared, "because people feel that Government is intruding in their lives through the regulatory process."[178] Proudly announcing that his proposal had the support of the Roundtable and the ABA, Bumpers called the measure "an idea for which the time has now come."[179]

Bumpers also continued talks with Carter's team.[180] The White House believed that a compromise amenable to both labor and business was possible, and that the AFL-CIO's involvement gave them "sufficient political protection on the Left."[181] Indeed, the negotiations between the Roundtable and the AFL-CIO appeared to yield language potentially acceptable to both sides, providing that reviewing courts "shall make the final determination of the limits of the agency's statutory authority to act."[182] Notwithstanding this push to enact the proposal, the Amendment's liberal opponents succeeded in delaying the Senate's

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176. Specifically, their proposal provided:

> [T]he court shall require that affirmative action by the agency is within the scope of agency jurisdiction or authority on the basis of the express language of the statute or other evidence of ascertainable legislative intent. In making determinations on other questions of law, as distinguished from questions of fact or discretion [policy], under this section, the court shall not accord any presumption in favor of or against agency action.

Id.

177. Sinclair, *supra* note 151; *see also* H.R. 3263, 96th Cong. § 706 (as reported by H. Comm. on the Judiciary, Sept. 25, 1980); H.R. REP. NO. 96-1393, at 110, 125-26 (1980) (laying out the view of Rep. Robert McClory (R-IL) and Rep. Mike Synar (D-OK) that the revised language would "direct[ ]" courts "to take a scrutinous look at whether or not an agency has acted within its specific statutory authority" and noting that "a court would 'not accord any presumption in favor of or against agency action' ").

178. 126 CONG. REC. 28,109 (1980) (statement of Sen. Dale Bumpers (D-AR)).

179. *Id.* at 28,107.

180. *See, e.g.*, Letter from Dale Bumpers to Stuart Eizenstat (Aug. 27, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]); Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 10, 1980) (Eizenstat Papers, *supra* note 124, Box 156, Folder Bumpers Amendment [CF, O/A 726]); Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 13, 1980), *supra* note 174; Memorandum from Simon Lazarus to Lloyd Cutler (Sept. 19, 1980) (Eizenstat Papers, *supra* note 124, Folder Bumpers Amendment [CF, O/A 726]); *see also* O'Reilly, *supra* note 113, at 766.

181. Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 22, 1980), *supra* note 174; *see also* Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 3, 1980) (Eizenstat Papers, *supra* note 124, Box 268, Folder Regulation Q—Banking [CF, O/A 730] [1]) (noting that Roundtable and AFL-CIO negotiations "have left Bumpers to negotiations between Bumpers and White House").

182. Memorandum from Simon Lazarus to Stuart Eizenstat (Sept. 10, 1980), *supra* note 180 (internal quotation marks omitted).

consideration of the proposal by removing it from the chamber's calendar.[183]

Bumpers would reintroduce his proposal in each of the next five years.[184] And the Amendment's prospects remained bright, as a new administration—more committed to a deregulatory agenda than its predecessor—took office.[185] In April 1981, Bumpers's proposal was again incorporated into a broader regulatory reform package.[186] Subsequent hearings made clear that the lines of debate had not changed. Business groups again offered their support; public interest groups remained opposed.[187] The measure passed the Senate unanimously in 1982, in what the *Washington Post* called an "unusually strong display of bipartisan politics."[188] But the regulatory reform bill

183. O'Reilly, *supra* note 113, at 767.

184. He continued to tinker with the Amendment's precise language. *See* Letter from J. William Howell, Dir. Of Gov't Rels., IBM, to Bill Massey, Chief Couns. & Legis. Dir. to Sen. Dale Bumpers (Feb. 11, 1982) (Bumpers Papers, *supra* note 100, Box 37, Folder 2) (describing additional changes, as analyzed by the Business Roundtable).

185. *See* Letter from George Bush, Vice President of the U.S, to Dale Bumpers (Feb. 23, 1981) (Bumpers Papers, *supra* note 100, Box 37, Folder 2); Max Friedersdorf, Chief Cong. Liaison, Talking Points for Meeting with Senator Dale Bumpers (Oct. 6, 1981) (Presidential Briefing Papers: Records, 1981–1989, Box 7, Folder 10/07/1981 (Case File: 043560), on file with the Ronald Reagan Presidential Library) (recommending that Reagan tell Bumpers that the Administration "support[ed] the basic thrust of what his amendment is trying to accomplish"); *see also Regulatory Reform Act*: *Hearing on S. 1080 Before the Subcomm. on Regul. Reform of the S. Comm. on the Judiciary*, 97th Cong. 140 (1981) (statement of James C. Miller III, Administrator for Information and Regulatory Affairs, Office of Management and Budget) (noting that with "minor changes" enactment of the Amendment "would result in a significant and enduring improvement in the substance and procedures of regulatory decision making").

186. *See* S. 1080, 97th Cong. § 560 (1981).

187. *See Regulatory Reform Act*: *Hearing on S. 1080 Before the Subcomm. on Regul. Reform of the S. Comm. on the Judiciary*, 97th Cong. 315 (1981) (statement of Richard J. Leighton, Chairman, Council on Administrative Law, United States Chamber of Commerce) (supporting the Amendment); *id.* at 342–43 (statement of Nancy Drabble and Carolyn Brickey, Acting Director and Staff Attorney, Public Citizen's Congress Watch) (opposing the Amendment); *see also Prospects for Regulatory Reform Legislation*, 8 ADMIN. L. NEWS, Summer 1983, at 3 ("A strong coalition of business groups, led by the Business Roundtable, lobbied aggressively and provided much of the drive behind the bill.").

188. *See* Caroline E. Mayer, *Senate Votes Controls on Regulators*, WASH. POST, Mar. 25, 1981, at D11. Reflecting traditional Democratic priorities, for example, the bill contained transparency-promoting requirements, including the disclosure of agencies' written communications with the White House; reflecting traditional Republican ones, it required cost-benefit analysis for "major" rules. In an op-ed urging passage, Carter's chief domestic policy advisor characterized the bill as one "designed to make individual regulatory programs more orderly, open, and commonsensical—not to gut useful health, safety, and environmental legislation." Stuart E. Eizenstat, *Pass the Regulatory Reform Bill*, CHRISTIAN SCI. MONITOR (Dec. 17, 1982), https://www.csmonitor.com/1982/1217/121729.html [https://perma.cc/P67D-RFTX]. Senator Paul Laxalt (R-NV), a conservative and Reagan ally, similarly suggested that the measure "enhances our efforts to secure cleaner air and water, safe workplaces, and the like, while reducing the economic excesses of federal regulation which fuel inflation." Paul Laxalt, *Don't Delay Bipartisan Regulatory Reform*, CHRISTIAN SCI. MONITOR (Aug 24, 1982), https://www.csmonitor.com/1982/0824/082426.html [https://perma.cc/Q92U-9GSF].

never made it out of the House, where it was doomed by opposition from senior Democrats, including Representative John Dingell (D-MI), and effective lobbying by public interest groups.[189]

III. POLITICIZED DEFERENCE: REAGANISM AND DEREGULATION, 1981–89

The Bumpers Amendment saga makes clear that, years before *Chevron* was decided, conservatives devoted significant energy to eliminating judicial deference and came close to succeeding. Ronald Reagan's victory in 1980, however, complicated their efforts in an unexpected way. With Republican control of the executive branch, conservatives came to see that deference could be harnessed toward deregulatory ends.[190] And with liberals dominating the D.C. Circuit, there was little for conservatives to gain by further empowering the courts to check agency power. These same dynamics led liberals to abandon their belief in deference's timeless value. As this Part shows, the Reagan Administration's ambitious pursuit of deregulatory policy temporarily altered the politics of deference.

A. Deregulator-in-Chief

Reagan's embrace of deregulation long predated his decision to seek the presidency.[191] His political commitments were shaped by his work as spokesman for General Electric, a bastion of 1950s conservatism. The future president liked to warn his audiences that "[t]he slow accretion of social legislation—the Veterans Administration, Social Security, federal education spending, and farm subsidies . . . — would bring totalitarianism before anyone even noticed."[192]

Once in office, Reagan sought to use the executive branch to make good on his commitment to regulatory retrenchment. He

189. *See* WATERHOUSE, *supra* note 78, at 194 (noting that, in the House, a "coalition of public interest and other liberal organizations and their political allies managed to keep the legislation bottled up in the Rules Committee until Congress recessed for the midterm elections"); *Prospects for Regulatory Reform Legislation*, *supra* note 187, at 4 (noting that the powerful House Rules Committee never issued a rule to permit the bill to be considered on the floor).

190. *See, e.g.*, Balkin, *supra* note 19, at 259–60 (observing that "[d]uring the early years of the Reagan administration, conservatives argued for deference to administrative agencies"); Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 662 (2020) (observing that in the 1980s, a "generation of deregulatory conservatives consistently praised administrative deference").

191. WATERHOUSE, *supra* note 78, at 192 (calling Reagan "the standard-bearer for arch-conservative critiques of New Deal policies from welfare to regulation").

192. KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 114 (2009).

suspended work on all of his predecessor's proposed regulations, issued an executive order mandating cost-benefit analysis of so-called major rules, instituted the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget to review proposed rules and delay their implementation, created a powerful Presidential Task Force on Regulatory Reform, and sought to slash "both the size and budget of federal regulatory agencies."[193] Perhaps more importantly, Reagan deployed his appointment power strategically, "select[ing] agency and department heads who shared his animus toward the regulatory project in general."[194] He staffed the agencies "with officials remarkable for their personal loyalty and ideological commitment, who would subscribe to his (obligingly clear) policy agenda even in the face of competing bureaucratic pressures."[195]

With Reagan appointing individuals committed to deregulation to prominent positions, the President's emphasis on deregulation was also felt at the agency level. For example, the newly appointed Secretary of the Interior sought to loosen regulations governing strip-mining.[196] Reagan's OSHA head dramatically thinned the ranks of the Agency's inspectors, leading to a corresponding downshift in the number of inspections conducted, the number of citations issued, and the amount of fines leveled.[197] And his EPA Administrator, Anne Gorsuch—mother of the contemporary Supreme Court's leading *Chevron* critic—dramatically scaled back environmental enforcement.[198]

B. Conservatives Embrace Deference

Reagan's use of the administrative state for deregulatory ends fundamentally reshaped the deference debate. For starters, conservatives came to see courts—and, in particular, the liberal-controlled D.C. Circuit—as a "roadblock" to White House initiatives.[199] One *Wall Street Journal* article described the D.C. Circuit as having

193. VOGEL, *supra* note 79, at 248; *see also* WATERHOUSE, *supra* note 78, at 193; Kagan, *supra* note 55, at 2277 ("Reagan . . . instituted . . . a centralized mechanism for review of agency rulemakings unprecedented in its scale and ambition.").

194. WATERHOUSE, *supra* note 78, at 195. On the relationship between centralization and politicization, see generally David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008).

195. Kagan, *supra* note 55, at 2277.

196. *See* VOGEL, *supra* note 79, at 249.

197. *Id.*

198. *Id.*

199. Stephen Wermiel, *Reagan Administration's Deregulation Drive Often Thwarted by Appeals Court in Washington*, WALL ST. J., Dec. 3, 1985, at 64.

"[t]ime and again . . . sent zealous Reagan [A]dministration deregulators back to the drawing board, ruling that officials either didn't use proper procedures or failed to follow what Congress had in mind for a particular agency."[200] The *Journal*'s editorial board sounded similar themes when condemning a decision by liberal D.C. Circuit Judges Skelly Wright and Abner Mikva that "reversed the Interstate Commerce Commission's deregulation of railroad rates on exported coal."[201] Indeed, the editors encouraged the President to appeal the decision to the Supreme Court to take advantage of its then-recent *Chevron* ruling.[202]

This kind of skepticism of the judiciary (and especially the D.C. Circuit), coupled with a concomitant interest in preserving executive latitude, motivated much of the Reagan Administration's reaction to the Bumpers Amendment. The White House surely recognized that many of its conservative allies supported the proposal.[203] Nevertheless, the President's legal team, including now-Chief Justice John Roberts, expressed concern that the bill would "shift power from the agencies to the judiciary."[204] Roberts underscored the Department of Justice's view that "giving the courts added review power could jeopardize deregulatory efforts."[205] As law professor Martin Shapiro observed at the time, "[m]aybe the Bumpers Amendment did not become law because it did not seem like a good idea to smart conservatives, given the composition of the bench at the time."[206]

Indeed, the Justice Department under Reagan echoed its Carter-era critiques of the Amendment. Calling the proposal both "unnecessary and undesirable," the Department argued that the Amendment would "further distort the balance of power between the executive and judicial branches of government—a balance which has already been tipped heavily in favor of the courts, principally through the activism of federal

200. *Id.*

201. *Creeping Back*, WALL. ST. J., Sept. 25, 1984, at 28.

202. *Id.*

203. *See* Talking Points for Meeting with Senator Dale Bumpers, *supra* note 185 (discussing the Bumpers Amendment); Memorandum from John G. Roberts, Assoc. Couns. to the President, to Fred F. Fielding, White House Couns. (Sept. 19, 1983) (John G. Roberts Papers, Files, Box 6, Folder JGR/Bumpers Amendment, on file with the Ronald Reagan Presidential Library [hereinafter Roberts Papers]) (noting that the Bumpers Amendment had "significant conservative support").

204. *Id.*

205. *Id.*; *see also* Memorandum from John G. Roberts to Fred F. Fielding (Oct. 7, 1983) (Roberts Papers, *supra* note 203, Files, Box 47, Folder JGR/Regulatory Oversight and Control Act of 1983 (1 of 2)) (discussing potential comments on the Regulatory Oversight and Control Act of 1983); Memorandum from John G. Roberts to Fred F. Fielding (Oct. 17, 1983) (Roberts Papers, *supra* note 203, Files, Box 47, Folder JGR/Regulatory Oversight and Control Act of 1983 (2 of 2)) (same).

206. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 485 (1986).

judges."[207] If some courts were "remiss" in carrying out their duty to "exercise independent judgment in deciding 'questions of law,' " the better approach was to "clarify and tighten the statutory standards which agencies and courts must interpret."[208] Bumpers's proposed alternative would simply "authorize[ ] the courts to substitute their own policy judgments for those of an agency under the guise of statutory interpretation."[209]

Against this backdrop, conservatives came to see deference as a way to help make their deregulatory interventions stick. Now that the deregulators were in charge, deference shielded their actions from judicial scrutiny. As then-Professor Antonin Scalia wrote for the conservative American Enterprise Institute, congressional Republicans "seem perversely unaware that the accursed 'unelected officials' downtown are now *their* unelected officials, presumably seeking to move things in their desired direction; and that every curtailment of desirable agency discretion obstructs (principally) departure from a Democrat-produced, pro-regulatory status quo."[210] This reality, Scalia prognosticated, "promise[d] to do major harm to the drive for genuine regulatory reform."[211] The same logic led Scalia to offer a scathing critique of the Bumpers Amendment:

> It would be bad enough, from the viewpoint of an enlightened deregulator, if Bumpers merely eliminated the Reagan [A]dministration's authority to give content to relatively meaningless laws. Worse still, however, Bumpers does *not* eliminate that authority—but merely transfers it to federal courts which, at the operative levels, will be dominated by liberal Democrats for the foreseeable future![212]

These dynamics helped to elevate the profile of the *Chevron* decision itself. Indeed, as has been well documented, the decision's

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207. Memorandum from James C. Murr to the Legislative Liaison Officer, Exec. Off. of the President, Proposed Statement of Jonathan C. Rose, Assistant Att'y Gen., Off. of Legal Pol'y, Concerning S. 1080, the Regulatory Reform Act (Sep. 19, 1983) (Roberts Papers, *supra* note 203, Files, Box 6, Folder JGR/Bumpers Amendment) (draft of statement for hearing before the Committee on the Judiciary's Subcommittee on Administrative Practice and Procedure).

208. *Id.*

209. *Id.*

210. Antonin Scalia, *Regulatory Reform—The Game Has Changed*, AM. ENTER. INST. (Feb. 7, 1981) (emphasis added), https://aei.org/articles/regulatory-reform-the-game-has-changed [https://perma.cc/9CC5-T87M].

211. *Id.*

212. *Id.* Once appointed to the Supreme Court, Scalia would continue to defend *Chevron*. In a lecture delivered at Duke Law School, for instance, Scalia argued that *Chevron* was "unquestionably" an improvement on the status quo. "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known." Scalia, *supra* note 34, at 517. Scalia emphasized that, in conferring discretion on an agency, Congress explicitly contemplated changes in "attitudes" that would be "impressed upon [the agency] through the political process." *Id.* at 519.

author (Justice John Paul Stevens) regarded the case as a routine "restatement of existing law."[213] His colleagues largely shared that view.[214] Rather, it was conservatives who helped to save the decision from obscurity, aware of *Chevron*'s potential to help insulate Reagan's administrative policymaking from judicial scrutiny. Recognizing that "*Chevron* seemed to say that the government should nearly always win," Merrill notes, the Justice Department "urged that *Chevron* serve as the relevant standard of review at nearly every turn."[215]

Prominent conservatives lauded the decision.[216] Then-D.C. Circuit Judge Ken Starr—later President George H.W. Bush's solicitor general and independent counsel during the Clinton impeachment—focused on deference as a vehicle for disciplining the judiciary. Starr in 1986 praised *Chevron* as sound in its "jurisprudential foundations" and likely to "have a number of salutary practical effects."[217] What most appealed to Starr was that *Chevron* "prevents the judiciary from . . . straying into the forbidden ground of overseeing administrative agencies"—a role "allotted to the political branches."[218] To boot, the Court's ruling would help to prevent (liberal) federal judges from "donning their Olympian *Marbury v. Madison* robes" to intrude as "unwanted do-gooders gumming up" agency action.[219]

Echoing these sentiments, the head of the Department of Justice's Civil Division argued that *Chevron* was "a helpful way of corralling the open-ended judicial arrogance that is so richly characterized by the D.C. Circuit's jurisprudence for the past 20 or 30 years."[220] In his view, *Chevron* advanced the primacy of the elected branches. "[I]f Congress simply authorized an administrative agency to act, with the power to do certain things, and if what the agency has done does not violate what the statute says, then one could assume the

213. Merrill, *supra* note 63, at 275. Contemporaneous news reports focused on the substance of the decision, emphasizing that it was a victory for industrial polluters. *See, e.g.*, Linda Greenhouse, *Court Upholds Reagan on Air Standard*, N.Y. TIMES, June 26, 1984, at A8; Stephen Wermiel, *EPA Rule Easing Restrictions on Sources of Pollution at Plants Is Upheld by Justices*, WALL ST. J., June 26, 1984, at 1.

214. *See* Merrill, *supra* note 63, at 276.

215. *Id.* at 281.

216. *See* Green, *supra* note 190, at 669–70.

217. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REGUL. 283, 307 (1986).

218. *Id.* at 309.

219. Kenneth W. Starr, Cass R. Sunstein, Richard K. Willard, Alan B. Morrison & Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 364 (1987) (quoting Kenneth W. Starr). Nevertheless, it is important not to overstate Starr's position. In defending *Chevron*, he emphasized—much like contemporary liberals—that *Chevron*'s first step was a "real test with real teeth and in fact can reasonably be argued to vindicate an appropriate judicial role." *Id.* at 363.

220. *Id.* at 373 (quoting Richard K. Willard).

agency could get away with doing it . . . ."[221] And the head of the Office of Legal Counsel authored a law review article defending *Chevron* on the same ground. "[W]hat possible constitutional justification," he asked, "can there be for a court to not only declare a statute to be vague, but also further remove the policy decision from the politically accountable branches by providing its own?"[222] Reflecting these defenses, the Reagan Justice Department's Office of Legal Policy promulgated a set of "Guidelines on Constitutional Litigation" that discussed *Chevron* in positive terms—praising it as consistent with the principle that department lawyers were to "determine whether Congress, in the text of the statute, has spoken to the question at issue."[223]

In sum, a shift in control of the executive branch produced a pronounced shift in the politics of deference. With an ally in the White House, conservatives recognized that deference to executive agencies now suited their deregulatory ambitions, particularly given liberals' hold on the D.C. Circuit—the court most likely to review agency action. Adjusting their views on deference accordingly, Reagan-era conservatives articulated a defense of deference that emphasized small-d democratic values.[224] Having gained control of the machinery of the administrative state, they had little intention of ceding regulatory power to the courts.

C. Liberals Respond

Not surprisingly, these same dynamics "provoked sharp criticism" from the left.[225] As with conservative defenses of *Chevron*, liberal critiques emphasized that deference would aid the Reagan Administration's deregulatory efforts. "Today, liberals find the courts helpful in delaying and even preventing deregulation," Shapiro crisply summarized. "The Bumpers-style, anachronistic, sentimental hope that the courts will go back to saving citizens (read corporations) from

221. *Id.*

222. Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 275 (1988).

223. OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST., GUIDELINES ON CONSTITUTIONAL LITIGATION 60 (1988).

224. *See, e.g.*, Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. L. REV. 197, 203 (2020) (describing as a tenet of the "Reagan Revolution" the principle—reflected in the nascent unitary executive theory—that the "President must be allowed a strong hand in governing the nation and providing leadership" (internal quotation marks omitted)).

225. Kagan, *supra* note 55, at 2279.

bureaucrats is kept alive only by the appointment potential of a Republican President."[226]

The director of Public Citizen's Litigation Group, Alan Morrison, declared that *Chevron* "is not correct and has gone too far."[227] Concerned about the decision's deregulatory potential, he reflected that courts ought not to defer "when agencies start construing their statutes in a way that fundamentally undermines their mission."[228] According to Morrison, deference jeopardized agency adherence to their pro-regulatory statutory mandates. "If the agency is supposed to be protecting health and safety, and it says, 'We don't have the authority to protect health and safety,' I think the courts ought to say, 'Wait a second, is that really what ought to be going on?' "[229]

Morrison even acknowledged some regret for his earlier critiques of the Bumpers Amendment. The Senator, he reflected, "maybe . . . wasn't wrong," or "at least, maybe he was wrong then, but now he has occasion to want to come back and do what he tried to do some time ago."[230] Presciently, Morrison predicted that conservatives would likely rethink their defense of deference were there to be a change in administration. Should the Democrats recapture White House, he suggested, "I would wonder how many [conservatives] would think we ought to continue to defer to administrative agencies the way we did in the good old days."[231]

For his part, the godfather of the consumer movement, Ralph Nader, used the occasion of Robert Bork's nomination to the Supreme Court to criticize what he saw as *Chevron*'s conservative bias. In an op-ed in the *New York Times*, Nader argued that, as a judge on the D.C. Circuit, Bork had "routinely" deferred to "executive agency decisions that [were] adverse to consumer and environmental interests—citing the superior expertise and knowledge of the agencies involved."[232]

Moderate Democrats took similarly critical positions. Cass Sunstein—then a young law professor at the University of Chicago, who would later head OIRA during the Obama Administration—described *Chevron* as a "mistake."[233] "Foxes shouldn't guard henhouses," he observed, contending that *Chevron* risked giving rise to "precisely that

226. Shapiro, *supra* note 206, at 486.

227. Starr et al., *supra* note 219, at 373 (quoting Alan B. Morrison).

228. *Id.* at 374.

229. *Id.* Morrison also argued that deference was inappropriate "when there are constitutional issues at stake," or "when the agency seeks to expand its power or jurisdiction." *Id.*

230. *Id.* at 375.

231. *Id.* at 376.

232. Ralph Nader & Eric Glitzenstein, *Bork, as Seen from Two Angles: His Judicial Restraint Is a Myth*, N.Y. TIMES, July 13, 1987, at A17.

233. Starr et al., *supra* note 219, at 369 (quoting Cass R. Sunstein).

problem."[234] Unlike those of Morrison and Nader, however, Sunstein's criticisms sounded less in policy than in a jurisprudential approach that would later reverberate within conservative circles. Sunstein commented that agencies were situated in an "uneasy constitutional position" that necessitated an "aggressive" judicial hand—"above all in interpreting administrative agency understandings of law"—to keep them in check.[235] Though readily admitting that "courts make occasional mistakes," Sunstein underscored the fundamental constitutional principle that "[c]ourts rather than agencies should be the interpreters of law."[236]

Taken together, these reactions make clear that liberals were not immune to the political shifts that produced conservative defenses of deference. Recognizing that deference could advance deregulatory objectives when a conservative was in the White House, liberals, too, changed their tune. Ironically, many of the critiques they leveled would later be adopted by their political opponents. These included an emphasis on the deep and durable structure of the separation of powers and cautions about the risks of an unchecked administrative state. It would take another shift in control of the executive branch, and a change in the composition of the judiciary, for the parties to reverse positions yet again.

IV. DEPOLITICIZED DEFERENCE: 1989–2009

After the debates of the Carter and Reagan years, *Chevron* fell nearly entirely out of mainstream political discourse for two decades. Executive branch officials said little about the doctrine, at least publicly. Congress largely ignored the issue of judicial deference to agency interpretations.[237] During judicial confirmation hearings,

234. *Id.* at 368.

235. *Id.* at 369.

236. *Id.* at 371.

237. The sole exception is that during the 104th Congress (1995–97), the Senate Judiciary Committee took up legislation that, like the Bumpers Amendment, sought to amend section 706 of the APA. In a reflection of the issue's low salience, the language—already less "drastic" than Bumpers—was quickly deleted from the broader regulatory reform package that Republicans had promised in their "Contract With America" that had propelled the GOP to majority control of the House for the first time in four decades. *See* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 655 (1996). What was more, as Levin observes, the proposed amendment "did not bespeak any consistent theme," and may well have simply codified *Chevron*. *Id.* at 655–58 (noting that it was an open question "whether many reviewing courts would have found in the statute the message of judicial responsibility and vigilance that its most zealous sponsors hoped to place there").

senators did not question nominees about *Chevron*.[238] Interest groups' mobilization around deference waned. One conservative commentator quipped that he "thought '*Chevron* deference' meant going there even if the gas was cheaper at Citgo."[239] Why, after being such a charged issue, did *Chevron* fall off the political map?

A first answer is that *Chevron* faded from the political forefront because conservative opponents had made their peace with the doctrine. As we have seen, those most hostile to deference have been opponents of regulation. We return to a more detailed discussion of this pattern in Part VI, but for present purposes the affinity between *Chevron* skepticism and deregulatory politics helps explain why that skepticism abated in the late twentieth century. Republicans won landslide presidential elections in 1984 and 1988. As we have argued, the result was that those who opposed deference in the 1970s on the ground that it would immunize new regulatory initiatives had little reason to maintain that stance when the doctrine could be deployed in support of their deregulatory goals.[240] As Merrill noted in 1999, "Federalist Society members tend to applaud the Supreme Court's *Chevron* doctrine."[241]

Conservatives also came to realize that *Chevron* was consistent with the jurisprudential philosophy they were propounding in other areas of law. During the 1980s and early 1990s, Republicans in the executive branch made judicial restraint on constitutional matters the watchword of their approach to the federal courts. Responding to the perceived activism of the Warren Court on constitutional matters,

238. During the six Supreme Court confirmation hearings held during the Bush I, Clinton, and Bush II presidencies, neither a single nominee nor a single senator ever discussed *Chevron*. *See Nomination Hearings for Supreme Court Justices*, U.S. SENATE, https://senate.gov/committees/SupremeCourtNominationHearings.htm (last visited Feb. 16, 2022) [https://perma.cc/RR3E-5P7A] (providing transcripts of confirmation hearings for Chief Justice Roberts and Justices Souter, Thomas, Ginsburg, Breyer, and Alito). This absence of discussion contrasts with the higher salience of *Chevron* at more recent confirmation hearings. *See infra* notes 332–334 and accompanying text.

239. Jonah Goldberg, *Going to Hell, or Whatever*, NAT'L REV., Nov. 21, 2005, at 12.

240. Conservative elites very occasionally expressed concerns about *Chevron* during the Clinton Administration, but these criticisms did not make their way into the mainstream conservative discourse. *See, e.g.*, James V. DeLong, *The* Chevron *Doctrine: Running Out of Gas*, 23 REGULATION, no. 3, 2000, at 5, 6 (critiquing *Chevron* for empowering regulatory agencies and contending that those agencies often lack the expertise they are assumed to have); John F. Duffy, *Administrative Common Law and the Original Meaning of Judicial Review Under the APA*, 3 ADMIN. L. PRAC. GRP. NEWSL. (Federalist Soc'y, Washington, D.C.), Aug. 1, 1999 ("No true fan of judicial restraint should be enamored of the opinion in [*Chevron*], for it provides one of the best examples of a pure judicial lawmaking.").

241. Thomas W. Merrill, Chevron*, the Nondelegation Doctrine, and Tobacco*, 3 ADMIN. L. PRAC. GRP. NEWSL. (Federalist Soc'y, Washington, D.C.), May 1, 1999.

Reagan,[242] George H.W. Bush,[243] and senior Republican Department of Justice officials[244] articulated a common priority of appointing judges who would defer to the elected branches. Judicial restraint became central to the conservative legal movement's self-understanding, despite ambiguity as to what the concept meant in practice.[245] And so *Chevron* may have gained support among conservatives simply because it was consistent with this more general jurisprudential commitment:

> [*Chevron*] seeks to restrict the lawmaking powers of unelected federal courts . . . . [A]gencies must answer to the President, who is in turn elected by all the people. Thus, the *Chevron* doctrine rests on a fundamental commitment to confining lawmaking power as much as possible to the democratic branches of government—the Congress and the executive branch agencies—as opposed to the unelected federal courts.[246]

While likely less important than *Chevron*'s deregulatory capacity in the hands of Republican presidents, the affinity between judicial restraint and *Chevron* may have made it easier for conservatives to embrace deference to agencies.

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242. *See, e.g.*, Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the Supreme Court of the United States, 1 PUB. PAPERS 819 (Sept. 21, 1981) ("Judge O'Connor's judicial philosophy is one of restraint. She believes . . . that a judge is on the bench to interpret the law, not to make it. This philosophy of judicial restraint needs representation in our courtrooms and especially on the highest court in our land."); *see also* Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1344 & n.1 (1990) ("In 1980 and again in 1984, Ronald Reagan promised to appoint judges committed to 'judicial restraint' and a conservative view of the Constitution.") (citing Republican Party platforms).

243. *See, e.g.*, Remarks Announcing the Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States and a Question-and-Answer Session with Reporters, 2 PUB. PAPERS 1047–48 (July 23, 1990) ("Judge Souter [is] committed to interpreting, not making the law . . . . [He] will interpret the Constitution and, in my view, not legislate from the Federal bench.").

244. *See* Balkin, *supra* note 19, at 255–56 (noting that "[t]he oldest group of conservative originalists"—a group which included Edwin Meese and Antonin Scalia—"generally argued for judicial restraint in controversial cases"); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 602 (2004) (describing judicial restraint as "[t]he primary commitment" for Robert Bork and other originalists of his era). Discussions of the linkage between originalism and judicial restraint include Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554 (2006) ("By affirming the Constitution's authority to restrain illegitimate judicial discretion, originalism would prevent a philosophical adventurism that would alter the Constitution's color and form in each era. Originalism would thus preserve the Constitution from the corruption of contemporary concerns that express merely the transient political views of judges." (footnotes omitted) (internal quotation marks omitted)), and Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 75 (2009) (arguing that originalism helped to achieve judicial restraint in practice while nevertheless advancing a positive conservative constitutional vision).

245. *See, e.g.*, Michael Stokes Paulsen, *The Many Faces of "Judicial Restraint,"* 1993 PUB. INT. L. REV. 3 (providing a taxonomy of judicial restraint); *see also, e.g.*, Balkin, *supra* note 19, at 255–57 (noting that affirmative action provided an exception to the general embrace of judicial restraint among conservatives in the 1980s).

246. Merrill, *supra* note 241.

A second, complementary explanation looks to the state of regulatory politics more generally. The first Bush and Clinton Administrations each had mixed records on regulatory policy; both pursued regulation in some areas and deregulation in others. One result of these mixed records was that agency deference lacked an obvious pro- or antiregulatory valence in the 1990s. As a result, neither liberals nor conservatives had strong policy reasons to embrace or condemn the doctrine.

The first Bush Administration partially followed the deregulatory trend of the Reagan years. Bush, who had served as head of Reagan's deregulatory presidential task force, described regulatory retrenchment as "one of [his] top priorities" and "a vital element of [his Administration's] national reform agenda."[247] Like his predecessor, he pursued that goal through White House oversight of the administrative state,[248] a moratorium on new regulations,[249] and attempts to incentivize agencies to relax existing regulations.[250] But Bush also "lost the deregulatory momentum of the Reagan years," in the words of his former White House counsel.[251] He presided over increased regulatory

247. Remarks on Regulatory Reform, 1 PUB. PAPERS 663 (Apr. 29, 1992); *see also Transcript of President Bush's Address on the State of the Union*, N.Y. TIMES, Jan. 29, 1992, at A16 ("[R]egulatory overkill must be stopped. And I have instructed our government regulators to stop it.").

248. *See* James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 871 (2001) ("Some critics of the Reagan and Bush regulatory review executive orders have stated candidly that the centralized review process was 'biased against regulation,' a 'profoundly anti-regulatory phenomenon' that 'threatens the legacy of the New Deal.' " (footnotes omitted)); *see also* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 155 (1991) (describing the Bush Administration's Council on Competitiveness); CHRISTINE TRIANO & NANCY WATZMAN, OMB WATCH & PUB. CITIZEN, ALL THE VICE PRESIDENT'S MEN: HOW THE QUAYLE COUNCIL ON COMPETITIVENESS SECRETLY UNDERMINES HEALTH, SAFETY, AND ENVIRONMENTAL PROGRAMS (1991) (providing a highly critical account of the Council's work).

249. *See* Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J 1883, 1894 (2012) (describing a 1992 moratorium that Bush contended would "address the country's economic woes through reduced regulation").

250. *See* Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 852 (2014) (noting a Bush Administration budget proposal under which agencies would "be given credits . . . for cutting regulatory [costs] by relaxing existing regulations" (alteration in original) (internal quotation marks omitted)).

251. C. Boyden Gray, *Reflections on the Bush Regulatory Record: Lessons*, 16 REGULATION, no. 3, 1993, at 31, 31.

activity,[252] including the passage and early implementation of the Clean Air Act Amendments[253] and the Americans with Disabilities Act.[254]

The Clinton Administration had a similarly mixed record on regulation. President Bill Clinton described his Democratic Party as "neither liberal nor conservative but both and different."[255] The White House's approach to regulatory policy reflected this general ambivalence.[256] Clinton eliminated the antiregulatory Council on Competitiveness and worked with progressive groups like the Natural Resources Defense Council and Public Citizen to modify the mechanics of presidential regulatory oversight.[257] Compared to the Reagan and Bush years, the result was an approach that was more respectful of agency policymaking.[258]

At the same time, Clinton retained the general system of centralized regulatory oversight pioneered by Reagan,[259] often preferred market-oriented approaches over command-and-control

252. *See, e.g.*, Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 167 (1995) ("[C]ontrary to President Bush's deregulatory rhetoric, the Bush Administration entered 1990 and 1991 with a record of significant increases in the number of new regulations being issued." (footnote omitted)).

253. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401-7671q). Judith Layzer notes that "Bush campaigned for president as an environmentalist, and early in his presidency he established a pro-environmental record," but later in his term "conservatives in the White House had gained the upper hand, and by late 1991, the president had assumed a more antiregulatory posture." JUDITH A. LAYZER, OPEN FOR BUSINESS: CONSERVATIVES' OPPOSITION TO ENVIRONMENTAL REGULATION 135 (2012).

254. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213).

255. STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 106 (2d rev. ed. 2011); *see also id.* at 109 ("[T]he accomplishments of the Clinton years—the deficit-reducing budget, the North American Free Trade Agreement (NAFTA), the crime bill, 'ending welfare' as we knew it—all tended to play against type, that is, against the interests expressed (or presumed of) traditional liberal constituencies."); Julian E. Zelizer, *Policy Revolution Without a Political Transformation: The Presidency of Barack Obama*, *in* THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT 1, 2–3 (Julian E. Zelizer ed., 2018) (describing Clinton's major initiatives as having "tended to stay within the framework established by conservatism" and characterizing his policies as "softened versions of what the increasingly conservative Republicans on Capitol Hill were trying to achieve").

256. *See* Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71 (1997) (providing an overview of the Clinton Administration's approach, which included both pro- and antiregulatory elements).

257. *See id.* at 73–75.

258. *See* Shane, *supra* note 252, at 174; *see also* James L. Gattuso, *Regulating the Regulators: OIRA's Comeback*, HERITAGE FOUND. (May 9, 2002), https://www.heritage.org/government-regulation/report/regulating-the-regulators-oiras-comeback [https://perma.cc/7GHR-T8NA] (contending that, during the Clinton Administration, "OIRA became a much less aggressive watchdog over regulation").

259. *See* Duffy, *supra* note 256, at 71–72 ("[R]egulatory review in the Clinton administration builds upon previous efforts and is firmly within the traditions of the institutional presidency.").

regulation,[260] and sometimes deployed antiregulatory rhetoric that would have been at home in Republican administrations.[261] In consequence, the substance of the Clinton Administration's regulatory legacy varied by policy area: it sometimes took pro-regulatory positions (such as on tobacco[262]), but it loosened regulations in other areas (such as financial services[263]). Taking stock of this record, some have characterized the Clinton White House as no more pro-regulatory than that of the first Bush.[264] In the face of both Administrations' mixed records on regulatory policy, *Chevron* did not have as clear a political valence as it would have under more consistently pro- or antiregulatory presidents.

Third, the Supreme Court's jurisprudence during this period likely helped make *Chevron* less politically salient than it otherwise might have been. Most notable in this regard are the Court's decisions in a pair of cases that exempted guidance documents and other informal agency decisions from *Chevron* deference. In its 2000 decision in *Christensen v. Harris County*, the Court narrowed *Chevron*'s domain: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[265] The subsequent year, the Court reaffirmed in *United States v. Mead Corp.* that guidance documents are "beyond the *Chevron* pale."[266]

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260. *See id.* at 75 ("Like his predecessors, Clinton recognized that command and control regulation is often inefficient, and has expressed a desire to rely more on market oriented approaches.").

261. *See id.* at 75–76 ("[T]he [Clinton] administration's claim that its regulatory review proposals were designed to 'lighten the load for regulated industries and make government regulations that are needed more cost-effective' could have been made by either Ronald Reagan or George Bush." (quoting Stephen Barr, *White House Shifts Role in Rule-Making*, WASH. POST, Oct. 1, 1993, at 12)).

262. *See infra* note 272 and accompanying text.

263. Clinton signed the Gramm-Leach-Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.), and the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended in scattered sections of 7, 11, 12, and 15 U.S.C.), both of which repealed existing regulation of financial institutions.

264. *See* William A. Niskanen, *The Clinton Regulatory Legacy*, REGULATION, Summer 2001, at 42, 42 (former Reagan Administration official observing that "[t]he regulatory record of the Clinton administration was better"—by which he meant less regulatory—"than that of George H.W. Bush, primarily because relatively little new regulatory authority was approved on Bill Clinton's watch").

265. 529 U.S. 576, 587 (2000).

266. 533 U.S. 218, 234 (2001); *see also id.* at 226–27 ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). These decisions initiated a wave of doctrinal and empirical scholarship. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443

Decisions exempting guidance documents from *Chevron* almost certainly helped to lower the political temperature around the doctrine. It is not possible to know definitively how political actors would have reacted had, counterfactually, the courts granted *Chevron* deference to guidance documents in the twenty-first century. But we can get some sense from the polarization of attitudes toward guidance documents themselves (even shorn of the benefit of *Chevron* deference) in the decades since *Christensen* and *Mead*. During that time, the use of agency guidance documents became increasingly controversial, with the political right, in particular, attacking them as tools of administrative overreach. Conservative think tanks have criticized the use of guidance documents as "stealth regulation"[267] and "regulating through the back door."[268] Sounding a similar theme, congressional Republicans have condemned them as "regulatory dark matter."[269] This wave of conservative hostility to guidance documents culminated with President Donald Trump issuing an executive order seeking to rein in their use, reproaching agencies for having "sometimes used this authority [to issue guidance documents] inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA."[270]

It is hard to draw direct causal links between conservative antagonism toward guidance documents and attitudes toward *Chevron*. It stands to reason, though, that conservative hostility toward *Chevron* may well have emerged sooner and in a stronger form if courts had consistently given deference to guidance documents in addition to notice-and-comment regulations. Indeed, for those who subscribe to the conservative critique of guidance documents, that critique would have

(2005); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771 (2002); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN. L. REV. 807 (2002); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen*,* Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173 (2002). But scholars have not, to our knowledge, focused on what effects *Christensen* and *Mead* may have had beyond the courts.

267. *See, e.g.*, JOHN D. GRAHAM & JAMES BROUGHEL, MERCATUS CTR., CONFRONTING THE PROBLEM OF STEALTH REGULATION 1 (Apr. 2015), https://www.mercatus.org/system/files/Graham-Stealth-Regulations-MOP.pdf [https://perma.cc/42F6-7Y5L].

268. *See, e.g.*, Hester Peirce, Regulating Through the Back Door at the Commodity Futures Trading Commission (Nov. 2014) (unpublished manuscript), https://www.mercatus.org/system/files/Peirce-Back-Door-CFTC.pdf [https://perma.cc/G3PD-VCCD].

269. *See, e.g.*, MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, 115TH CONG., SHINING LIGHT ON REGULATORY DARK MATTER 5 (Mar. 2018), https://republicans-oversight.house.gov/wp-content/uploads/2018/03/Guidance-Report-for-Issuance1.pdf [https://perma.cc/Z23P-7L7P].

270. Exec. Order No. 13,891 § 1, 84 Fed. Reg. 55,235, 55,235 (Oct. 15, 2019), *revoked by* Exec. Order No. 13,992 § 2, 86 C.F.R. 7049 (2021).

even more force if guidance documents were subject to judicial deference. Thus, by exempting guidance documents from *Chevron*'s domain, the Supreme Court likely made the doctrine more palatable than it would have been had those decisions come out the other way.

Another doctrinal development that may have softened conservative hostility to *Chevron* was the Supreme Court's decision not to grant deference in several high-profile cases, a dynamic that many characterize as the growth of a "major questions" exception to *Chevron*. As the Court put it in one such case, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion" as a statutory ambiguity.[271]

As with guidance documents, linking doctrinal changes and political dynamics necessarily requires some speculation. But thinking through the development of doctrine can help us spot political "dogs that didn't bark." Consider, for example, the Supreme Court's decisions not to grant *Chevron* deference to a Clinton Administration attempt to reduce smoking[272] or Bush Administration inaction on climate change.[273] Had the antismoking rule been upheld under *Chevron*, it is easy to imagine that tobacco companies and perhaps other business interests would have rallied against deference, with antismoking advocates and others on the left perhaps lining up in its defense. Conversely, had the Court upheld climate inaction on *Chevron* grounds, one could have imagined criticisms of the doctrine by environmental groups or others on the left, with energy companies and business interests mobilizing on the right.[274] The absence of these kinds of mobilizations suggests that judicial nonuse of *Chevron* may have helped to keep the political peace, removing from the doctrine's domain precisely the sorts of cases where political activism around deference would be most likely.

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271. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); *see also, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.").

272. *See Brown & Williamson*, 529 U.S. at 120 (declining to apply *Chevron* in reviewing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,418 (Aug. 28, 1996)).

273. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (declining to apply *Chevron* in finding that the EPA did not ground its reasons for declining to regulate greenhouse gases in the Clean Air Act).

274. Even when the Bush Administration did benefit from *Chevron* deference, liberals might not have wanted to advocate for de novo review by a conservative Supreme Court, especially in the wake of *Bush v. Gore*, 531 U.S. 98 (2000).

V. REPOLITICIZED DEFERENCE: 2009–PRESENT

A. Liberal Reform

After a long period of quiescence, recent years have seen the most heated political debates over *Chevron* since the days of the Bumpers Amendment. For the first time since the mid-1980s, *Chevron* deference became a topic of discussion in the halls of Congress and by mainstream journalists. This increased political salience is inseparable from the presidency of Barack Obama. Obama presided over an administration that was simultaneously more ambitious in its regulatory aims *and* more dependent on administrative policymaking to achieve them than any other executive in decades.

One reason for this was ideological. Under Obama, the Democratic Party moved away from Clinton's rejection of big government, articulating instead a far bolder regulatory agenda. In Obama's first two years, during which Democrats controlled both the House and Senate, Congress enacted three wide-ranging pieces of legislation: the American Recovery and Reinvestment Act ("Recovery Act"),[275] Patient Protection and Affordable Care Act ("ACA")[276] and Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[277] The passage of these major statutes led to over a thousand new rulemakings,[278] and rulemakings prompted by other new statutes only added to the final tally.[279] The Obama Administration's legislative successes, in short, fed a need for administrative agencies to engage in follow-on rulemakings.

While legislative productivity spurred one sort of rulemaking, legislative gridlock drove another. When Congress does not act, an ambitious president has little choice but to turn to the administrative state. Following the 2010 midterm elections, Republicans used control of one or both chambers of Congress to block nearly the entirety of the

275. Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified as amended in scattered sections of 16 and 42 U.S.C.).

276. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

277. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered section of 12 and 15 U.S.C.).

278. New rulemakings can be tallied through the ProQuest Regulatory Insight Database. *Regulatory Insight*, PROQUEST, https://regulatoryinsight.proquest.com/regulatoryinsight/search/basicsearch (last visited Feb. 16, 2022) [https://perma.cc/B7EA-Y4LA] (showing 212, 482, and 770 final rules promulgated under the Recovery Act, ACA, and Dodd-Frank, respectively).

279. *See, e.g.*, *id.* (showing forty-nine final rules associated with the CARD Act).

White House's legislative agenda.[280] In this context, administrative power was often the only way for the President to achieve his regulatory objectives. Climate policy was perhaps the most prominent area of executive action. Congress's failure to pass comprehensive climate legislation prompted the EPA to read the Clean Air Act to authorize robust regulation to limit greenhouse gas emissions.[281] This typified a broader trend.[282] Using rulemakings, the Obama Administration made major policy changes on topics ranging from worker safety and wages[283] to consumer protection[284] to nutrition labeling.[285] Indeed, across all areas of regulatory policy, the Administration was uniquely prolific in its promulgation of major rules.[286]

The combination of ambitious new statutes in some domains and congressional gridlock in others made the executive branch under Obama especially reliant on administrative policymaking. This reliance, in turn, increased *Chevron*'s overall salience. As the Administration pursued progressive goals, sometimes through expansive interpretations of aging statutes, deference could be dispositive.

The fate of several Obama-era rules illustrates that Administration's dependence on *Chevron*. The Supreme Court, for example, relied on the doctrine in upholding an EPA requirement that

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280. *See, e.g.*, MICHAEL GRUNWALD, THE NEW NEW DEAL: THE HIDDEN STORY OF CHANGE IN THE OBAMA ERA 140–60 (2012) (describing obstructionism by congressional Republicans during the Obama era).

281. *See* HUGH ATKINSON, THE POLITICS OF CLIMATE CHANGE UNDER PRESIDENT OBAMA 24–38 (2017); Meg Jacobs, *Obama's Fight Against Global Warming*, *in* THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT, *supra* note 255, at 62, 72–77.

282. *See, e.g.*, Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1752 (2015) (describing Obama's frequent invocation of the slogan "We Can't Wait" to justify executive branch policymaking); Jennifer Epstein, *Obama's Pen-and-Phone Strategy*, POLITICO, https://politico.com/story/2014/01/obama-state-of-the-union-2014-strategy-102151 (last updated Jan. 14, 2014, 4:09 PM) [https://perma.cc/X35P-TVUZ] (summarizing the use of administrative policymaking as a strategy in Obama's second term).

283. Barry Meier, *New Rules Aim to Reduce Silica Exposure at Work Sites*, N.Y. TIMES (Mar. 24, 2016), https://nytimes.com/2016/03/24/business/new-rules-aim-to-reduce-silica-exposure-at-work-sites.html [https://perma.cc/UV78-EHPX] (discussing Department of Labor silica exposure rules); Noam Scheiber, *White House Increases Overtime Eligibility by Millions*, N.Y. TIMES (May 17, 2016), https://nytimes.com/2016/05/18/business/white-house-increases-overtime-eligibility-by-millions.html [https://perma.cc/3DWG-9F56] (discussing Department of Labor overtime regulations).

284. *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (expanding the definition of who is a "fiduciary" under the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code to obligate a larger number of financial advisers and professionals to abide by fiduciary standards).

285. Sabrina Tavernise, *F.D.A. Finishes Food Labels for How We Eat Now*, N.Y. TIMES (May 20, 2016), https://nytimes.com/2016/05/21/health/fda-nutrition-labels.html [https://perma.cc/L54W-MBKU] (discussing FDA nutrition labeling rules).

286. *See infra* note 369 and accompanying text.

states improve air quality by reducing emissions that contribute to pollution in other states.[287] And in the D.C. Circuit, *Chevron* was central to decisions upholding important Obama-era rules expanding regulatory oversight over polluters,[288] internet companies,[289] tobacco products,[290] and institutions of higher education.[291] Deference was, in short, a key tool for the Obama Administration to expand the scope of regulation in areas where Congress did not act.

B. Conservative Backlash

At precisely the same time that the Obama White House was most actively deploying its administrative power, conservatives turned against the administrative state to a degree not seen since the New Deal.[292] Administrative law topics previously relegated to law reviews became prominent in political discourse. Republicans began attacking deference as lawless, a violation of separation of powers, and an abnegation of the judicial role—the diametric opposite of the position they took during the Reagan years.[293]

This shift is most visible in the reemergence of antideference legislation in Congress.[294] During Obama's second term, conservative

287. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 512–20, 524 (2014) (analyzing the EPA's Transport Rule under *Chevron* and concluding that the "EPA's cost-effective allocation of emission reductions among upwind States . . . is a permissible, workable, and equitable interpretation of the Good Neighbor Provision [of the Clean Air Act]").

288. *See, e.g.*, Nat'l Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1125–30 (D.C. Cir. 2013) (applying *Chevron* to uphold the EPA's authority under the Clean Air Act to establish emission standards for sewage sludge incinerators).

289. *See, e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 701–06 (D.C. Cir. 2016) (applying *Chevron* to uphold as permissible under Title II of the Communications Act of 1934 the FCC's classification of broadband as a telecommunications service subject to common carrier regulation).

290. *See, e.g.*, Competitive Enter. Inst. v. U.S. Dep't of Transp., 863 F.3d 911, 914–17 (D.C. Cir. 2017) (applying *Chevron* to uphold a Department of Transportation rule interpreting a statutory reference to "smoking" to include the use of e-cigarettes).

291. *See, e.g.*, Ass'n of Priv. Sector Colls. & Univs. v. Duncan, 640 F. App'x 5, 7–8 (D.C. Cir. 2016) (applying *Chevron* to uphold as consistent with the Higher Education Act a Department of Education rule requiring that institutions of higher education show that their programs can "lead to earnings that will allow students to pay back their student loan debts").

292. Many have expressly made this comparison. *See, e.g.*, Metzger, *supra* note 5, at 6 ("[R]ecognizing . . . the parallels to the 1930s conservative attacks on the New Deal[ ] demonstrates [contemporary] anti-administrativism's radical potential."). On debates during the New Deal era, see, for example, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); GRISINGER, *supra* note 73; and Metzger, *supra* note 5, at 51–71.

293. *See, e.g.*, Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1091 (2016) (explaining conservatives' opposition to *Chevron* as reflecting "frustration with eight years of a Democratic administration, contrasted with enthusiasm for the doctrine at its outset in the Reagan years").

294. Most existing commentary has focused on changes in how conservative judges approach *Chevron*, as exemplified by the public attention paid to then-Judge Gorsuch's criticism of the

Republicans in both the House and Senate began advocating for a statute that mirrored the Bumpers Amendment: the Separation of Powers Restoration Act ("SOPRA").[295] The statute proposed amending the APA to require that courts "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules made by agencies."[296]

As was true in the fight over Bumpers, participants often joined battle by articulating competing constitutional principles. Conservatives justified SOPRA on the ground that *Chevron* had "helped to midwife a kind of shadow government operating within the federal Executive" that "imposes and enforces the vast majority of new federal laws without being subject to public consent or checks and balances."[297] Framing SOPRA as necessary to correct what Senator James Lankford (R-OK) called a "constitutional imbalance," they characterized *Chevron* deference as "a blank check for the Executive Branch."[298] Liberals responded with concerns that abandoning *Chevron* would foster judicial activism and "encourage agencies to conduct rulemaking out of the public view, to issue guidance documents in lieu of rulemaking, or to cause them to avoid rulemaking altogether."[299]

But behind this principled rhetoric, it is evident that the SOPRA debate was ultimately about opposing views on regulation. The bill's political valence was clear to everyone involved. It was an attempt by conservative Republicans in Congress to rein in a Democratic president's administrative powers. Indeed, support for SOPRA cleanly split along party lines. In both chambers, SOPRA's cosponsors were exclusively Republicans. Those cosponsors included some of the most conservative members of each chamber, including those with ties to the Tea Party and Freedom Caucus.[300] A policy brief in favor of SOPRA, for

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doctrine in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). While we of course do not discount the importance of doctrinal developments, our focus is on political actors rather than judicial ones.

295. H.R. 4768, 114th Cong. (2016); S. 2724, 114th Cong. (2016).

296. H.R. 4768 § 2(3); S. 2724 § 2.

297. Mike Lee, Jeb Hensarling, Cynthia Lummis, Dave Brat, Barry Loudermilk, Mia Love, John Ratcliffe & Mark Walker, *Reforming Executive Discretion, Part I: The End of* Chevron *Deference*, ARTICLE I PROJECT 1 (Mar. 17, 2016), https://lee.senate.gov/public/_cache/files/11cf0f9b-d445-4116-a789-23bd6870141c/a1p-issue-no-2—-reforming-executive-discretion-part-i—-the-end-of-chevron-deference.pdf [https://perma.cc/42AB-L7AK].

298. *Examining Agency Use of Deference, Part II*: *Hearing Before the Subcomm. on Regul. Affs. & Fed. Mgmt. of the H. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. 2 (2016) (statement of Sen. James Lankford (R-OK), Chairman, S. Comm. on Regul. Affs. & Fed. Mgmt.).

299. *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*: *Hearing Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. on the Judiciary*, 114th Cong. 5 (2016) (statement of Rep. John Conyers (D-MI)).

300. *See* H.R. 4768 (listing the Bill's 113 House cosponsors, all Republicans); S. 2724 (listing the Bill's twelve Senate cosponsors, all Republicans). The House Judiciary Committee held

example, was coauthored by Senator Mike Lee (R-UT), a Tea Party favorite, along with some of the most conservative members of the House.[301] Given this advocacy, it is unsurprising that when the House passed SOPRA in July 2016, Republicans unanimously backed the bill (239–0), while every Democrat but one opposed it (171–1).[302] This partisan breakdown made it natural, then, for Obama to announce his intent to veto the bill should it pass both chambers.[303]

Nor does the debate over SOPRA reveal any of the bipartisan negotiation or coalition-building that characterized the Bumpers era. Instead, the positions of lawmakers and interest groups were firmly entrenched. This fierce partisanship even trickled down to the states: taking cues from Congress, some conservative Republican legislators introduced bills to eliminate state courts' deference to legal interpretations by state agencies.[304]

Beyond partisan realignment more generally,[305] one important reason for this polarization is that SOPRA's proponents were responding directly to what they saw as Democratic regulatory overreach. Congressional Republicans viewed SOPRA as a counterweight to Obama-era environmental initiatives. Indeed, their statements evidence a specific fear: that *Chevron* would lead courts to defer to a pair of 2015 EPA rulemakings: the Clean Power Plan,[306] which sought to reduce U.S. carbon emissions,[307] and the Waters of the

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hearings and divided along partisan lines, with all twelve Republicans voting in favor and all eight Democrats voting against. *See* H.R. REP. NO. 114-622, at 16–17 (2016). The House Rules Committee similarly divided on partisan lines. *See* H.R. REP. NO. 114-641, at 1 (2016) (all nine Republicans in favor and all three Democrats opposed).

301. *See* Lee et al., *supra* note 297, at 1 (indicating support among Republicans to replace *Chevron* deference with de novo review).

302. *Roll Call 416 — Bill Number: H.R. 4768*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (July 12, 2016, 4:30 PM), https://clerk.house.gov/Votes/2016416 [https://perma.cc/X74S-9BK4]. The sole legislator to cross party lines in the House was Rep. Collin Peterson (D-MN), one of the chamber's most conservative Democrats. *Id.* The Senate did not hold either a committee or a floor vote on SOPRA.

303. *See* 162 CONG. REC. H4620 (daily ed. July 11, 2016) (quoting a Statement of Administration Policy noting that the Obama Administration "strongly oppose[d]" SOPRA and would veto it on the grounds that it "would unnecessarily overrule decades of Supreme Court precedent, it is not in the public interest, and it would add needless complexity and delay to judicial review of regulatory actions").

304. *See* Kileen Lindgren, Chevron *Deference Dies in the Desert*, FEDERALIST SOC'Y: FEDSOC BLOG (May 1, 2018), https://fedsoc.org/commentary/fedsoc-blog/chevron-deference-dies-in-the-desert [https://perma.cc/BET4-ZEEE] (describing the Arizona equivalent to SOPRA, the first bill of its kind to be enacted into law).

305. *See generally* BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2014); SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008).

306. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60 (2021)).

307. *See, e.g.*, 162 CONG. REC. H4615 (daily ed. July 11, 2016) (statement of Rep. Robert Goodlatte (R-VA)):

United States Rule,[308] which broadly read the Clean Water Act's protections to apply to a greater number of bodies of water.[309] They also charged that SOPRA was necessary to prevent judicial deference to rulemakings by the Consumer Financial Protection Bureau, which was created in 2010 over strong Republican opposition.[310]

The salience of these policy-driven concerns in the congressional debates is revealing. To the extent that *Chevron* raises separation of powers concerns, those concerns have existed for decades. Only a focus on particular regulatory initiatives explains why SOPRA gained momentum among congressional Republicans at precisely the time when the Obama Administration was more vigorously asserting its regulatory power.

The alignment of interest groups on each side of the SOPRA debate supports the view that disagreements about the proper scope of the regulatory state were driving the politics of *Chevron*. The Chamber of Commerce endorsed SOPRA on the ground that eliminating deference "would deter agencies from attempting to expand the scope of their own regulatory authority without any new grant of authority from Congress."[311] On the other side, SOPRA opponents included a familiar

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> This legislation takes square aim at . . . the [*Chevron*] Doctrine, under which Federal courts regularly defer to regulatory agencies' self-serving and often politicized interpretations of the statutes they administer. This includes interpretations like those that underlie the EPA's Clean Power Plan . . . [which] threaten[s] to wipe out the Nation's key fuel for electric power generation . . . .

See also, e.g., Editorial, *Climate-Change Putsch*, WALL ST. J. (Aug. 3, 2015, 6:50 PM), https://wsj.com/articles/climate-change-putsch-1438642218 [https://perma.cc/9VSL-K3ES] (calling for the Supreme Court to revisit *Chevron*, arguing that "[a]n agency using a 38-year-old provision as pretext for the cap-and-tax plan that a Democratic Congress rejected in 2010 and couldn't get 50 Senate votes now is the all-time nadir of administrative 'interpretation' "); William Yeatman, *Primer on the Separation of Powers Restoration Act*, COMPETITIVE ENTER. INST.: OPEN MKT. BLOG (July 12, 2016), https://cei.org/blog/primer-separation-powers-restoration-act [https://perma.cc/Y4X7-R3KW] (expressing concern that *Chevron* could lead courts to defer to the EPA's interpretation of the Clean Air Act articulated in the Clean Power Plan).

308. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified in scattered parts of 40 C.F.R.).

309. For statements by legislators arguing that SOPRA is a necessary response to the Waters of the United States Rule, see, for example, 162 CONG. REC. H4615 (statement of Rep. Robert Goodlatte (R-VA)); *Examining Agency Use of Deference, Part II*, *supra* note 298, at 1 (statement of Sen. James Lankford (R-OK)); and *Examining Agency Use of Deference, Part II*, *supra* note 298, at 17 (statement of Sen. Joni Ernst (R-IA)).

310. *See, e.g.*, *Bureau of Consumer Financial Protection's Unconstitutional Design*: *Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 114th Cong. 2 (2017) (statement of Rep. Ann Wagner (R-MO)); *see also id.* at 28–29 (statement of Rep. Loudermilk (R-GA)).

311. Letter from R. Bruce Josten, Exec. Vice President for Gov't Affs., Chamber of Com., to Members of the United States Congress (Mar. 18, 2016), https://uschamber.com/sites/default/files/documents/files/3.18.16-_hill_letter_to_congress_supporting_h.r._4768_and_s._2724_the_separation_of_powers_restoration_act.pdf [https://perma.cc/88S8-295H]. While big business supported SOPRA, some small

coalition of progressive groups, including Public Citizen, the AFL-CIO, the Service Employees International Union, the United Steelworkers, the Center for Progressive Reform, the Consumers Union, the Consumer Federation of America, the Natural Resources Defense Council, and the Sierra Club.[312] A letter from progressive groups alleging that politics, not principle, was driving SOPRA proponents underscores the political stakes. "At root," they argued, the statute "seems motivated by the dissatisfaction . . . with the statutory implementation decisions made by the current [Obama] Administration."[313]

The opposing views taken by business groups and progressive organizations make the SOPRA debate look like merely a reprise of debates over the Bumpers Amendment, and to a large degree it was. But a new set of actors came onto the scene between the 1970s and 2010s: ideological conservatives.[314] In contrast to an older generation of conservative elites, often drawn from the business community, who felt the regulatory state had simply grown too large, this "new class" of libertarian-leaning conservatives, which counted among its ranks a number of influential "legal professionals and academics,"[315] expressed hostility to the regulatory state's very existence.[316] Financially, they could draw on the resources of wealthy donors who opposed the

businesses took the opposite view on the ground that antiregulatory legislation would " 'only worsen the uneven economic playing field' for small businesses, providing incumbent and large businesses with a competitive advantage." H.R. REP. NO. 114-622, pt.1, at 46 (2016) (quoting David Levine, CEO of the Am. Sustainable Bus. Council) (dissenting views).

312. 162 CONG. REC. H4621 (daily ed. July 11, 2016) (statement of Rep. John Conyers, Jr. (D-MI) (listing SOPRA opponents); *see also* H.R. REP. NO. 114-622, at 21 (dissenting views) ("[T]he Coalition for Sensible Safeguards—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—strongly opposes this legislation, explaining that it 'will make our system of regulatory safeguards weaker by allowing for judicial activism at the expense of agency expertise and congressional authority . . . .' " (quoting Letter from the Coal. for Sensible Safeguards to Rep. Bob Goodlatte (R-VA), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (June 8, 2016))).

313. 162 CONG. REC. H4657 (daily ed. July 11, 2016) (quoting a letter in opposition to SOPRA submitted to Congress by twenty-one progressive groups).

314. *See* JACOB HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 237 (2016); Jack Balkin, *The Great Debate in the Conservative Legal Movement*, BALKINIZATION (June 18, 2020), https://balkin.blogspot.com/2020/06/the-great-debate-in-conservative-legal.html [https://perma.cc/F5WS-8UFX].

315. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 276 (2008).

316. *See, e.g.*, THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 190–91 (2012) (arguing that for right-wing advocacy groups and political action committees, the contemporary Republican Party "is a vehicle for realizing an agenda that includes . . . removal of regulations").

regulatory state as a matter of principle.[317] And institutionally, they could count on the support of a well-developed network of para-academic institutions, such as the American Enterprise Institute and the Heritage Foundation, and conservative public-interest law firms to develop their critiques of deference.[318]

These ideological conservatives and libertarian groups, many of which had strong ties to the Koch network, strongly supported SOPRA, typically articulating their critiques of deference in more strident language than their predecessors.[319] Deference was not simply an enabler of regulatory excess; it threatened foundational individual liberties. The intellectual groundwork for their advocacy was laid by the Heritage Foundation,[320] the Hudson Institute,[321] and the Liberty Fund Network,[322] each of which called for rethinking *Chevron* and provided the arguments that advocacy groups and Republican members of Congress would later employ. Although Obama Administration regulations were the proximate cause of conservative anti-*Chevron* sentiment, changes within the Republican coalition fueled the fire.

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317. *See, e.g.*, Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism*, 14 PERSPS. ON POL. 681 (2016) (documenting the growing influence of the Koch network on Republican Party politics); Alexander Hertel-Fernandez, Theda Skocpol & Jason Sclar, *When Political Mega-Donors Join Forces: How the Koch Network and the Democracy Alliance Influence Organized U.S. Politics on the Right and Left*, 32 STUD. AM. POL. DEV. 127 (2018) (similar).

318. *See* TELES, *supra* note 315, at 221 (observing that conservative public interest firms "had clearer, more forthrightly libertarian principles than their . . . predecessors" and that they were led by "products of a new constellation of conservative institutions committed to a set of ideological principles rather than corporate interests").

319. 162 CONG. REC. H4617 (daily ed. July 11, 2016) (noting that supporters of SOPRA included the Competitive Enterprise Institute, American Commitment, American Energy Alliance, Americans for Prosperity, Americans for Competitive Enterprise, Americans for Tax Reform, Campaign for Liberty, Frontiers of Freedom, Heritage Action for America, Institute for Liberty, Less Government, National Center for Public Policy Research, National Taxpayers Union, 60 Plus Association, and Taxpayers Protection Alliance). Many of the groups supporting SOPRA received funding from the Koch Network. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT, at xiv, xvii, 236, 362, 433, 502 n.304, 510 n.375 (2d ed. 2017).

320. *See* Elizabeth H. Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and* Chevron *Deference*, HERITAGE FOUND. (May 7, 2015), https://heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and [https://perma.cc/T5MX-VBFV].

321. *See* Christopher DeMuth, *Congress Incongruous*, HUDSON INST. (Aug. 3, 2015), https://hudson.org/research/11588-congress-incongruous [https://perma.cc/J4SC-C247] (characterizing "regulatory statutes" like "Dodd-Frank and ObamaCare" as "executive empowerment documents—launching hundreds of rulemaking proceedings that give agencies unprecedented discretion over matters of momentous national importance" and anticipating that "the Supreme Court, in its *Chevron* line of cases . . . will tolerate wild executive extemporizing with statutory law").

322. *See* Richard Samuelson, *Time to Rethink the* Chevron *Doctrine*, LAW & LIBERTY (Aug. 1, 2014), https://lawliberty.org/time-to-rethink-the-chevron-doctrine [https://perma.cc/3FZW-5QUK].

C. Coda

It would have been reasonable to expect that Donald Trump's election would have blunted conservative critiques of *Chevron*. After all, we saw how Republicans, who had once enthusiastically backed the Bumpers Amendment while a Democratic president was in office, came to defend *Chevron* deference when their party held the White House.

But this reversal did not repeat itself. The Trump Administration made opposition to regulation central to its domestic policy agenda.[323] In the service of its deregulatory goals, it treated opposition to *Chevron* as a litmus test in judicial appointments.[324] With their party having gained unified control of both ends of Pennsylvania Avenue in 2017, House and Senate Republicans reintroduced SOPRA[325] along with a number of other antiregulatory pieces of legislation.[326] Given unified Republican control of government and widespread support for SOPRA within the party, the Senate filibuster may have been all that prevented SOPRA from becoming law during the Trump Administration. And conservative commentators continued to condemn

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323. *See supra* note 4 and accompanying text; *see also* Keith B. Belton & John D. Graham, *Deregulation Under Trump*, REGULATION, Summer 2020, at 14 ("[Deregulation] was a central plank of [Trump's] national economic and energy plans . . . .").

324. *See, e.g.*, Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking "The Administrative State,"* N.Y. TIMES (Mar. 26, 2018), https://nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html [https://perma.cc/KJ6F-VVX9] (reporting on President Trump's "plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations, often without being subject to judicial oversight" and noting that candidates "not on board with this agenda" were "unlikely to be nominated by President Trump"); Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), https://nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/ZAG7-UXA4] ("Gorsuch is said to have risen to the top of Trump's Supreme Court list in large part because of a 2016 concurring opinion he wrote as a [circuit] judge . . . in which he forcefully attacked what's known as '*Chevron* deference.' ").

325. *See* Separation of Powers Restoration Act, H.R. 76, 115th Cong. (2017); Separation of Powers Restoration Act, S. 1577, 115th Cong. (2017); Separation of Powers Restoration Act of 2019, H.R. 1927, 116th Cong.; Separation of Powers Restoration Act of 2019, S. 909, 116th Cong.; Separation of Powers Restoration Act of 2020, H.R. 7895, 116th Cong. After failing to pass SOPRA directly, House Republicans attempted to pass SOPRA by including it in an omnibus bill. On January 3, 2017, Representative Bob Goodlatte (R-VA) introduced the Regulatory Accountability Act of 2017, which included SOPRA as its Title II. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong.

326. *See* Regulations from the Executive in Need of Scrutiny Act, H.R. 26, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act, S. 92, 115th Cong. (2017); Regulatory Accountability Act, H.R. 5, 115th Cong. (2017); Regulatory Accountability Act, S. 951, 115th Cong. (2017); Congressional Article I Powers Strengthening Act, H.R. 469, 115th Cong. (2017); RED Tape Act, S. 56, 115th Cong. (2017); Sunshine for Regulatory Decrees and Settlements Act, S. 119, 115th Cong. (2017); One In, One Out Act, H.R. 674, 115th Cong. (2017); *see also* Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487 (2019) (describing and critiquing some of these proposed reforms).

Chevron even when the doctrine's application would have favored the Trump Administration's deregulatory initiatives.[327]

One reason conservatives may have felt comfortable turning against *Chevron* when they did is the death of the doctrine's most prominent conservative defender: Antonin Scalia. Before his elevation to the Court, Scalia was quick to recognize the promise of deference as a tool to aid deregulation. Critiquing what he called "[e]xecutive-enfeebling measures," the future Justice argued that they did not "deter regulation," but instead "deter change."[328] Once on the Court, Scalia continued to defend deference, perhaps feeling "authorized to prefer *Chevron* simply because of its predictability and because of the baneful consequences of the alternative."[329] In turn, Scalia's substantial influence within conservative circles played a role in insulating the doctrine from conservative broadsides. It is likely no accident that the rise of contemporary attacks on deference coincided with Scalia's own possible change of heart about the wisdom of *Chevron*,[330] and took on increasing momentum with his death and eventual replacement by a prominent deference critic, Neil Gorsuch.[331]

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327. *See, e.g.*, Elizabeth Price Foley, Opinion, *The Court Needs Another Clarence Thomas, Not a Scalia*, N.Y. TIMES (Jan. 30, 2017), https://nytimes.com/2017/01/30/opinion/the-court-needs-another-clarence-thomas-not-a-scalia.html [https://perma.cc/FWL3-F529] ("*Chevron* deference has aggrandized executive power, giving agencies considerable leeway to promulgate regulations on controversial subjects not addressed by Congress and coming dangerously close to encroaching on legislative power."); Timothy Snowball, *The Greatest Threat to Liberty*, PAC. LEGAL FOUND. (Apr. 9, 2018), https://pacificlegal.org/the-greatest-threat-to-liberty [https://perma.cc/P3Z6-MQ95] (arguing that "the so-called *Chevron* Doctrine . . . represents [a grave] threat to individual liberty").

328. Scalia, *supra* note 210.

329. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 766 (2017); *see also id.* (arguing that deference "had the virtue of offering a clear background rule of law against which Congress can legislate" (internal quotation marks omitted)); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (expressing a general preference for clear doctrinal rules over more open-ended standards).

330. *See* Adam White, *Scalia and* Chevron*: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 23, 2016), https://www.yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/ [https://perma.cc/KV3N-Q23C] (arguing that Scalia "may have surveyed recent years' developments and concluded that the state of affairs justifying judicial deference twenty-five years ago no longer held").

331. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (characterizing *Chevron* as a doctrine that "permit[s] 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").

The mid-2010s also featured other prominent conservative judges expressing opposition to *Chevron*. *See, e.g.*, Michigan v. EPA, 576 U.S. 743, 760 (2015) (Thomas, J., concurring) ("I write separately to note that [the EPA's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (describing *Chevron* as "an

Democrats, meanwhile, persisted in defending *Chevron* even after Trump took office. Senate Democrats criticized Gorsuch's views about *Chevron* during his 2017 Supreme Court confirmation hearings.[332] A coalition of liberal interest groups charged that Gorsuch would "relegate this vital precedent to the dustbin of history because it disfavors the corporate interests he championed as a lawyer and as a judge."[333] These left-leaning groups argued further that Gorsuch's opposition to *Chevron* "betray[ed] a general hostility to regulatory agencies and regulatory safeguards that protect our air, water, lands, and wildlife."[334]

More generally, liberal commentators predicted that an end to *Chevron* deference would "cripple the next Democratic President."[335] As one put it: "A Supreme Court hostile to *Chevron* would be a grave threat to Democrats' ability to pursue progressive policies if they reclaim the White House in 2020 and beyond."[336] Senate Republicans' use of the filibuster has meant that Democrats must secure sixty votes to invoke cloture on new regulatory legislation—an impossibility on many contested topics. As a result, the Biden Administration, much like the Obama Administration, is deploying administrative power to achieve key policy goals.[337] An end to *Chevron*, or even cutbacks to it, could hamper these initiatives, including on top Administration priorities such as climate change.[338] For this reason, congressional Democrats

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atextual invention by courts" and "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch").

332. *See* Metzger, *supra* note 5, at 4 n.15, 69–70 n.413 (citing statements by Senate Democrats).

333. Letter from The Leadership Conf. on Civ. & Hum. Rts. to Sen. Charles Grassley (R-IA), Chairman, Senate Comm. on the Judiciary & Sen. Dianne Feinstein (D-CA), Ranking Member, Senate Comm. on the Judiciary 4 (Mar. 20, 2017).

334. *Id.* at 5.

335. *E.g.*, Pema Levy, *How Brett Kavanaugh Could Cripple the Next Democratic President*, MOTHER JONES (July 24, 2018), https://motherjones.com/politics/2018/07/brett-kavanaugh-supreme-court-chevron-deference [https://perma.cc/6B2H-S7Z9].

336. *Id.*

337. *See, e.g.*, Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021); Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021); *Regulatory Actions and Initiatives*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/climate-change/regulatory-actions-and-initiatives (last visited Feb. 16, 2022) [https://perma.cc/4SV3-DQ6V] (discussing EPA regulatory actions during the Biden Administration on the topic of climate change).

338. *See* Samuel Moyn & Aaron Belkin, *The Roberts Court Would Likely Strike Down Climate Change Legislation*, TAKE BACK THE CT. 6, 8–9 (Sept. 2019), https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d7d429025734e4ae9c92070/1568490130130/Supreme+Court+Will+Overturn+Climate+Legislation+FINAL.pdf [https://perma.cc/FPZ2-5WWB] (documenting how judicial narrowing or elimination of *Chevron* deference could hinder climate policymaking); *see also* John H. Cushman, Jr., *Why*

have attempted to codify *Chevron* and *Mead* in the face of an increasingly skeptical Supreme Court. The month after Democrats captured the presidency in the 2020 election, leading liberal members of the House and Senate introduced bills to require reviewing courts to "defer to the agency's reasonable or permissible interpretation of [a] statute" that the agency administers if that statute is "silent or ambiguous" and the agency has followed notice-and-comment procedures.[339]

In short, after flip-flopping on *Chevron* in earlier eras, the parties have now dug in their heels. Why? What can the positions that political actors take on deference issues teach us about both politics and law? The next Part turns to these questions.

VI. LESSONS AND IMPLICATIONS

A. The Divergence of Politics and Law

One lesson of our historical account is that the politics of deference do not neatly track doctrinal debates. Today, opposition to *Chevron* exists across the conservative movement: in the courts and in the halls of Congress, among scholars and interest groups alike. So, too, defenses of *Chevron* span the political left. But our historical account shows that this convergence is a recent phenomenon. The politics of deference are driven by conflict over regulatory policy, not about the wisdom of legal changes initiated by the Supreme Court. Tempting as it would be to link the politics of deference with doctrinal developments, the two have typically traveled on separate paths—an observation that sheds light on the relationship between law and politics more generally.

Consider, first, the relative timing of the Bumpers Amendment debate and the Supreme Court's *Chevron* decision. Were political actors responding to judicial decisions, one would have expected the height of the Bumpers Amendment debate to come after *Chevron*. By the same token, were the Court tracking political dynamics elsewhere in the constitutional system, we might have expected the Justices to recognize the salience of the decision, which the historical record suggests they did not. What we have shown is that the heyday of the debate over the Bumpers Amendment was in the years *before* the Court decided

Environmentalists Are So Worried About Trump's Supreme Court Pick, INSIDE CLIMATE NEWS (Feb. 1, 2017), https://insideclimatenews.org/news/01022017/neil-gorsuch-donald-trump-supreme-court-climate-change [https://perma.cc/6Y5D-6QH8] (arguing that *Chevron* has empowered the EPA to use the Clean Air Act to regulate carbon emissions and, as a result, matters greatly to fighting climate change).

339. H.R. 9029, 116th Cong. § 311 (2020); S. 5070, 116th Cong. § 311 (2020).

Chevron.[340] At precisely the time that deference began to dominate legal academic discourse—that is, after the *Chevron* decision—Congress lost interest. Conversely, despite the divisiveness of the debates over the Bumpers Amendment, the Court decided *Chevron* unanimously, seemingly without recognizing the ideological and political fissures that had riven Congress only a few years prior.

Subsequent history confirms that political and doctrinal tracks rarely cross. The Supreme Court's decisions in *Christensen* and *Mead*, arguably the most important deference cases since *Chevron*, passed without notice by lawmakers. Nor did the Court's use of the major questions doctrine in several high-profile cases prompt much by way of legislative reaction.[341] And the conservative turn against deference reflects a backlash to Obama-era administrative governance, but it is strikingly *not* a backlash to any particular judicial decision. Congressional debates over SOPRA focused on particular executive branch regulatory efforts (mostly concerning the environment) rather than high-profile judicial decisions. Indeed, the Court declined to apply *Chevron* in arguably the Obama Administration's most important statutory interpretation win in court. The Court interpreted the Affordable Care Act in a manner favorable to the Administration in *King v. Burwell*,[342] but conspicuously decided the statutory interpretation issue de novo.[343]

An important consequence of this divergence is that the political and legal logics of deference differ. Recent years have witnessed the emergence of an important debate within legal academic circles about the doctrinal foundations of deference to agency legal interpretations. Some view it as contrary to history and discordant with constitutional structure.[344] Others view it as almost inevitable, a result of law "working itself pure."[345] We take no position on this debate, but we do

340. *See supra* Part II.

341. Nine years after the Supreme Court's decision in *Brown & Williamson*, Congress gave the FDA jurisdiction over tobacco products with the passage of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). But that statute opted to redefine the FDA's jurisdiction rather than call for greater judicial deference to the FDA or other agencies, and so it is best understood as a response to a policy problem, not as an attempt to alter the allocation of interpretive authority between courts and agencies.

342. *See* 576 U.S. 473, 474, 498 (2015) (interpreting the Affordable Care Act to allow tax credits to be used on federally run health care exchanges).

343. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 82 (2015) (discussing "the Court's rejection of *Chevron*" in *King*).

344. *See, e.g.*, Bamzai, *supra* note 65; Beermann, *supra* note 43.

345. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION 7 (2016); *see also id.* at 31 (arguing that "deference arises from the long-term working out of legal principles by judges who, over time, become aware of the limits of their own knowledge and who build deference into law itself").

note that neither position maps neatly onto the politics of deference. To the contrary, the political story seems substantially more *contingent*. One reason that deference has persisted is that Congress has allowed it to persist. But the Bumpers Amendment very nearly became law with bipartisan support in the late 1970s and early 1980s. It might well have been enacted if not for the general difficulty of lawmaking under bicameralism and the specific legislative dynamics of a transitional time in U.S. politics. Similarly, SOPRA may well have become law in 2017–18, when Republicans held unified control of government, if not for the Senate filibuster—a powerful weapon that only in recent decades has come to be deployed in the ordinary course of the legislative process. Indeed, that *Chevron* has become a polarizing issue in Congress—a symbol of the differences between the two parties—is itself contingent, in part an artifact of broader changes within each party and in the political environment.[346] All of this should give us pause before telling deterministic stories about the past and make us more hesitant to offer predictions concerning the future.

We can say, however, that no doctrinal development can indefinitely repress political conflict over regulation—and thus over deference to agency interpretations. Doctrine can certainly change the character of that contestation, by shaping the arguments that partisans and interest groups make, the venues where they make them, and the instances in which they choose to mobilize. But political disagreement will always surface, even in the face of attempts to suppress it.[347]

The history of *Chevron* demonstrates this point. *Chevron* was itself decided unanimously. One prominent commentator described the decision as "admirable judicial diplomacy," given that the Supreme Court's "liberals bowed to the conservatives and agreed to keep the courts out of political thickets" of regulatory policymaking.[348] It is true that *Chevron* creates the conditions for less aggressive judicial partisanship: judges who disagree about the best reading of a statute can nonetheless agree that a given reading is reasonable. Though the

346. *Cf.* FRANCES LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (arguing that alternation in control of Congress leads both parties to focus on amplifying their differences).

347. For a similar argument from the campaign finance realm, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (arguing that "political money, like water, has to go somewhere," that it "is part of a broader ecosystem," and that "[u]nderstanding why it flows where it does and what functions it serves when it gets there requires thinking about the system as a whole").

348. *See* Verkuil, *supra* note 25.

decision did not succeed in depoliticizing administrative law,[349] there is no doubt some value in creating doctrinal off-ramps that enable judicial compromise.

Politics cannot, however, be stripped out of administrative law. In the long run, whatever its intent, it is clear that *Chevron* did not succeed in reducing political conflict over deference. Nor is there any evidence that the period of political quiescence over deference during the 1990s and 2000s was in any way attributable to *Chevron* as a judicial compromise. What's more, partisans and interest groups who want to either empower or limit the regulatory state can, and do, turn to Congress, even if their advocacy often sounds in second-order arguments about the allocation of decisionmaking authority rather than first-order arguments about how much regulation is desirable. As we have argued, the historical record makes clear that the Bumpers Amendment and SOPRA debates were substantive fights about the regulatory state cloaked in the language of constitutional principle. But the Bumpers Amendment and SOPRA are not exceptional. They are part of a long trend of partisans and interest groups seeking to achieve their (de)regulatory goals by turning to the legislative branch to change the contours of administrative procedure. Sometimes their efforts succeed,[350] though more often they fail.[351] But these persistent struggles to reshape the administrative process in the service of desired regulatory outcomes show that doctrine cannot eliminate or substantially constrain political conflict over regulatory policy.

* * *

If the law and politics of deference proceed on separate tracks, then what drives the politics of deference? The remainder of this Part presents three explanations. The first focuses on who holds power in which institution, contending that political actors shift their views about deference depending on which party controls the White House and the ideological composition of the federal judiciary. The second highlights the asymmetric effects of deference on the two parties' agendas, presenting several reasons why contemporary Democrats are more reliant on the doctrine than their Republican counterparts. And the third rests on the role of *Chevron* specifically (and deference more

349. *See* Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2220–25 (2009) (noting the ways in which *Chevron* failed to successfully depoliticize administrative law and suggesting doctrinal reforms to better achieve that goal).

350. *See, e.g.*, Congressional Review Act of 1996, 5 U.S.C. §§ 801-808.

351. *See supra* note 326 (collecting examples of proposed regulatory reform legislation from the 2010s).

broadly) as a form of symbolic politics, and as a proxy for a broader partisan battle over the administrative state.

B. Rotating Power, Rotating Politics

Views about deference reflect, at least in part, the distribution of political power. The doctrine shifts interpretive authority from the judiciary to the executive; eliminating the doctrine would shift power back to the courts.[352] It stands to reason, then, that a party with control over the executive branch but facing an unfriendly judiciary would favor *Chevron*. Conversely, a party that does not control the White House but has a sympathetic Supreme Court (or, secondarily, D.C. Circuit) would take the reverse position.

Our historical account supports this thesis. Conservative opposition to deference on questions of law intensified during the Carter Administration, waning only after the Reagan Administration began deploying the administrative state to deregulatory ends. During a twelve-year period of Republican control of the White House (1981–1993), conservatives made their peace with deference. Because that period featured a moderate Supreme Court and a liberal D.C. Circuit, at least on issues of administrative law, Republicans preferred that courts defer to agencies headed by Reagan and Bush appointees rather than decide statutory issues de novo.[353] Republicans' embrace of deference was likely buttressed by the fact that they held the presidency for all but four years between 1969 and 1993. By the end of that period, some Republicans were even optimistic that their party maintained a durable, built-in advantage in presidential elections,[354] a view that contributed to their continued support of *Chevron*.

Contrast these dynamics with those of the Obama years. Democrats controlled the White House but faced a Supreme Court more conservative than any in decades.[355] These conditions intersected with

352. *See supra* note 34 (citing sources).

353. On tensions between the Reagan Administration and the D.C. Circuit over regulatory policy, see, for example, CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 53–56, 71–86 (1999) (describing the D.C. Circuit during the 1970s and 1980s and characterizing it as functionally a "trustee for the ghosts of Congresses past"); and Larry W. Thomas, *The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy*, 39 ADMIN. L. REV. 27, 31–41 (1987) (describing D.C. Circuit cases invalidating Reagan-era deregulatory actions).

354. On the rise of the right and the decline of the left during this era, see THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992).

355. For much of its eight years, the Obama Administration also faced a D.C. Circuit with a pronounced antiregulatory bent. *See, e.g.*, Sunstein & Vermeule, *supra* note 66, at 393 (describing "a series of judge-made [D.C. Circuit] doctrines that are designed to protect private ordering from

two important legislative developments: a flurry of new statutes during Obama's first two years in office that required follow-on rulemaking, coupled with subsequent congressional gridlock that pushed policymaking into the administrative state. Under these conditions, *Chevron* became an important tool for protecting the Democratic agenda—sometimes reliant on expansive readings of existing statutes—from conservative judges. And for the same reason that *Chevron* served Democratic objectives during this period, it became a conservative target.

One might conclude that Trump-era politics deviated from this pattern, given that Republican attacks on *Chevron* continued notwithstanding their surprising 2016 victory. But a closer look at political dynamics during this period helps to explain why conservatives remained hostile to deference. Trump was the second consecutive Republican president to come into office after losing the national popular vote.[356] There was no guarantee that Republicans would continue to hold the White House in the future. The Supreme Court, by contrast, was conservative at the start of the Trump Administration and became only more so with three new Republican appointments. Taken together, these realities help to explain why conservative skepticism of *Chevron* has persisted, even when Republicans have held the White House. Republicans today prefer de novo review because they (quite reasonably) expect their control of the judiciary, especially the Supreme Court, to be more secure than their control of the White House. Put differently: with the security of a conservative Court, Republicans eager to limit the power of Democratic presidents to use the administrative state for regulatory ends are willing to do away with *Chevron*.

C. Chevron*'s Asymmetries*

Important as it is to trace the rotation of power, there is more to the story. Even from behind a veil of ignorance with respect to the institutional distribution of partisan power, *Chevron* deference will in the aggregate favor regulatory initiatives over deregulatory ones. To be sure, it will promote regulatory ends in some circumstances and

national regulatory intrusion"); Floyd Norris, *Circuit Court Needs to Let the S.E.C. Do Its Job*, N.Y. TIMES (Sept. 20, 2012), https://nytimes.com/2012/09/21/business/circuit-court-needs-to-let-the-sec-do-its-job.html [https://perma.cc/T868-3VMF] (describing the D.C. Circuit as "now controlled by judicial activists who seem quite willing to negate, on technical grounds, any regulations they do not like").

356. Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836-2016*, 14 AM. ECON. J. 327, 333 fig.1 (2022).

deregulatory effects in others. But those effects do not wash out. Despite some prominent statements to the contrary,[357] deference will, in the long term, support an expansion of the regulatory state.[358]

As we have seen, participants from both sides of the public debate seem to understand that the doctrine is not politically neutral. After all, notwithstanding the flip-flops we have documented, it is generally true that over the past five decades liberals have favored deference while conservatives have opposed it. Consistent with this observation, one prominent *Chevron* critic has argued that "[a]s new problems arise and knowledge increases, federal agencies tend to increase the level of regulation," such that "[s]tringent judicial review may be Republicans' last great hope to stem the tide."[359] A *Chevron* defender has agreed, observing that "proponents of deregulation[ ] have made a calculation [that SOPRA] would have disproportionate adverse impacts on regulations rather than deregulation."[360] Yet, surprisingly, the reasons for this bias have not received more than a passing mention in the scholarly literature on *Chevron*.[361]

We identify four reasons that help to explain *Chevron*'s asymmetric effects. First, the parties differ in their levels of regulatory ambition. Second, Democrats have fewer tools with which to achieve their regulatory goals than Republicans do their deregulatory aims. Third, various carve-outs from the doctrine, including on national security and immigration, give Republicans less to lose should the Court abandon *Chevron*. Finally, the parties have strikingly divergent attitudes toward the federal bureaucracy. Understanding each of these four dynamics helps explain why contemporary Democrats and Republicans have lined up to defend or attack the doctrine, respectively.

1. Regulatory Ambition

First, there is an asymmetry in administrative ambition between the two parties. Put simply: in most instances, today's

357. *See, e.g.*, *supra* note 25 and accompanying text (quoting Paul Verkuil).

358. In this way, *Chevron* is an example of what one of us has elsewhere called a structural bias: a seemingly neutral public law doctrine that favors some substantive outcomes over others in the long term. *See generally* Gould & Pozen, *supra* note 21.

359. *See* Jack M. Beermann, Chevron *Is a Rorschach Test Ink Blot*, 32 J.L. & POL. 305, 313 (2017).

360. *See Separation of Powers Restoration Act of 2016*: *Hearing on H.R 4768 Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. on the Judiciary*, 114th Cong. 47 (2016) (testimony of John D. Walke, Clean Air Director and Senior Attorney for the National Resources Defense Council).

361. *See, e.g.*, Sunstein, *supra* note 42, at 1665–66 (suggesting that "there might be a broader institutional hunch, to the effect that in the long run, *Chevron* is more likely to promote the expansion than the contraction of agency power").

Democrats support regulation while Republicans oppose it, and legislative gridlock has made proregulation Democrats more dependent on *Chevron* than antiregulation Republicans.

Consider recent changes in the composition of the two parties. Conservative skeptics of regulation have lost power in the Democratic Party in recent decades, while calls for greater regulation—most notably in the environmental and financial services domains—are now central parts of the party's platform.[362] Concerns about regulatory capture by industry, which tempered Democratic enthusiasm for agency power in earlier eras,[363] seem to have receded in favor of a more technocratic faith in scientists and other policy experts.[364] At least when it comes to regulatory politics, civil libertarian voices are not dominant. Instead, the party's platform is filled with calls for bold government action to address national challenges, ranging from economic and racial inequality to the climate crisis. A party with this ambitious set of priorities needs a robust administrative state to carry them out.

The picture is very different among Republicans. Libertarian opponents of the administrative state have only grown more influential within the party.[365] Changes in campaign finance law, in particular, have advantaged ideologically motivated donors like Charles and David Koch, who tend to have sharp-edged views about regulation.[366] And with fewer centrists in the party, those favoring a less aggressive approach to deregulation have been marginalized.[367] As conservatives continue to grapple with the stickiness of the administrative state, they

362. *See, e.g.*, PEW RSCH. CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER (Oct. 2017), https://pewresearch.org/politics/2017/10/05/2-government-regulation-and-the-social-safety-net/ [https://perma.cc/EUB3-88YU] (noting that, in 2017, "Democratic support for regulation of business [was] higher than . . . during much of the 1990s and 2000s").

363. *See, e.g.*, LOWI, *supra* note 75, at 51 (arguing that "interest-group liberalism" is designed to "insur[e] access to the most effectively organized").

364. *See, e.g.*, Brian Kennedy & Cary Funk, *Democrats and Republicans Differ Over Role and Value of Scientists in Policy Debates*, PEW RSCH. CTR. (Aug. 9, 2019), https://pewresearch.org/fact-tank/2019/08/09/democrats-and-republicans-role-scientists-policy-debates [https://perma.cc/GV8X-D9FU].

365. *See, e.g.*, MAYER, *supra* note 319; Hertel-Fernandez et al., *supra* note 317, at 154 (describing the "organizational patterns and resource shares" that have shifted the Republican Party "toward the antigovernment, ultra-free-market right").

366. *See, e.g.*, RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 824–26 (2014).

367. *See* DANIELLE M. THOMSEN, OPTING OUT OF CONGRESS: PARTISAN POLARIZATION AND THE DECLINE OF MODERATE CANDIDATES (2017) (exploring the causes of the growing paucity of legislative centrists).

have turned to structural attacks in lieu of calls for more modest reforms.[368]

Against this backdrop, it is perhaps unsurprising that agency agendas have been more ambitious under recent Democratic presidents than their Republican counterparts. The contrast between Obama- and Trump-era regulatory policymaking illustrates the point. While the Obama Administration engaged in significantly more major rulemakings than either of its immediate Republican predecessors,[369] the Trump Administration engaged in fewer major rulemakings than predecessors of either party.[370] This gap is especially pronounced for the regulatory and social welfare agencies—such as the EPA and the Departments of Education, Energy, Health and Human Services, Labor, and Transportation—all of which have witnessed far more regulatory activity under Democrats than Republican administrations.[371] This gap in regulatory ambition would look even larger if we considered only those regulations that sought to make policy in the first instance, rather than those seeking to repeal an earlier administration's policy, as was the case for many of Trump's most prominent rulemakings.[372] In short, across many federal agencies, Democratic administrations are more prolific than their Republican counterparts in using rulemakings to craft new regulatory policy.

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368. *See supra* Section V.B.

369. Per the General Accounting Office, the second Bush Administration published 221 major rules during its first term and 276 during its second; the Obama Administration published 326 major rules during its first term and 369 during its second; and the Trump Administration published 260 major rules. *Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFF., https://gao.gov/legal/other-legal-work/congressional-review-act (last visited Feb. 16, 2022) [https://perma.cc/4CC6-ETCQ] (in the database search box, select "Major" under "Rule Type" and enter the start and end dates of the administration under "Rule Effective Date" and "To," respectively). For purposes of these figures, we use the definition of "major rule" set out in the Congressional Review Act, 5 U.S.C. § 804(2).

370. Belton & Graham, *supra* note 323, at 16 tbl.1 (documenting the number of "total," "significant," and "major" rulemakings during the first two years of recent administrations, and finding that the Trump Administration engaged in far fewer rulemakings during its first two years as compared to the Bush and Obama Administrations).

371. *See Economically Significant Rules by Agency*, GEO. WASH. UNIV. REGUL. STUD. CTR., https://regulatorystudies.columbian.gwu.edu/economically-significant-rules-agency (last visited Feb. 16, 2022) [https://perma.cc/5VU2-M39G] (providing data on major rulemakings by agency and year).

372. *See, e.g.*, Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, https://nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html (last updated Jan. 21, 2021) [https://perma.cc/EBB9-GHFX]; Marianne Lavelle, *Trump Rolled Back 100+ Environmental Rules. Biden May Focus on Undoing Five of the Biggest Ones*, INSIDE CLIMATE NEWS (Nov. 17, 2020), https://insideclimatenews.org/news/17112020/trump-rollbacks-biden-clean-cars-power-methane [https://perma.cc/C6EG-NWB2].

The related concepts of policy "decay"[373] and policy "drift"[374] help to explain this asymmetry of ambition. Absent deliberate updating, old regulatory statutes will often fail to cover, at least expressly, circumstances created by new social, scientific, or economic developments.[375] This may not be a problem for those who prefer that these new developments go unregulated.[376] But those who wish to regulate must respond to the changed circumstances either by passing new statutes or by reading old ones broadly to cover societal changes that statutory drafters may not have fully anticipated. Given the difficulty of legislating in a polarized age, readings of old statutes to address new problems are often the only practical option for those who wish to regulate as circumstances change.[377] For this reason, deference to agency statutory interpretations is especially important to the Democratic Party. The result is that *Chevron* is "a major benefit to agencies seeking to regulate (or re-regulate) under conditions of congressional gridlock and only a small benefit to agencies seeking to deregulate."[378]

Environmental law and policy illustrate Democrats' reliance on deference. Given the practical impossibility of enacting new environmental protection statutes, the Obama Administration made heavy use of EPA rulemaking to address environmental hazards, most notably climate change. It promulgated motor vehicle emissions standards,[379] tightened regulation of power plants,[380] and expanded

373. *See, e.g.*, Steven Callander & Gregory Martin, *Dynamic Policymaking with Decay*, 61 AM. J. POL. SCI. 50 (2017) (developing a formal model of how social, economic, demographic, and technological changes can influence policy effectiveness).

374. *See, e.g.*, Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 246 (2004) (developing the concept of policy drift to explain "changes in the operation or effect of policies that occur without significant changes in those policies' structure").

375. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (discussing this issue with a focus on environmental law applications).

376. *See* Hacker, *supra* note 374, at 247.

377. *See supra* note 282 and accompanying text (describing Obama's use of executive action).

378. MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 162 (2020).

379. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified in scattered sections of 40 and 49 C.F.R.); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (codified in scattered sections of 40 and 49 C.F.R.); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,623 (Oct. 15, 2012) (codified in scattered sections of 40 and 49 C.F.R.).

380. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 60, 70, 71, 98); Carbon Pollution Emission Guidelines for Existing

federal jurisdiction over water pollution,[381] among dozens of other rulemakings.[382] These rulemakings each involved EPA interpretations of its existing authority, often under decades-old statutes like the Clean Air Act and Clean Water Act.[383] In consequence, the Obama Administration depended heavily on *Chevron* to safeguard its statutory interpretations from invalidation, especially by conservative judges inclined toward narrower understandings of the Agency's authority.

2. Viability of Other Policymaking Tools

Second, independent of the asymmetric reliance problem, opponents of regulation have many more tools at their disposal than do its proponents. This asymmetry arises not from *Chevron* itself, but rather from the full panoply of executive policymaking tools. The result is that Republicans, but not Democrats, can often achieve their policy goals through means other than rulemakings eligible for *Chevron* deference.

Take this nonexhaustive list. An administration wishing to reduce federal regulation of private industry can decline to promulgate new regulations or create barriers to agencies that might wish to do so, such as by imposing additional procedural requirements or layers of internal review.[384] It can be lax in enforcing existing regulatory

Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).

381. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and in scattered sections of 40 C.F.R.).

382. For a detailed overview of EPA rulemakings during the Obama Administration, see JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RSCH. SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? 8–36 (2016).

383. *See* Freeman & Spence, *supra* note 375, at 69 n.299.

384. *See, e.g.*, Exec. Order No. 13,771, § 2(a), 82 Fed. Reg. 9339 (Feb. 3, 2017) ("[W]henever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."); Exec. Order No. 13,891, § 1, 84 Fed. Reg. 55,235 (Oct. 9, 2019) (making it "the policy of the executive branch . . . to require that agencies treat guidance documents as non-binding both in law and in practice" and providing that "[a]gencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications").

requirements.[385] It can seek to limit funding for agency enforcement.[386] It can decline to appoint[387] or confirm[388] regulators to run disfavored

385. *See, e.g.*, Ben Protess, Robert Gebeloff & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), https://nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html [https://perma.cc/4ULT-7XPF] (comparing the first twenty months of the Trump Administration to the last twenty months of the Obama Administration, and finding a "62 percent drop in penalties imposed and illicit profits ordered returned by the S.E.C.," a "72 percent decline in corporate penalties from the Justice Department's criminal prosecutions . . . and a similar percent drop in civil penalties against financial institutions," and a "lighter touch toward the banking industry, with the S.E.C. ordering banks to pay $1.7 billion during the Obama period, nearly four times as much as in the Trump era"); Alex Leary, *Trump Administration Pushes to Deregulate With Less Enforcement*, WALL ST. J., https://wsj.com/articles/trump-administration-pushes-to-deregulate-with-less-enforcement-11561291201 (last updated June 23, 2019, 7:12 PM) [https://perma.cc/9WZ8-54FQ] (noting dramatic decreases in EPA, OSHA, and CFPB inspections and enforcement during the Trump Administration); Anna M. Phillips, *Polluters Are Paying Much Lower Fines Under Trump, EPA Says*, L.A. TIMES (Feb. 8, 2019, 3:52 PM), https://latimes.com/politics/la-na-pol-epa-enforcement-decline-20190208-story.html [https://perma.cc/5E2P-LZ83] (noting that during the first year of the Trump Administration, EPA civil penalties were at their lowest since the creation of the EPA's enforcement office in 1994); Ellen Knickmeyer, *EPA Criminal Action Against Polluters Hits 30-Year Low*, ASSOCIATED PRESS (Jan. 15, 2019), https://apnews.com/article/d72a4d3dfb584d15949c88917b48ddf9 [https://perma.cc/8TX7-3WHC] (noting that in 2018 the EPA hit a thirty-year low in the number of pollution cases referred for criminal prosecution); Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), https://nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html [https://perma.cc/LZ8B-29SN] (documenting ways in which the Trump-era HUD "attempt[ed] to scale back federal efforts to enforce fair housing laws, freezing enforcement actions against local governments and businesses, including Facebook, while sidelining officials who have aggressively pursued civil rights cases").

On White House encouragement of more lax regulatory enforcement, see, for example, Exec. Order No. 13,892, § 1, 84 Fed. Reg. 55,239 (Oct. 9, 2019) ("[T]he Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct."); and Exec. Order No. 13,924, § 1, 85 Fed. Reg. 31,353 (May 19, 2020) ("Agencies should address [the] economic emergency [brought about by COVID-19] by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery.").

386. *See, e.g.*, Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018, 5:00 AM), https://propublica.org/article/how-the-irs-was-gutted [https://perma.cc/6KHM-S6AL] (noting that from 2010 to 2018, the IRS's enforcement budget declined by twenty-three percent, adjusting for inflation); John Hudson, *Why Is Congress Defunding Financial Regulation?*, ATLANTIC (June 19, 2012), https://theatlantic.com/politics/archive/2012/06/why-congress-gutting-financial-regulation/325870 [https://perma.cc/77TV-47D2] (discussing cuts to the budget of the Commodity Futures Trading Commission).

387. *See, e.g.*, Cody Derespina, *Trump: No Plans to Fill 'Unnecessary' Appointed Positions*, FOX NEWS (Feb. 28, 2017), https://foxnews.com/politics/trump-no-plans-to-fill-unnecessary-appointed-positions [https://perma.cc/V9YP-29KE] (quoting Trump's view that "in many cases, we don't want to fill [executive branch] jobs . . . because they're unnecessary to have").

388. *See, e.g.*, Jim Puzzanghera, *Senate Republicans Vow to Block Any Appointee to Head Consumer Protection Bureau*, L.A. TIMES (May 6, 2011, 12:00 AM), https://latimes.com/business/la-xpm-2011-may-06-la-fi-consumer-czar-20110506-story.html [https://perma.cc/P4AJ-N7FN] (describing Senate Republicans' refusal to confirm any CFPB director unless the agency was restructured); *see also* Jonathan Cohn, *The New Nullification: GOP v. Obama Nominees*, NEW REPUBLIC (July 18, 2011), https://newrepublic.com/article/92167/cordray-warren-cfpb-obama-

agencies. And it can seek to limit private lawsuits through changes in either statutory[389] or judge-made[390] law. None of these approaches depends on *Chevron* to achieve the administration's aims. To be sure, opponents of regulatory expansion could also rely on narrow readings of existing statutes and cross their fingers that the D.C. Circuit and Supreme Court would uphold those readings under *Chevron*. But the crucial point is they have many other—perhaps better—tools at their disposal.

These strategies systematically favor deregulation over regulation.[391] They are a one-way ratchet, far more potent in the hands of those with a deregulatory orientation than those taking a proregulatory approach. In recent years, Republicans have used each of them to pursue deregulatory ends.[392] But these tools can rarely be deployed to serve the environmental, health and safety, labor, and consumer goals that are central to the contemporary Democratic Party's administrative policymaking agenda. To be sure, Democrats have availed themselves of such tools in the few areas where they want a less active federal government than Republicans. Forbearance on immigration[393] and drug enforcement[394] provide good examples. But the

republicans-nomination [https://perma.cc/N96K-U97W] (providing examples of the Senate refusing to confirm several Obama-era appointees in order to hamper regulatory efforts).

389. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1, 1711).

390. *See, e.g.* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (heightening the pleading requirement for federal civil cases); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (strictly applying class action rules).

391. *See generally* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021) (documenting a rise in "structural deregulation" during Republican presidential administrations, wherein presidents "target[ ] an agency's core capacities" and "erode[ ] an agency's staffing, leadership, resource base, expertise, and reputation—key determinants of the agency's capacity to accomplish its statutory tasks").

392. *See* sources cited *supra* notes 384–390.

393. *See, e.g.*, Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r., U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals who Came to the United States as Children (June 15, 2012), https://dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/WM4W-SZPN]; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/Y38U-EERF].

394. *See* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Just., to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1–2 (Oct. 19, 2009), https://justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/U8D8-2JTD] (directing that federal prosecutors "not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

many techniques for reducing the proliferation and enforcement of regulatory law will, in the aggregate, favor the party that favors less government.[395]

3. *Chevron*'s Carve-Outs

Third, the fact that *Chevron* is not applied consistently across all policy areas and all agencies changes the politics of the doctrine. *Chevron* squarely applies in areas where Democrats favor regulation and Republicans oppose it: rulemakings by regulatory agencies responsible for environmental stewardship, overseeing the financial system, and safeguarding public health and safety. But the doctrine applies less consistently—or not at all—in policy areas where Republicans want a more muscular federal government. The result of selective carve-outs to *Chevron* means that Republicans can do away with this particular form of judicial deference with comparatively little cost to their policy agenda.

In particular, special deference regimes for national security and immigration issues mean that eliminating *Chevron* would not impact the areas where Republicans most believe in robust executive power. In the national security realm, the Supreme Court applies the tripartite framework set out in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[396] rather than *Chevron*.[397] *Youngstown* allows Republicans to oppose *Chevron* without fear that doing so will curb presidential power over national security matters. In the immigration realm, the Court sometimes applies *Chevron*,[398] but it "does not meaningfully apply *Chevron* in cases concerning deportation, and also seems reluctant to do so in cases concerning immigration

395. *See* Gould & Pozen, *supra* note 21, at 29–31 (making this argument); *see also* Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RSRV. L. REV. 1119, 1145 (2014) (describing nonenforcement as "fundamentally a deregulatory power" and noting that Republicans have used it to advance deregulatory objectives "in many areas of regulation (such as environmental protection, workplace safety, antitrust, consumer protection, and civil rights) that Democrats have traditionally favored").

396. 343 U.S. 579 (1952).

397. *See, e.g.*, Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1919 (2012) ("Rather than apply *Chevron*, the Court has invoked Justice Jackson's seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* as the critical framework for scaling deference to the Executive's preferred security policies." (footnotes omitted)).

398. *See, e.g.*, I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (concluding that "by failing to follow *Chevron* principles in its review of the BIA, the Court of Appeals erred" in a case involving withholding of deportation and asylum claims); Scialabba v. Cuellar de Osorio, 573 U.S. 41, 56–57 (2014) (holding that because "[p]rinciples of *Chevron* deference apply when the BIA interprets the immigration laws," deference was owed to a reasonable Board of Immigration Appeals interpretation resolving an ambiguity in the Child Status Protection Act).

detention."[399] As a result, eliminating *Chevron* would be less consequential for immigration cases as compared to more traditional areas of regulatory law—giving Republicans who favor aggressive immigration enforcement less to lose from the doctrine's demise.

4. Attitudes Toward Bureaucracy

Fourth, and finally, the parties' different attitudes toward the federal bureaucracy—regardless of who controls the presidency—drive divergent attitudes toward *Chevron*. While we have focused on the ways in which the doctrine strengthens presidential power, it can also be understood as empowering civil servants, especially on lower-profile issues that do not attract the attention of the White House or agency leadership. Many of the doctrine's critics, including both Republican elected officials[400] and conservative commentators,[401] have trained their criticism of *Chevron* on its tendency to advantage unelected officials within the executive branch. In Donald Trump's words, "[u]nelected, unaccountable bureaucrats must not be able to operate outside the democratic system of government."[402] The federal civil service is less ideologically uniform than is typically assumed, but civil servants at agencies such as the Environmental Protection Agency, Federal Trade Commission, National Labor Relations Board, and Department of

399. Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019). The Court has not, for example, applied *Chevron* in determining which state criminal convictions qualify as generic crimes listed in the Immigration and Nationality Act. *See* Shannon M. Grammel, Note, Chevron *Meets the Categorical Approach*, 70 STAN. L. REV. 921, 924 (2018) (noting that the Court has "never squarely engaged with the question"); Kagan, *supra*, at 524 ("There is good reason to think that the categorical approach inherently leaves little room for judicial deference.").

400. *See, e.g.*, Eric Katz, *Congress Takes up Bill to Restrict Interpretive Powers of 'Unelected Bureaucrats*,*'* GOV'T EXEC. (July 12, 2016), https://govexec.com/oversight/2016/07/congress-takes-bill-restrict-interpretive-powers-unelected-bureaucrats/129807 [https://perma.cc/UNH8-5PNJ] ("Proponents of [SOPRA] have said the measure would rein in unelected bureaucrats with too much latitude in asserting their regulatory agenda on the American people."); Press Release, Off. of Sen. Chuck Grassley, Grassley, Colleagues Introduce Separation of Powers Restoration Act (Mar. 27, 2019), https://grassley.senate.gov/news/news-releases/grassley-colleagues-introduce-separation-powers-restoration-act [https://perma.cc/Z26W-Q3DZ] ("For years, unelected bureaucrats have relied on judicial deference to expand their own authority beyond what Congress ever intended . . . creat[ing] a recipe for regulatory overreach." (quoting Sen. Chuck Grassley (R-IA))).

401. *See, e.g.*, Iain Murray, *Stopping the Bureaucrats Requires an End to* Chevron *Deference*, NAT'L REV. (May 11, 2016, 6:53 PM), https://nationalreview.com/corner/stop-bureaucrats-ending-chevron-deference-through-sopra [https://perma.cc/8TKL-5VP9] (arguing that "[a]nyone who studies the power bureaucrats have over ordinary Americans' lives swiftly comes to the realization that the courts, which are meant to redress grievances, will be of little help" on account of *Chevron*).

402. Eric Katz, *Trump Signs Orders to Restrict 'Unaccountable Bureaucrats' From Creating 'Backdoor Regulations'*, GOV'T EXEC. (Oct. 9, 2019), https://govexec.com/management/2019/10/trump-signs-orders-restrict-unaccountable-bureaucrats-creating-backdoor-regulations/160493 [https://perma.cc/B2RU-VYT4].

Health and Human Services do tend to hold left-of-center views.[403] To the extent that the views of civil servants at these agencies influence their legal interpretations, it makes sense that Republicans would criticize judicial deference to those interpretations while Democrats would defend it. And the changing politics of attitudes toward the bureaucracy as a whole, typified by conservative attacks on a liberal "deep state,"[404] likely exacerbates partisans' divergent attitudes toward *Chevron*.

D. Deference Debates as Symbolic Politics

A close look at how Democrats and Republicans are differentially reliant on *Chevron* implicitly assumes that attitudes toward the doctrine derive from its real-world impacts. But the relationship between politics and legal doctrine need not be so closely tethered to the doctrine's effects. Hostility toward the administrative state and allegations that it is unlawful or illegitimate have become a constitutive commitment among many Republican elites.[405] Democrats, in turn, have rallied to defend the administrative state, not only because of the merits of administrative governance, but also because of conservatives' sustained assault. Against this discursive backdrop, partisan attitudes toward *Chevron*—at least in the present day—may have as much or more to do with symbolic politics than the doctrine's actual consequences.

Taking these symbolic resonances seriously helps us to understand the changing politics of the doctrine. On this account, position-taking on *Chevron* is a way for public officials to signal an attitude about the administrative state as a whole. Those who condemn or defend *Chevron* are not necessarily concerned with how deference actually operates in the federal courts. They are, instead, using the doctrine to stake out public positions about the administrative state writ large. It is consistent—thematically and rhetorically—for liberals who defend federal agencies' roles in contemporary governance to defend deference, and for conservatives who have a more adversarial posture toward the administrative state to criticize it. This is especially

403. *See* Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 348 (2011) (plotting bureaucrats' ideologies based on a large-scale survey of federal executive branch employees).

404. *See, e.g.*, JASON CHAFFETZ, THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA (2018).

405. *See, e.g.*, Metzger, *supra* note 5, at 9–27, 33–46.

true for elected officials, who stand to benefit from position-taking on issues of interest to their core constituencies.[406]

A focus on symbolic politics also helps explain why the political rhetoric around *Chevron* remains heated despite reasons to doubt the doctrine's real-world impact. An array of empirical studies question whether the doctrine really constrains judges or affects litigation outcomes, at least at the Supreme Court level.[407] Moreover, the ascent of textualism as a dominant methodology of statutory interpretation over the past generation means that judges are more likely to find statutes unambiguous and less likely to defer to agencies—even if *Chevron* survives.[408] Perhaps politicians simply do not understand the doctrine's limited power on the ground. But we think it more likely that symbolic politics is at work. Even when *Chevron* doesn't affect judicial outcomes, position-taking about the doctrine still provides political actors a chance to signal their general views about the administrative state to the public and relevant interest groups.[409]

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406. *Cf.* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61–62 (1974) (describing "position taking" as one of the main activities of legislators, defined as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors," including statements made via roll-call votes, co-sponsorships, and public communications).

407. *See, e.g.*, Raso & Eskridge, *supra* note 61, at 1799 (analyzing more than two decades of Supreme Court decisions and concluding that in many cases *Chevron* carries little weight, and instead "the ultimate disposition will rest on the Justices' ideological agreement with, or at least comfort with, what the agency is doing"). Raso and Eskridge do not conclude that *Chevron* never affects judicial outcomes, but only that the Court's practice includes many examples of cases where *Chevron* both does and does not matter. *See id.* at 1800.

408. Scholars have recognized this relationship between *Chevron* and statutory interpretation methodologies since at least the early 1990s. *See, e.g.*, Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 198–99 (1992) ("Confidence in statutory meaning is likely to keep a textualist judge in *Chevron*'s nondeferential step one."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354 (1994) ("[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and use of the *Chevron* doctrine."); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) ("As the Court has changed the mix of 'tools' it uses and the ways in which it uses those tools, it has gradually ceased to apply step two of the *Chevron* test to uphold an agency construction of ambiguous statutory language, because it rarely acknowledges the existence of ambiguity."); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 772 (2008) ("[A] considerable literature argues that textualism is more likely to make judges operating under the *Chevron* framework find that a statute has a 'plain meaning' and thus deny deference to an administrative agency's interpretation of the law."); *see also* Kavanaugh, *supra* note 331, at 2140 ("[T]he judge may conclude that the interpretation offered by an agency does not accord with the judge's sense of reason, justice, or policy. In that case, the judge may avoid *Chevron* deference simply by finding a sufficient degree of clarity in the statute at the outset.").

409. In this respect, position-taking on *Chevron* is roughly analogous to what Louis Michael Seidman has described as the phenomenon of "substitute argument" in constitutional law. *See* Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237 (2016). For Seidman, the legalistic reasons offered in favor of a conclusion often differ from the policy- or

The three accounts presented in this Section are not mutually exclusive. The positions that public officials and interest groups take are influenced in part by rotations of power, in part by the doctrine's asymmetric effects on the two parties' agendas, and in part by the doctrine's symbolic value in debates over the administrative state. No single theory fully explains the politics of *Chevron*, but layering several accounts together can provide an accurate picture of why political dynamics have evolved as they have over the past half-century.

CONCLUSION

In courts and law reviews, *Chevron* has been praised and condemned on the basis of widely held values like separation of powers, expertise, liberty, and democratic accountability. But in the halls of Congress, and among interest groups and commentators, the doctrine has been a means to an end—a way to promote pro- or antiregulatory policy agendas. These dynamics highlight a brute truth about American law and politics: the politics of administrative law simply *are* the politics of regulation. So it has always been. American politics have featured fights about regulatory policy since the nineteenth century. The birth of each new regulatory agency—from Progressive-era and New Deal agencies to more recently established ones like the Environmental Protection Agency and the Consumer Financial Protection Bureau—has prompted contestation among partisans about how broad or narrow the agency's authority should be. Despite the reversals in position we have documented, it should be no surprise that debates over judicial deference on questions of law have been subsumed into broader conflict over regulatory policy.

This Article has sought to illuminate a political history that shows how and when debates over *Chevron* deference have intersected with debates over regulatory policy. In so doing, we have deemphasized abstract values like expertise and accountability in favor of showing how the doctrine relates to material interests in regulatory outcomes. Despite efforts by some to cast *Chevron* in terms of timeless values, the positions taken by executive branch officials, members of Congress, and business, labor, and consumer groups tell a more outcome-oriented story. As we have shown, understanding political actors' attitudes toward the doctrine requires looking to three factors: changes in control over the levers of power; the two parties' asymmetric reliance on

politics-related reasons that actually motivate it. *See id.* at 238–39. Similarly, political actors may appear to be arguing only about *Chevron* and agency statutory interpretations, but in fact their focus on *Chevron* is at least partially a proxy for a broader debate about the legality and legitimacy of agencies themselves.

administrative policymaking to accomplish their respective policy goals; and symbolic politics—particularly as the Republican Party has turned against the administrative state.

This analysis suggests that no matter whether *Chevron* is preserved or eliminated, contestation over deference to agency decisions is likely to remain an enduring feature of our politics. Should *Chevron*'s critics on the Court fail to win over a majority of their colleagues, conservatives will likely continue to attack deference, believing as they do that it is responsible for more regulation. Should they succeed, liberals will likely condemn the judiciary for subverting the efforts of agencies to solve important social and economic problems. Given the ever-increasing practical stakes of administrative law in our politically polarized age, it is unsurprising that political actors have re-engaged in debates over deference with only greater vehemence.

More broadly, this Article's focus on politics provides a distinctive way of understanding legal doctrine. We have provided an account of the politics of deference to agency interpretations of law. But similar analyses could be undertaken for other areas of administrative law, such as arbitrary and capricious review, and of constitutional law, such as federalism and the separation of powers. Examining how political actors have thought and talked about these and other public law doctrines can provide insight into how our constitutional system works on the ground—how doctrines create winners and losers, and how political actors sometimes try to bend the rules of the game to their advantage. Legal doctrines neither are nor should be the domain of judges and lawyers alone. Rather, they matter to partisans, interest groups, and everyone who cares about what sorts of policies our government generates.