ARTICLES

MAKING SENSE OF PROCEDURAL INJURY

RICHARD J. PIERCE, JR.*

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PROCEDURAL INJURIES ARE "SPECIAL" FOR STANDING PURPOSES

My goal in this Article is to try to make sense of the concept of procedural injury as courts use that concept to determine whether a petitioner has standing to obtain judicial review of an agency action. In 1970, the Supreme Court held that a court has jurisdiction to review an agency action only at the behest of a party who has suffered an injury that was caused by the agency action and that is redressable by a court.[1] In subsequent cases, the Court applied a variety of tests to determine whether a challenged action "caused" a petitioner's injury. With rare exceptions, the tests varied from a requirement that the petitioner demonstrate a probable causal relationship between the challenged action and the injury to a requirement that the petitioner demonstrate a near-certain causal relationship between the challenged action and the injury.[2]

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* Lyle T. Alverson Professor of Law, George Washington University. I am indebted to Jonathon Siegel and Roger Trangsrud for helping me find a point of entry into this project.

1. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152, 156 (1970).

2. For detailed discussion of the cases, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.5 (5th ed. 2010).

In a footnote in its 1992 opinion in *Lujan v. Defenders of Wildlife*, however, the Court singled out procedural injuries for special treatment:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.[3]

In a sense, the Court's acknowledgment that procedural injuries are "special" for standing purposes was no more than belated recognition of a reality that should have been obvious to any student of administrative law. In thousands of cases, courts have routinely decided whether an agency erred by refusing to grant a petitioner a statutorily or constitutionally required procedure, e.g., a hearing without requiring the petitioner to demonstrate that the agency certainly, or even probably, would have reached a different result if it had granted the petitioner's request for a hearing. Courts have long been willing to address the procedural issue based only on a petitioner's claim that it raised a material issue of contested fact that might plausibly be resolved differently after a hearing without any mention of standing. Yet, since the Court had not previously addressed the issue of standing to redress a procedural injury, the 1992 footnote induced many circuit courts to address, for the first time, the question of when an alleged procedural injury suffered by a petitioner qualifies the petitioner for standing.[4]

The circuit court opinions fall in two categories with respect to the nature of the causal relationship required between the omitted procedure and a substantive result that is unfavorable to the petitioner. In many cases, a petitioner prevails by alleging only unlawful deprivation of a procedural

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3. 504 U.S. 555, 572 n.7 (1992).

4. Many of the procedural injury cases are resolved by deciding whether the procedure the agency failed to provide affected what the Court refers to as a "separate concrete interest" of the petitioner, e.g., the agency action would damage a tract of land the petitioner uses for recreational purposes. I have discussed that class of disputes in detail elsewhere. *See, e.g.*, Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL. L. & POL'Y F. 207, 210 (2001); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1752–58 (1999). For purposes of this Article, I am ignoring that important class of cases. I am focusing only on cases in which the agency's failure to provide the procedure at issue jeopardizes a separate concrete interest of the petitioner and in which the only question the court must resolve is whether the petitioner has demonstrated an adequate causal relationship between the omission of that procedure and the resolution of the underlying substantive dispute against the petitioner.

right that might plausibly have changed the outcome of a substantive dispute.[5] In other cases, however, a petitioner loses because a court concludes that the petitioner did not demonstrate that "it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest."[6] The choice of which causal test to apply is outcome determinative. When a court applies the plausibility standard, it holds that the petitioner has standing because it is almost always plausible that the provision of a procedural safeguard will change the outcome of a case. Conversely, when a court applies the probability standard, it holds that the petitioner lacks standing because it is usually impossible to prove that the provision of a procedural safeguard will probably change the outcome.

WHAT CAN THE HARMLESS ERROR DOCTRINE TELL US ABOUT THE PROCEDURAL INJURY DOCTRINE?

The Supreme Court has helped to provide a way of making sense of the procedural injury cases in its 2009 opinion of *Shinseki v. Sanders*.[7] In *Shinseki*, the Court addressed another long-neglected question: when is an agency's failure to provide a required procedure an error so harmless that a reviewing court should not use the omission as a basis to vacate the agency action, remand the agency action, or both. The procedural injury test and the harmless error test are doctrinally discrete. A court applies the procedural injury test at the beginning of the review process to determine whether an agency's omission of an arguably required procedure has caused an injury sufficient to confer jurisdiction on the court to review the challenged action. A court applies the harmless error test at the end of the review process to determine whether an agency's omission of a required procedure constituted an error so unlikely to cause harm that the court would not be justified in vacating the challenged action, remanding it, or both.

Those differences in the timing, procedural posture, and effects of application of the procedural injury and harmless error doctrines are important because they limit the value of any direct analogy between the two doctrines. This Article will first discuss the similarities between the

5. *E.g.*, Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1261–62 (D.C. Cir. 2004) (acknowledging that if the Association's procedural rights had been violated, the decisionmaking would be affected); FEC v. NRA Political Victory Fund, 6 F.3d 821, 824 (D.C. Cir. 1993) (finding error with the lower court's holding that the petitioner needed to allege a different outcome would have occurred in the agency's decision).

6. Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1159 (D.C. Cir. 2005) (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc)).

7. 129 S. Ct. 1696 (2009).

two doctrines and later will discuss the implications of the differences between the two.

The procedural injury doctrine and the harmless error doctrine are logically and functionally related. If a court concludes that a procedure is so important that its omission produced harm sufficient to justify a court in vacating or remanding the agency action, or both, it seems logical that the court also should conclude that omission of the procedure caused the petitioner to suffer a procedural injury. The converse does not follow, however. A court cannot effectively evaluate many claims that a procedural error was harmless without reviewing the entire record of the proceeding. A court cannot engage in that review process unless it first determines that the petitioner suffered a procedural injury sufficient to allow the court to review the record of the agency action the petitioner is challenging.

In *Shinseki*, the Court held that § 706 of the Administrative Procedure Act (APA)[8] codifies the version of the harmless error rule that courts have long applied in civil cases.[9] The Court then criticized and rejected the version of the harmless error rule that the Federal Circuit had been applying to decisionmaking by the Department of Veterans Affairs. The Court rejected the Federal Circuit's version for three reasons: (1) it relied on a series of "mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record," (2) it imposed an unreasonably high burden on the agency, and (3) it imposed the burden of showing that an error was harmless on the agency.[10]

The Court then instructed lower courts to apply the harmless error rule to agencies the same way courts apply the rule to civil cases. The Court emphasized that the courts must apply the rule in a flexible manner, with the results dependent on the nature of the error and its likely effects on the outcome of the case:

> [T]he factors that inform a reviewing court's "harmless-error" determination are various, potentially involving, among other case-specific factors, an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.[11]

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8. 5 U.S.C. § 706 (2006) ("[A] court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error.").

9. 129 S. Ct. at 1704 (incorporating § 706 into its opinion).

10. *Id.* at 1704–05.

11. *Id.* at 1707.

The Court noted, however, that "courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful."[12]

The Court's description of the application of the harmless error rule in the context of civil cases provides an accurate overview of the complex body of case law in which it has applied the harmless error rule.[13] As the Court has repeatedly recognized, the harmless error rule is designed to allow courts to protect the fundamental procedural rights of parties in a manner that is consistent with avoidance of unnecessary costs in adjudicating cases. The leading treatise on civil procedure describes the rule in the following language: "At the heart of Rule 61 is the proposition that the critical consideration is the seriousness of the error, not its occurrence. The difficulty is in gauging when an error is sufficiently serious that it has defeated 'substantial justice' and affected 'the substantial rights of the parties.'"[14] The treatise emphasizes that the process of determining whether an error is harmless is "highly subjective" and it cautions against broad generalizations about application of the rule.

Consistent with the Court's opinion in *Shinseki*, however, the treatise then goes on to describe some of the empirically based generalizations that are reflected in the opinions in which courts apply the harmless error rule to procedural errors of various types.[15] Thus, for instance, it describes errors in admitting or excluding evidence as "prime candidates for application of the harmless error rule[,]"[16] while it describes the showing required to demonstrate that "denial of [a] jury trial was harmless is a very rigorous one."[17] It describes errors in giving jury instructions as falling between errors in denying a jury trial and errors in making evidentiary rulings.[18]

It is easy to explain why courts apply the harmless error rule quite differently within these three classes of cases. The right to jury trial is so fundamental that courts should rarely forgive a judge's erroneous denial of that right by asking whether the provision of a jury trial probably would have produced a different result in the case. If courts asked that question in every case in which a judge erroneously denied a request for a jury trial, the

12. *Id.*

13. *E.g.*, Neder v. United States, 527 U.S. 1, 19–20 (1999) (noting that a court considers whether certain evidence could lead to a contrary holding); O'Neal v. McAninch, 513 U.S. 432, 434–35 (1995) (concluding that an "uncertain judge should treat the error . . . as if it affected the verdict"); Kotteakos v. United States, 328 U.S. 750, 771 (1946) (stating that misnomers cannot be considered prejudicial).

14. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2883 (2d ed. 1995) (citation omitted).

15. *Id.*

16. *Id.* § 2885.

17. *Id.* § 2887.

18. *Id.* § 2886.

answer almost always would be no. Empirical studies have consistently found that judges and juries would reach the same decision in the vast majority of cases.[19] Thus, if courts applied a probability test to erroneous deprivations of the right to a jury trial, they would logically conclude that the error was harmless in most cases.

With the harmless error rule applied in that manner, trial judges would soon realize that they could erroneously deny motions for jury trials at little, if any, cost. That realization inevitably would cause them to tip the balance against granting motions for jury trials in all close cases, thereby de facto eroding the right to a jury trial. Society places such a high value on the right to a jury trial that it wants judges to decide close cases by granting motions for jury trial. That result is obtained by making an erroneous decision denying a motion for jury trial costly, i.e., by applying a version of the harmless error rule that almost always yields a reversal to erroneous denials of jury trials that must then be followed by an expensive jury trial.

Erroneous evidentiary rulings raise quite different considerations. Given the complexity of the rules of evidence and the need for a judge to make a large number of evidentiary rulings in a typical trial, it is unrealistic to expect any judge to preside over a trial that is free of evidentiary errors. Even the best trial judges probably make at least a few erroneous evidentiary rulings in every trial.[20] Yet, a single erroneous ruling—or even a handful of erroneous rulings—is unlikely to change the outcome of a case. Moreover, society simply does not place as high a value on the right to a trial free of evidentiary errors as on the right to a jury trial. In this situation, it would be far too costly to require a retrial in every case in which a judge makes one or a few erroneous evidentiary rulings. This high cost is appropriately absorbed only in the rare case in which a circuit court, after considering all of the evidence presented, concludes that the erroneous ruling probably affected the outcome of the case.

Errors in giving jury instructions are closer to errors in making evidentiary rulings than they are to errors in refusing to grant a motion for

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19. *E.g.*, Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126, 1137 (1992) (demonstrating that the "win ratio" ranges from 0.85 to 1.15 in most types of cases, but is significantly more different in product liability and medical malpractice cases); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064–65 (1964) (finding vast agreement between judge and jury decisions in both criminal and personal injury cases).

20. One way of testing the accuracy of this assertion is to ask how often an evidence student submits an error-free final exam paper. In my decades of teaching the subject to hundreds of students, I have never seen a perfect paper. I must also admit that I always discover that the answer sheet I initially made up for grading purposes has errors that I correct as I read exam papers in which one or more students did a better job of answering a question than I did. Once I detect and correct the errors in my initial answer sheet, I regrade any of the exams that I previously graded using my initially flawed answer sheet.

jury trial. Given the number of jury instructions and the difficulty of determining the precise language that should be included in each instruction, a trial that is free of all jury instruction errors is probably as rare as a trial that is free of all erroneous evidentiary rulings. Yet, it is more likely that an erroneous jury instruction on a critical issue will affect the outcome of a case than that an erroneous evidentiary ruling will be determinative of the outcome of the case. Moreover, it is easier for circuit courts to detect serious and material errors in giving jury instructions than it is for them to detect serious and material errors in making evidentiary rulings. Circuit court judges know far more about the abstract legal principles that trial courts should reflect in jury instructions than they do about the rules of evidence that trial judges must apply every day. Most circuit court judges have never had occasion to apply the rules of evidence that trial judges regularly apply. By contrast, circuit court judges regularly announce and apply the rules of law that should be reflected in the jury instructions given by trial judges.

With two important exceptions, the application of the procedural injury doctrine should be informed by the same factors that explain the application of the harmless error rule. Both exceptions relate to the time and procedural posture of a case when a court applies each of the doctrines.

First, it is easy to apply a flexible, case-specific version of the harmless error doctrine, but it is hard to apply a flexible case-specific version of the procedural injury doctrine. By definition, a reviewing court has not yet looked in detail at the record of a proceeding when it decides whether an arguably erroneous decision depriving someone of a procedural right is so important that it justifies holding that the petitioner has suffered a procedural injury. By contrast, a reviewing court can consider the entire record of a proceeding when it decides whether an erroneous deprivation of a procedural right was harmless. It follows logically that courts must be more willing to engage in broad generalizations when they apply the procedural injury doctrine than when they apply the harmless error rule.

Second, the consequences of a determination of whether a petitioner has suffered a procedural injury caused by an agency action are different from the consequences of a determination of whether any such injury suffered by a petitioner was harmless. A determination that a petitioner did not suffer a procedural injury ends a case because the petitioner then lacks standing to obtain judicial review of the agency action. In that situation, the court never has an opportunity to decide whether the procedural injury defeated "substantial justice" and affected "the substantial rights of the parties" by considering the nature and effects of the deprivation of the procedural right in the overall context of the full record. The highly contextual case-specific harmless error rule would serve no purpose at all if courts were to

apply a version of the procedural injury test that precludes a court from reviewing agency actions to determine whether omission of a required procedure constituted harmless error in light of the nature and likely effect of the omission.

By contrast, a determination that a petitioner has suffered a procedural injury gives the reviewing court the power to review the case and leaves the court with the discretion to decide that any violation of procedural rights was harmless. It also leaves the court with discretion to decide that, even if the deprivation of the procedural right was not harmless, the court should choose a remedy that keeps the costs of the decision within reasonable bounds given the severity of the deprivation of the procedural right. In short, application of a single, easy-to-meet procedural injury test leaves courts with ample means of furthering the resource-saving purpose of the harmless error rule.

This difference suggests that courts should be much more willing to engage in broad generalization in the context of procedural injury determinations than in the context of harmless error determinations. Moreover, it suggests that courts should apply a test for determining whether a petitioner suffered from a procedural injury that is easier to meet than the test the court applies to determine whether an erroneous deprivation of a procedural right constituted harmless error. With these considerations in mind, this Article turns to the circuit court opinions that apply the two types of tests to determine whether a petitioner has suffered a procedural injury.

CIRCUIT COURT OPINIONS THAT APPLY A PLAUSIBILITY TEST

Many circuit court opinions apply an easy-to-meet plausibility test in determining whether an alleged deprivation of a procedural right qualifies as a procedural injury sufficient to support a grant of standing. Those opinions have been issued in many contexts, including the right to a hearing in an adjudication,[21] the right to an environmental impact statement (EIS) before an agency takes an action that significantly affects the petitioner's environment,[22] the right to notice of and opportunity to comment on a proposed legislative rule,[23] the right to be free from the

21. The Supreme Court recognized with approval the universal use of a plausibility test in the context of deprivation of hearing rights in its opinion in *Lujan v. Defenders of Wildlife*. 504 U.S. 555, 572 (1992).

22. The Court also approved of the practice in the context of environmental impact statements in *Lujan*. *Id.* at 572 n.7.

23. Courts routinely entertain arguments by petitioners that an agency denied the petitioner the right to notice and comment conferred by APA § 553 by erroneously claiming that the rule was exempt from the notice-and-comment procedure. I have collected and described scores of such cases in my treatise. PIERCE, *supra* note 2, §§ 6.3–6.5, 7.10. I have

potential effects of illegal ex parte communications in a formal hearing,[24] the right to have an enforcement proceeding decided by a forum with a constitutionally acceptable composition,[25] and the right to be free from the potential adverse effects of an advisory committee whose composition violates the Federal Advisory Committee Act (FACA).[26] Courts have not applied a probability test in any of these contexts because if they did, the petitioner would be unable to satisfy the test in the vast majority of cases. It is virtually impossible to "prove" that provision of any procedural safeguard that an agency unlawfully refused to provide would "probably" change the outcome of the case.

Each of the contexts in which courts have applied the easy-to-meet plausibility test involved alleged deprivation of procedural rights that satisfy the criteria the Supreme Court has identified as critical in applying the harmless error rule. Each involved deprivation of a fundamental procedural right. Each of the procedural rights at issue was either the subject of a Supreme Court opinion in which the Court held the right to be constitutionally required or the subject of a statute in which Congress required the agency to provide the procedure before it takes a specified class of actions. In each case, the agency's arguably unlawful deprivation of the procedural right might plausibly have affected the substantive outcome, but in each case it is impossible to determine the likelihood that it did so without first considering the merits of the case. In each of these contexts, a holding that the petitioner lacks standing because of a failure to have suffered a procedural injury would render it impossible for a court to determine the likely effects of the deprivation in the context in which it took place.

Conversely, in each of these contexts, a court can further the resource-conserving purpose of the harmless error rule even if it holds that the

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not read a single such opinion in which a court has required a petitioner to show that the provision of the right to notice and comment probably would have caused the agency to issue a rule more favorable to the petitioner.

24. *E.g.*, Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1262 (D.C. Cir. 2004) (deciding that if FERC were involved in illegal ex parte communication, the petitioner would be adversely affected). *See generally* PIERCE, *supra* note 2, § 8.4 (discussing ex parte communications in adjudications).

25. FEC v. NRA Political Victory Fund, 6 F.3d 821, 824 (D.C. Cir. 1993) (reiterating that less favorable treatment does not need to be shown by a petitioner if the agency was unconstitutionally constituted). *See generally* PIERCE, *supra* note 2, §§ 2.4–2.5 (outlining the relationship between separation of powers, checks and balances, and independent agencies).

26. Courts routinely address arguments that an agency violated the Federal Advisory Committee Act (FACA) without requiring a petitioner to prove the impossible—that compliance with FACA probably would have changed the outcome of the proceeding. *E.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 447–48 (1989) (restating the Justice Department's argument that the action did not fall within FACA). For discussion of many other FACA cases, see PIERCE, *supra* note 2, § 5.19.

petitioner has standing because of the procedural injury. The court has two opportunities to avoid imposing undue costs on agencies after it holds that a petitioner has suffered a procedural injury—by concluding that the error was harmless or by choosing a relatively low-cost remedy even if it concludes that the error was not harmless. Numerous cases illustrate both of these means of furthering the purposes of the harmless error rule.

For instance, even though courts always hold that a party has standing attributable to a procedural injury when it alleges that an agency unlawfully deprived it of a hearing that might plausibly have changed the outcome of the case, courts routinely hold that errors made in admitting or excluding evidence in such a hearing[27] and inadequacies in the agency's explanation of its decision after a hearing[28] were harmless. Similarly, while courts invariably hold that a party has standing attributable to a procedural injury when it alleges that it was unlawfully deprived of the notice-and-comment rulemaking procedure prescribed by APA § 553, courts routinely apply the harmless error rule both to agency failures to provide adequate notice of a study on which it relied[29] and to agency failures to adequately discuss comments submitted by parties.[30] Moreover, courts couple their universal practice of holding that deprivation of the right to a hearing that is free from the potential adverse effects of unlawful ex parte communications qualifies as a procedural injury with regular application of the harmless error rule to such communications.[31]

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27. Courts are even more reluctant to reverse agencies based on erroneous evidentiary rulings than to reverse judgments in civil cases based on erroneous evidentiary rulings. *See* Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 6–7 (1987) ("If an agency's statutory and regulatory provisions relating to admissibility of evidence incorporate only the A[dministrative] P[rocedure] A[ct (APA)] standard, it seems impossible for an agency action to be reversed on the basis that the agency erroneously admitted evidence. Courts routinely decline to reverse agencies on this basis.").

28. *E.g.*, Shkabari v. Gonzales, 427 F.3d 324, 328–29 (6th Cir. 2005) (averring that the inconsistencies in the agency documents lessened their credibility); Tourus Records, Inc. v. DEA, 259 F.3d 731, 739 (D.C. Cir. 2001) (pointing out that the internal memoranda were clear and therefore the DEA's rationale was reasonable). *See generally* PIERCE, *supra* note 2, § 8.5 (dissecting APA § 557(3)(A) which requires agencies to provide findings and conclusions in certain situations).

29. *E.g.*, Chamber of Commerce v. SEC, 443 F.3d 890, 900–01, 904 (D.C. Cir. 2006) (stating that the SEC's reliance on material outside the record required additional opportunities for comment). *See generally* PIERCE, *supra* note 2, § 7.3 (outlining the APA's adequate notice requirement).

30. *E.g.*, USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 713–14 (7th Cir. 1996) (finding no fault on the part of the Secretary of Education for not adequately discussing the differences between strict liability and negligence liability as brought up in comments). *See generally* PIERCE, *supra* note 2, § 7.4 (discussing the relationship between comments and the statutory requirement of incorporating a general statement of basis and purpose, and the requirements of agencies to respond to comments).

31. *E.g.*, La. Ass'n of Indep. Producers & Royalty Owners v. FERC, 958 F.2d 1101, 1111–12 (D.C. Cir. 1992) (per curiam) (holding that no harmful error occurred when FERC

Even when a court does not hold a procedural error harmless, it often furthers the resource-conserving goal of the harmless error rule by declining to impose a costly remedy. Thus, while courts invariably hold that a petitioner has standing based on a procedural injury when it alleges that an agency deprived it of the APA right to notice-and-comment rulemaking, courts frequently remand a rule without vacating when they conclude that the agency is likely to be able to correct any procedural errors on remand.[32] Similarly, the courts combine the universal practice of holding that a petitioner has suffered a procedural injury when the allegation is that the relevant decision was made by an agency with an unconstitutional composition, with a willingness to apply any holding on the merits prospectively only to avoid imposing undue costs on agencies.[33] And courts frequently refuse to vacate an agency's actions when they determine that the agency used an unlawfully composed advisory committee in making such a decision, even though they routinely hold that deprivation of the statutory right to a properly composed advisory committee qualifies as procedural injury for standing purposes.[34]

CIRCUIT COURT OPINIONS THAT APPLY A PROBABILITY TEST

I have found only two opinions in which circuit courts have held that a petitioner lacked standing because of a failure to demonstrate that an agency's deprivation of a procedural safeguard probably changed the outcome of a case. Those cases are important, however, because one was a 2005 opinion in which a panel of the D.C. Circuit held that a 1996 en banc D.C. Circuit opinion requires application of the probability test in all cases in which a petitioner relies on an alleged procedural injury as the basis for

representatives engaged in ex parte communication because the appellants did not suffer prejudice as it was a purely procedural proceeding). *See generally* PIERCE, *supra* note 2, § 8.4 (discussing the role of ex parte communications in administrative adjudications).

32. *E.g.*, Heartland Reg'l Medical Ctr. v. Sebelius, 566 F.3d 193, 197–98 (D.C. Cir. 2009) (discussing how the first *Allied-Signal* factor counsels courts to remand without vacating if an agency can cure a defect by an explanation of its decision); Allied-Signal, Inc. v. NRC, 988 F.2d 146 (D.C. Cir. 1993) (creating a test to determine when courts should overrule agency decisions and when courts should remand, vacating the decision). *See generally* PIERCE, *supra* note 2, § 7.13 (describing a court's ability to overturn rules or remand without vacating in order to correct instances of error).

33. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 142 (1976) (per curiam) (upholding the actions of the FEC even though the selection of its members violated statute). *See generally* PIERCE, *supra* note 2, § 2.4 (discussing the use of the Judiciary as a check on federal agencies).

34. *E.g.*, Cal. Forestry Ass'n v. U.S. Forest Serv., 102 F.3d 609, 613 (D.C. Cir. 1996) (reversing the district court's grant of summary judgment to the Forest Service because its program was in fact under FACA and therefore plaintiffs had standing to bring suit). *See generally* PIERCE, *supra* note 2, § 5.19 (discussing the Advisory Committee Act).

standing.[35] If the 2005 panel opinion is correct in its characterization of the effect of the 1996 en banc opinion, the probability test will apply to the high proportion of administrative law disputes that are decided by the D.C. Circuit. Because the probability test will almost always yield a holding that a petitioner lacks standing, the D.C. Circuit's method of applying the procedural injury test has the potential to eliminate de facto the procedural standing doctrine, with major repercussions for administrative law. Uniform application of the probability test to all cases in which a petitioner claims standing based on a procedural injury would create a legal environment in which agencies could ignore virtually all constitutional and statutory procedural rights with little fear that any court would or could require them to provide the procedures.

The 2005 panel opinion was issued in *Center for Law & Education v. Department of Education*.[36] The No Child Left Behind Act required the Department of Education (DOE) to use a negotiated rulemaking process to issue a rule to govern DOE oversight of state implementation of the Act.[37] The Act explicitly required DOE to convene a negotiated rulemaking committee that would "provide an equitable balance between representatives of parents and students and representatives of educators and education officials . . . ."[38] The plaintiffs, including a parent of a potentially affected student, objected to the composition of the committee.[39] The plaintiffs alleged that the composition of the committee violated the statutory requirement of an equitably balanced committee because only one of the twenty-four members of the committee represented the interests of parents and students.[40] DOE rejected that argument and used the committee to issue a rule that the plaintiffs later claimed was objectionable on various grounds.[41] The plaintiffs sought review of the DOE rule in district court, which held for DOE on several grounds.[42] The plaintiffs appealed to the D.C. Circuit, where a majority of the D.C. Circuit panel addressed only the standing issue.[43] It held that the plaintiffs lacked standing because they had not satisfied the procedural injury test.[44]

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35. Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152 (D.C. Cir. 2005).
36. *Id.*
37. *Id.* at 1154.
38. *Id*. (quoting 20 U.S.C. § 6571(b)(3)(B) (2006)).
39. *Id*. at 1155–56.
40. *Id*. at 1154–55.
41. *Id*. at 1155.
42. *See id*. at 1156 (restating that the district court found for Department of Energy on the grounds that plaintiffs lacked standing, actual injury, and causation).
43. *Id*.
44. *See id*. at 1156–62 (holding that the plaintiff lacked standing because the act did not create a right of action, the plaintiff could not show an injury to a concrete interest, and the plaintiff failed to show a causal connection). The third member of the panel wrote a

The panel majority relied on the following reasoning to support its holding:

> [A] procedural-rights plaintiff must demonstrate standing by "show[ing] not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." In other words, while we relax the imminence and redressability requirements, the procedural-rights plaintiff must still satisfy the general requirements of the constitutional standards of particularized injury and causation.[45]

The panel majority concluded that the plaintiffs lacked standing because they had not demonstrated that inclusion of more representatives of parents or students on the negotiating committee *probably* would have produced a rule more favorable to their interests as parents.

This reasoning is flawed on many grounds. First, it is inconsistent with the routine judicial practice of applying a plausibility test to all other alleged deprivations of procedural rights that are rooted in statutes or in the Constitution. Thus, courts regularly hold that a petitioner has standing to obtain review of an alleged violation of the FACA requirement that an advisory committee must be "fairly balanced in terms of the points of view represented . . . ."[46] That FACA requirement is remarkably similar to the statutory requirement of an "equitably balanced" committee, the deprivation of which the court found inadequate to support standing in *Center for Law & Education*.[47] Like the "equitably balanced" requirement in the No Child Left Behind Act and virtually all other statutory procedural requirements, the "fairly balanced" committee requirement of FACA could never support standing if a court used a probability test to apply it.

Second, the distinction the court drew between causation and redressability defies logic. In most situations, causation and redressability are functionally indistinguishable. In the context of most agency actions, a court can redress an injury only by vacating and remanding the agency action with instructions to the agency to correct the error that led to the judicial rejection of the agency action. Courts routinely hold that an injury caused by an agency can be redressed by a judicial decision that vacates and remands the agency action. Further, courts necessarily apply the same

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concurring opinion in which he disagreed with the majority's reasoning and conclusion with respect to the procedural injury test and concurred on the basis of his belief that the petitioner had failed to demonstrate that the individual plaintiff had a concrete interest that was at stake in the rulemaking. *Id*. at 1166–68 (Edwards, J., concurring).

45. *Id*. at 1159 (majority opinion) (citation omitted) (alteration in original).

46. 5 U.S.C. app. § 5(b)(2) (2006). *See, e.g.*, Cal. Forestry Ass'n v. U.S. Forest Serv., 102 F.3d 609 (D.C. Cir. 1996) (finding for plaintiffs because the panel was not fairly balanced). *See generally* PIERCE, *supra* note 2, § 5.19 (discussing the balancing requirement of the Advisory Committee Act).

47. *See supra* notes 36–45 and accompanying text.

test to redressability disputes and to causation disputes. It makes no sense to say that a court should apply a more relaxed test to determine whether an injury is redressable than it should apply to determine whether the challenged agency action caused the alleged injury. That reasoning would require a court to say that a judicial decision vacating and remanding an agency action can redress an injury that was not caused by the agency action at issue.

Third, if courts use a probability test to apply the causation requirement of the procedural injury test, in most cases they will not have the opportunity to apply the version of the harmless error rule the Supreme Court announced in *Shinseki*. Application of the probability test to all cases in which an agency allegedly deprived a petitioner of a constitutionally or statutorily prescribed procedure would yield a holding that a court lacks Article III jurisdiction to review most agency actions to determine the effect of the alleged deprivation of a procedural right. As a result, in most such cases, a court would not be able to engage in the "case-specific application of judgment, based upon examination of the record" that the Court mandated in *Shinseki*.[48]

The *Center for Law & Education* majority claimed that its application of a probability test in all procedural injury cases was required by the en banc D.C. Circuit opinion in *Florida Audubon Society v. Bentsen*.[49] If the majority interpreted *Florida Audubon Society* accurately, the D.C. Circuit must apply the probability test even if it is wrong, unless and until the en banc Circuit overrules *Florida Audubon Society*. There are reasons to be skeptical of the accuracy of the *Center for Law & Education* majority's interpretation of the *Florida Audubon Society* opinion, however. First, other D.C. Circuit panels have not interpreted the *Florida Audubon Society* opinion to adopt a probability test for determining whether omission of a required procedure caused a procedural injury. Since the D.C. Circuit issued its en banc opinion in *Florida Audubon Society*, it has applied the easy-to-meet plausibility test in many other cases.[50]

Second, the *Center for Law & Education* majority adopted a simplistic interpretation of the *Florida Audubon Society* opinion that does not reflect accurately the primary concerns that caused the en banc court to hold that the Florida Audubon Society (FAS) lacked standing. In the critical passage of its opinion, the *Center for Law & Education* majority attributed the

48. Shinseki v. Sanders, 129 S. Ct. 1696, 1705 (2009).

49. *Ctr. for Law & Educ.*, 396 F.3d at 1159 (citing Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996)).

50. *E.g.*, Chamber of Commerce v. SEC, 443 F.3d 890, 896–97 (D.C. Cir. 2006) (applying the plausibility test to find that the plaintiff had standing); Chamber of Commerce v. SEC, 412 F.3d 133, 138 (D.C. Cir. 2005); Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1262 (D.C. Cir. 2004).

following reasoning to the *Florida Audubon Society* court:

> [A] procedural-rights plaintiff must demonstrate standing by "show[ing] not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." In other words, while we relax the imminence and redressability requirements, the procedural-rights plaintiff must still satisfy the general requirements of the constitutional standards of particularized injury and causation.[51]

The first sentence in that passage is a direct quote from *Florida Audubon Society*.[52] The second sentence is a misleading paraphrase of the court's lengthy discussion of standing.

The en banc court discussed many issues in the twelve-page opinion in which it held that FAS lacked standing. FAS sought review of a directive in which the Secretary of the Treasury clarified an existing rule in a way that expanded the scope of a tax credit for the use of a blend of gasoline and an additive derived from ethanol. FAS argued that the agency violated the National Environmental Policy Act by refusing to prepare an EIS before it issued the directive. According to FAS, the agency had to prepare the EIS because the directive was a major federal action that affected the environment.[53]

FAS argued that it had standing derivative of the standing of its members who viewed wildlife in areas near farm lands. FAS argued that the directive injured its members because the clarification in the directive would encourage farmers to plant more corn, which in turn would cause more agriculture-related pollution, which would then have adverse effects on the wildlife that FAS members liked to observe in the vicinity of farm lands.[54] As I read the en banc opinion, the holding had little if anything to do with the procedural injury doctrine. The holding was based on the en banc court's skepticism with respect to the lengthy alleged causal chain between the challenged agency action and the concrete injury alleged as the basis for the FAS claim of standing.

The opinion has many passages that support my interpretation. The court divided the standing inquiry into two parts:

> As in all cases, standing in an EIS suit requires adequate proof of causation. The conceptual difficulty with this requirement, in this type of case, is that an adequate causal chain must contain at least two links: one connecting the omitted EIS to some substantive government decision that may have been wrongly decided because of the lack of an EIS and one connecting that

51. 396 F.3d at 1159 (citation omitted) (alteration in original).
52. 94 F.3d at 664–65.
53. *Id.* at 662.
54. *Id.*

substantive decision to the plaintiff's particularized injury.[55]

The court had no difficulty resolving the first part of the causal inquiry in favor of the petitioner. The court recognized that the petitioner had linked the failure to prepare an EIS adequately with the agency action the petitioner challenged.[56] The court had no choice but to recognize the adequacy of the causal link between failure to prepare an EIS and an agency action because the Supreme Court used the adequacy of that causal relationship to illustrate its point that "procedural rights are special" in its 1992 opinion in *Lujan v. Defenders of Wildlife*.[57]

The court described the reasoning in the district court opinion it upheld in a manner that focused on the court's real concern:

> [T]he district court dismissed as "speculative" appellants' argument that the tax credit, by increasing the market for ETBE, would stimulate production of the corn, sugar cane and sugar beets necessary to make the ethanol from which ETBE is derived, and that this increased crop production would, in turn, necessarily result in more agricultural cultivation, with its accompanying environmental dangers, in regions that border wildlife areas appellants (or their members) use and enjoy. The court declared that, even if it presumed that the tax credit would increase corn and sugar production, appellants had advanced no credible evidence that the increased production would necessarily harm or even occur near the wildlife areas in Michigan, Minnesota, and Florida that appellants visit. Because appellants had not established a geographic nexus between the harm they asserted that the tax credit will likely cause and lands that appellants—or their members—use, the court ruled that appellants had not suffered the particularized injury necessary for standing.[58]

The court then made explicit the basis for its holding:

> Appellants in this case premise their claims of particularized injury and causation on a lengthy chain of conjecture. In brief, appellants contend that the tax credit will cause more ETBE production, which in turn will cause more ethanol production, which consequently will cause more production of the corn and sugar necessary for ethanol, which will then cause more agricultural pollution, which, as this pollution is likely to occur on farmland bordering wildlife areas appellants visit, is also likely to harm the areas visited by appellants. As we are reviewing a motion for summary judgment, we require specific facts, not "mere allegations," to substantiate each leap necessary for standing. Because appellants have not adequately demonstrated either an injury to their particularized interest or that defendant's actions created a "substantial probability" of this injury, we conclude that they lack standing to sue for preparation of an EIS.[59]

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55. *Id*. at 668.

56. *See id*. at 667–68 (stating that appellants merely proffered expert testimony that a harm might occur and that such speculation is not sufficient for standing).

57. 504 U.S. 555, 572 n.7 (1992).

58. 94 F.3d at 662.

59. *Id*. at 666 (citations omitted).

In other words, the holding that FAS lacked standing had nothing to do with the procedural injury doctrine—the required causal relationship between the failure to provide a required procedure and the challenged agency action. It was based instead on the court's conclusion that there was an inadequate causal link between the challenged agency action and the concrete injury the petitioner alleged.

The majority of the en banc court may or may not have been right with respect to its determination that the petitioner failed to establish an adequate causal link between the agency directive and the concrete injury alleged—reduced pleasure from viewing wildlife in areas near farm lands. I find the dissenting opinion of four judges more persuasive than the opinion of the six-judge majority on that issue. Even if one accepts the majority's reasoning, however, as all D.C. Circuit panels must, unless and until the en banc court overrules the opinion, the opinion does not hold that a court must apply a probability test in determining whether a petitioner has suffered a procedural injury sufficient to support standing.

CONCLUSION

My attempt to use the harmless error rule as a point of entry in attempting to understand the procedural injury doctrine has persuaded me that the many cases in which courts apply an easy-to-meet plausibility test to determine whether there is an adequate causal relationship between the omitted procedure and the challenged action are correct. Application of the plausibility test to determine whether a petitioner has standing to challenge an agency action where an agency allegedly deprived a petitioner of a required procedural safeguard allows a court to review the entire record of the case to decide: (1) whether the agency was required to provide the procedure; (2) if so, whether the agency deprived the petitioner of that procedure; (3) if so, whether any such deprivation of a procedural right was harmless; and (4) even if the deprivation was not harmless, whether it was sufficiently serious enough to justify granting the often costly remedy of vacating and remanding the challenged agency action.

Application of a probability test has the opposite result. Because it is usually impossible to demonstrate that the provision of a required procedure—a hearing, an EIS, or notice and comment—probably would change the results in a case, application of a probability test would have many unfortunate results. It would devalue the procedures required by the Constitution and by statutes by encouraging agencies to deny procedural safeguards in all close cases. It would deprive courts of the opportunity to decide important cases in which agencies allegedly deprived a party of such a right. It would also render irrelevant the nuanced and fact-specific harmless error rule because courts rarely, if ever, would be in a position to

engage in the detailed review of the entire record required to determine whether an agency's deprivation of a procedural safeguard was harmless or instead "defeated 'substantial justice' and affected 'the substantial rights of parties.'"[60]

60. WRIGHT, MILLER & KANE, *supra* note 14, § 2883.

HIDING NONDELEGATION IN MOUSEHOLES

JACOB LOSHIN* & AARON NIELSON**

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* Associate, Winston & Strawn, LLP, former law clerk to the Hon. Jerry E. Smith, United States Court of Appeals for the Fifth Circuit, and 2007 graduate of Yale Law School.

** Associate, Kirkland & Ellis, LLP, former law clerk to the Hon. Janice Rogers Brown, United States Court of Appeals for the District of Columbia Circuit, former law clerk to the Hon. Jerry E. Smith, United States Court of Appeals for the Fifth Circuit, and 2007 graduate of Harvard Law School.

> Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.[1]

> Just then [Alice] heard something splashing about in the pool a little way off, and she swam nearer to make out what it was: at first she thought it must be a walrus or hippopotamus, but then she remembered how small she was now, and she soon made out that it was only a mouse, that had slipped in like herself.[2]

Under the familiar principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[3] courts apply a two-step inquiry to an agency's interpretation of its statutory authority. First, under Step One, a court asks "whether Congress has directly spoken to the precise question at issue,"[4] and if so, the court "must give effect to the unambiguously expressed intent of Congress."[5] Second, under Step Two, if the statutory provision is ambiguous such that "Congress has not directly addressed the precise question at issue," the court must defer to any "permissible construction of the statute" by the agency[6] and may "reverse [an] agency's decision only if it [is] 'arbitrary, capricious, or manifestly contrary to the statute.'"[7] On the other hand, if an agency's interpretation of an ambiguous provision is not "arbitrary, capricious, or manifestly contrary to the statute," then a court must defer to the agency's interpretation. All of this is hornbook administrative law and well settled. That is, unless the court discovers an "elephant in a mousehole."

In a series of recent cases, the Supreme Court and various courts of appeals have declined to afford deference to agency interpretations where an agency's proposed interpretation relies on an insufficiently definite statutory provision in order to greatly increase the agency's power—even in situations that would seem to suggest statutory ambiguity and would thus warrant *Chevron* deference. Writing for the Court in *Whitman v. American Trucking Ass'ns*, Justice Scalia explained that incongruous turn:

> [R]espondents must show a textual commitment of authority to the EPA to consider costs . . . . [And] that textual commitment must be a clear one. Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one

1. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
2. LEWIS CARROLL, THE ANNOTATED ALICE 25 (2000).
3. 467 U.S. 837 (1984).
4. *Id.* at 842.
5. *Id.* at 843.
6. *Id.*
7. Texas Coal. of Cities for Util. Issues v. FCC, 324 F.3d 802, 807 (5th Cir. 2003) (quoting *Chevron*, 467 U.S. at 844).

might say, hide elephants in mouseholes.[8]

Justice Scalia's colorful image begot a departure from traditional *Chevron* principles which we dub the elephants-in-mouseholes doctrine: Where an agency uses "vague terms and ancillary provisions" (the mousehole) to alter "the fundamental details of a regulatory scheme" (the elephant), the agency's assertion of authority is forbidden. In effect, the doctrine requires a clear statement in an obvious place for a significant expansion of regulatory authority. Without such a clear statement, the Court not only does not defer to the agency's interpretation of the statute, but it per se forbids the agency action—even if the agency's interpretation is a reasonable interpretation of ambiguous statutory language.[9]

Although the elephants-in-mouseholes doctrine has made repeated appearances in recent Supreme Court decisions and has begun to take hold in the lower appellate courts, it has yet to be squarely addressed by scholars. What is more, despite the voluminous literature on *Chevron*, the elephants-in-mouseholes doctrine has not been identified or taken seriously *as a doctrine*.[10] This Article presents the first sustained analysis of this maturing doctrine, assessing its origins and implications for administrative law.

Because the elephants-in-mouseholes doctrine subverts the traditional *Chevron* scheme, and because it has arisen in recent politically charged cases, including two contentious environmental cases decided last Term,[11] some have sought to explain these decisions in terms of result-oriented motives.[12] That is not our approach. Taking the elephants-in-mouseholes

8. 531 U.S. 457, 468 (2001).

9. This means the *Chevron* two-step is side-stepped, as the elephants-in-mouseholes doctrine does "not say that courts, rather than agencies, will interpret ambiguities. [It] announce[s], far more ambitiously, that ambiguities will be construed so as to reduce the authority of regulatory agencies." Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 244 (2006).

10. *See, e.g.*, Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1149 (1994) (defining *judicial doctrine* as rules that "order[] a course of conduct not by commanding an external goal, but, like an argument, by developing from within that course of conduct, lending to or acknowledging in that conduct a structure whose statement is not exhausted by the statement of the goal to which it may be directed").

11. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) (discussing the authority of the EPA to use "cost–benefit analysis when setting regulatory standards"); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458 (2009) (assessing the authority of the EPA under the Clean Water Act to allow mines to classify slurry as "fill material").

12. *See, e.g.*, Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 346 (2004) ("The most likely example of pro-industry, anti-regulation conservatism run amok is *Brown & Williamson*, [529 U.S. 120 (2000), an elephants-in-mouseholes case] setting aside the FDA's effort to regulate tobacco cigarettes. . . . What is suspicious is that all the Justices largely abandoned their usual methodological preferences . . . . The convenient methodological shifts do suggest that the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking.").

doctrine seriously as a doctrine, this Article proposes that the decisions are not driven by judicial whim but instead by long-standing tenets of administrative law, particularly concerns over excessive delegation to the Executive Branch. We argue, then, that what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine.

Ever since the *Benzene* case,[13] the Court has sometimes construed statutes narrowly to avoid nondelegation concerns.[14] We argue that the search for elephants in mouseholes is an attempt to "doctrinalize" the *Benzene* approach into a workable test. By creating the elephants-in-mouseholes doctrine, the Court has tried to confine the *Benzene* principle to a particular subset of cases, namely, those that *both* (1) involve a "fundamental" or "extraordinary" expansion of regulatory authority *and* (2) are based on a "vague or ancillary" statutory provision. By using this conjunctive test, the Court addresses a discrete class of potential nondelegation violations without enmeshing itself in a much larger and more aggressive campaign against nondelegation in general. Likewise, by using the elephants-in-mouseholes doctrine, which focuses on a statutory scheme's structure, the Court does not itself have to create an intelligible principle for the agency; instead, it can rely on the principle—*Congress's* principle—already contained in the broader statute to understand specific language that may, by itself, appear to have no intelligible principle. But at the same time, because of this conjunctive requirement, the broader the express delegation, the less appropriate the elephants-in-mouseholes doctrine becomes. Thus, the Court did not invoke the elephants-in-mouseholes doctrine in *Massachusetts v. EPA*: while no one can reasonably argue that regulating greenhouse gases is not an elephant, the language of the statute was quite broad and so was not a mousehole.[15]

The elephants-in-mouseholes doctrine is thus one instance of what Cass Sunstein has dubbed "nondelegation canons."[16] As with the canons

13. Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980) (considering whether the Secretary of Labor had the authority to promulgate regulations related to occupational exposure to benzene).

14. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 455 n.240 (2008) (listing other cases where the Court has construed statutes narrowly to avoid nondelegation concerns).

15. 549 U.S. 497, 497 (2007) ("[T]he Clean Air Act . . . requires that the EPA 'shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.'" (alterations in original)).

16. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (arguing that some canons of statutory interpretation are nondelegation canons because "they forbid administrative agencies from making decisions on their own").

Sunstein has identified, the elephants-in-mouseholes doctrine is an attempt to address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency. Sunstein considers this indirect approach to be a virtue—and famously has argued such "nondelegation canons" are more easily administrable, more consistent with a minimalist judicial role, and more congenial to democracy than is judicial enforcement of the traditional nondelegation doctrine. Contrary to Sunstein's optimism, however, we argue that the elephants-in-mouseholes doctrine cannot live up to such lofty ambitions. Instead, in the tradition of John Manning, we argue that though the elephants-in-mouseholes doctrine emerges from principled nondelegation apprehension, the doctrine is not a workable reincarnation of the nondelegation doctrine because it is not amendable to consistent application.[17] One judge's mouse is another judge's elephant, and it ever will be so.

In this Article, we evaluate the elephants-in-mouseholes doctrine as a doctrine, i.e., whether it successfully reflects "rules and principles . . . that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers."[18] In Part I, we set forth the doctrine's backdrop and then examine the elephants-in-mouseholes line of cases. In Part II, we critique the doctrine in two ways: first, because it is not susceptible to consistent application, and second—and relatedly—because its premise is in tension with textualist modes of statutory interpretation. Given the elephants-in-mouseholes doctrine is in large part Justice Scalia's handiwork, this failure to offer bright lines or focus on specific statutory text is surprising.

This does not mean, though, that the Court has crafted the doctrine for political ends. Instead, in Part III, we explain the elephants-in-mouseholes doctrine as a nondelegation canon. The Court is alarmed by excessive delegation but is wary about directly enforcing the nondelegation doctrine—so it looks for more judicially manageable proxies. The elephants-in-mouseholes doctrine is one such proxy, a doctrine announced in the very case, *American Trucking*, where the Court effectively abandoned direct enforcement of the nondelegation doctrine.[19] But just because the elephants-in-mouseholes doctrine rests on valid administrative law principles is not enough to justify its continued use. We thus

17. *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2001) (noting that the use of nondelegation canons creates "significant pathologies").

18. *See* Fried, *supra* note 10, at 1140; *see also* Richard J. Pierce, Jr., *The Supreme Court's New Hyperterxtualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 762 (1995) (explaining the Supreme Court's "managerial role" over the lower federal courts).

19. *See* 531 U.S. 457, 468 (2001) (adopting the elephants-in-mouseholes doctrine).

reluctantly conclude the elephants-in-mouseholes doctrine should be abandoned as a failed enterprise.

I. THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE AS A DOCTRINE

We begin by sketching the origins and evolution of the elephants-in-mouseholes doctrine. As with much else in administrative law, the story begins with *Chevron*—a case that reshaped the law by making statutory ambiguity a doctrinal trigger for deference to agencies.[20] But *Chevron* begged the important question of what counts as ambiguity. And so the elephants-in-mouseholes doctrine emerged as a mechanism for detecting ambiguity (or, more precisely, the lack thereof). As it evolved, however, the elephants-in-mouseholes doctrine became itself ambiguous. It has suffered from inconsistent application, abetting division far more often than inducing consensus.

A. The Chevron *Backdrop*

In *Chevron*, the Court reconceptualized how agency interpretations of the statutes they administer are reviewed by federal courts. Instead of trying to find the best judicial interpretation of federal law, as courts do in nearly every other context, the Court began to treat agencies differently. Courts defer to an agency's interpretation so long as it is reasonable[21]—though it cannot, of course, be reasonable to read a statute in a way that flatly contradicts the text of the statute,[22] as understood by using the traditional tools of statutory construction.[23]

In 1977, Congress amended the Clean Air Act to require certain states "to establish a permit program regulating 'new or modified major stationary sources' of air pollution."[24] After President Reagan was elected, the Environmental Protection Agency (EPA) adopted a plant-wide

20. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (noting that where a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

21. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) (noting that a *Chevron* analysis "calls for a single inquiry into the reasonableness of the agency's statutory interpretation").

22. *See id.* at 599 ("If an agency's construction of the statute is contrary to clear congressional intent . . . on the precise question at issue, then the agency's construction is a fortiori not based on a permissible construction of the statute. Step One is therefore nothing more than a special case of Step Two, which implies that all Step One opinions could be written in the language of Step Two." (internal quotations and footnote omitted)).

23. *E.g.*, Pharm. Research & Mfrs. of Am. v. Thompson, 251 F.3d 219, 224 (D.C. Cir. 2001) (noting that at Step One, courts must employ all "traditional tools of statutory interpretation," such as "text, structure, purpose, and legislative history").

24. *Chevron*, 467 U.S. at 840.

definition of *stationary source* such that an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without triggering the Act's permit requirement if the alteration would not increase the total emissions.[25] The Court unanimously deferred to EPA's interpretation and set out the now-ubiquitous approach for reviewing agency constructions of the statutes they administer:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[26]

To determine whether the agency's interpretation "is based on a permissible construction of the statute," the Court explained that where "legislative delegation to an agency on a particular question is implicit rather than explicit," the Court would refuse to "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[27] The Court tied its methodology to political accountability. Recognizing that "[j]udges are not experts in the field, and are not part of either political branch of the Government" and agency action involves "policy preferences,"[28] the Court reasoned that when "Congress has delegated policymaking responsibilities" to an agency, the agency should receive deference. The Court noted,

> While 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 such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[29]

According to *Chevron*'s premise, once a statute is deemed ambiguous, making sense of that ambiguity requires more policy choice than interpretive casuistry. And this being so, deference encourages agency accountability, democratic policymaking, and judicial restraint. *Chevron*

25. *Id.*
26. *Id.* at 842–43 (footnotes omitted).
27. *Id.* at 843–44.
28. *Id.* at 865.
29. *Id.* at 865–66.

thus accords critical doctrinal significance to the concept of ambiguity. But *Chevron* begged an important question: What counts as ambiguity? This bedeviling question has been the subject of countless articles[30] and will surely be the subject of many more.[31] It is, after all, difficult to say,

> "what ambiguity *is*; for the word itself is ambiguous. To say a statute is ambiguous could be a claim that ordinary readers of English would disagree about its meaning . . . . Or it could be a private conclusion that, regardless of what others might think, the reader is unsure how best to read the text . . . ."[32]

Moreover, for either definition, ambiguity is often a matter of degree. For instance, even statutory provisions that are so clear that unanimous courts can discern their meaning at *Chevron* Step One are not so clear that there is no case at all for the court to decide.[33] By definition, one of the parties at least thinks there is a *chance* that the court will side with him or her. And often lawyers speak of being "[insert number]%" sure about what a statute means. How much uncertainty, then, do we need for a statute to be ambiguous? *Chevron* does not say.[34]

B. Emergence of the Elephants-in-Mouseholes Doctrine

The elephants-in-mouseholes doctrine emerged as one doctrinal tool for solving *Chevron*'s ambiguity problem. As we will see, however, it is a tool of questionable utility for that original purpose. Although the doctrine is purportedly a canon for discerning clarity in a statute, the doctrine is often

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30. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006) (discussing the role of political judgments in judicial review of agency interpretations of law due to the ambiguities of statutory language in congressional provisions).

31. *See, e.g.*, Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, J. LEGAL ANALYSIS (forthcoming), *available at* SSRN: http://ssrn.com/abstract=1441860 (investigating how ambiguity in statutes affect judicial review and statutory interpretations based on the policy preferences of judges themselves).

32. *See id.* at 4.

33. *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1974 app. B (2009) (compiling data in a table titled *A Sample of Unanimous Decisions Involving "Mixed Panels" Reviewing Complicated and Important Administrative Agency Actions September 2000–July 2008*); *id.* at 1943 n.184 ("Administrative Office of the Courts data on the D.C. Circuit show that dissent rates hover from below 5 percent to 10 percent of cases for which opinions were written.").

34. It is beyond the scope of this Article to delve *too* deeply into the issue of ambiguity. There are, of course, well-documented theoretical difficulties with an ambiguousness standard. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986). It is not this Article's intent to wade into those issues. It is sufficient for our purposes that the elephants-in-mouseholes doctrine seems to be doing something more than the Court's ordinary tests for ambiguousness. *See* Manning, *supra* note 17, at 233 (asserting that the Court exercises a certain policymaking discretion when reviewing an agency's interpretation of a statute).

applied in cases where many members of the Court believe a statute is ambiguous, and their dissenting arguments are not obviously misguided. Moreover, the fact that individual Justices themselves seem to be inconsistent from case to case suggests the elephants-in-mouseholes doctrine can be used to impose clear meaning rather than discern it.

The Supreme Court first expressly announced the doctrine in *American Trucking*, declaring that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." [35] But what might appear at first blush to be merely a pithy phrase—yet another striking animal image by the wordsmith Scalia[36]—is much more than that. The elephants-in-mouseholes doctrine emerged from a pair of the most controversial administrative law cases of the last twenty years. And the doctrine has matured, having been repeatedly applied by both the Supreme Court[37] and the courts of appeals.[38]

1. Precursors

As authority for the elephants-in-mouseholes doctrine, Justice Scalia for the *American Trucking* Court cited two cases: *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[39] and *FDA v. Brown & Williamson Tobacco Corp.*[40] These citations should raise eyebrows because the opinions are notorious in administrative law circles. Neither

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

36. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1817 (2009) (Scalia, J., concurring) ("There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." (citation omitted)); Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."). *See generally* Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 HARV. J.L. & PUB. POL'Y 529, 530 (1993) (praising Justice Scalia for the "magical conciseness" he exhibits in his opinions).

37. *See supra* Part I.B.

38. *Compare* Am. Bar Ass'n v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005) (finding an elephant-in-mousehole where Federal Trade Commission claimed authority under financial consumer privacy statute to regulate attorneys in the practice of law), *with* Am. Fed'n of Gov't Employees, AFL–CIO v. Gates, 486 F.3d 1316, 1324–25 (D.C. Cir. 2007) (finding no elephant-in-mousehole where Department of Defense claimed authority under National Defense Authorization Act to curtail collective bargaining with civilian employees), *and* NISH v. Rumsfeld, 348 F.3d 1263, 1269 (10th Cir. 2003) (holding "[w]e simply do not see the elephant in the mousehole" where the military claimed statutory authority to give blind vendors priority in awarding mess hall contracts).

39. 512 U.S. 218 (1994).

40. 529 U.S. 120 (2000).

was a "boring case"—both affected administrative law in profound ways.[41] Given the extensive commentary these particular decisions have generated, it is not unlikely that Scalia's reference to both of them at once was intended to make a broad point to the legal community.

a. MCI Telecommunications Corp. v. AT&T

In *MCI*, the Court was called upon to decide whether the Federal Communications Commission (FCC or Commission) abused its authority by permitting "nondominant long-distance carriers" to bypass having to file rates while a dominant long-distance carrier—AT&T—still had to file them.[42] Justice Scalia, wielding the pen for a divided Court, gave the history of the filed-rate requirement, noting, "When Congress created the Commission in 1934, AT&T, through its vertically integrated Bell system, held a virtual monopoly over the Nation's telephone service. The Communications Act of 1934 . . . authorized the Commission to regulate the rates charged for communication services to ensure that they were reasonable and nondiscriminatory."[43] As part of that regulatory regime, § 203 of the Act required "common carriers [to] file their rates with the Commission and charge only the filed rate."[44]

As often happens, the world changed, but the statute did not. "In the 1970's, technological advances reduced the entry costs for competitors of AT&T in the market for long distance telephone service, [and] [t]he Commission, recognizing the feasibility of greater competition, [therefore] passed regulations to facilitate competitive entry."[45] Relying on its statutory authority to "modify" rate-filing requirements, the Commission relieved "nondominant carriers" of the requirement to file while retaining the requirement for "dominant carriers"—of which AT&T was the only one. In practical effect, this "amounted to a distinction between AT&T and everyone else."[46]

The Court sided with AT&T, concluding that the statutory authority to "modify" did not permit "basic and fundamental changes" to the statutory

41. Neil M. Richards, *The Supreme Court Justice & "Boring" Cases*, 4 GREEN BAG 2D 401, 403 (2001) (defining "boring cases" as those "requiring technical legal analysis such as statutory interpretation and doctrinal analysis" without much impact on "interesting" areas of law and commenting on some examples of such cases).

42. 512 U.S. at 220.

43. *Id.*

44. *Id.*

45. *Id.* Indeed, "some urged that the continuation of extensive tariff filing requirements served only to impose unnecessary costs on new entrants and to facilitate collusive pricing." *Id.*

46. *Id.* at 221.

scheme.[47] In über-textualist form, Justice Scalia instructed that "[t]he word 'modify'—like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum'—has a connotation of increment or limitation."[48] The Court discounted *Webster's Third New International Dictionary*—which defined *modify*, inter alia, as "to make a basic or important change in"—observing the dictionary is "widely criticized for its portrayal of common error as proper usage"; that its definitions are inconsistent; that it contradicts other dictionaries; and that, in any case, "[i]n 1934, when the Communications Act became law—the most relevant time for determining a statutory term's meaning—Webster's Third was not yet even contemplated."[49] Thus, the Court held that the word *modify* was unambiguous and rejected the Commission's rule at *Chevron* Step One, even in the face of conflicting dictionaries.[50]

Having resolved the dueling dictionaries, the *MCI* Court went on to reason, "Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[51] But what is "a less than radical or fundamental" change? To answer, Scalia explained that "[f]or the body of a law, as for the body of a person, whether a change is minor or major depends to some extent upon the importance of the item changed to the whole. Loss of an entire toenail is insignificant; loss of an entire arm tragic. The tariff-filing requirement is, to pursue this analogy, the heart of the common-carrier section of the Communications Act."[52] Consequently, "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."[53] Though expressing sympathy with the Commission's policy goal of encouraging more-robust telecommunications competition, Scalia closed by accusing the agency of introducing "a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that

47. *Id.* at 225.
48. *Id.*
49. *Id.* at 225–28 & n.8 (citation omitted).
50. This aspect of the decision has been severely criticized as contrary to the principles of *Chevron*. *See, e.g.*, Pierce, *supra* note 18, at 757–58.
51. 512 U.S. at 229 (citations omitted).
52. *Id.*
53. *Id.* at 231.

Congress established."[54]

Justice Stevens, joined by Justices Blackmun and Souter, dissented. Stevens first noted, "The Communications Act of 1934 . . . gives the FCC unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate 'to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges,'"[55] and the "Court's consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities."[56] Because, according to Justice Stevens, Congress specifically intended this flexibility, "it is quite wrong to suggest that the mere process of filing rate schedules—rather than the substantive duty of reasonably priced and nondiscriminatory service—is 'the heart of the common-carrier section of the Communications Act.'"[57]

The dissent next took on the meaning of *modify*, explaining that "[e]ven if the sole possible meaning of 'modify' were to make 'minor' changes," "[w]hen § 203 is viewed as part of a statute whose aim is to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances—one that remains faithful to the core purpose of the tariff-filing section."[58] Justice Stevens also noted *modify* is "defined in Webster's Collegiate Dictionary as meaning 'to limit or reduce in extent or degree,'" and he explained, with that definition in mind, "The Commission's permissive detariffing policy fits comfortably within this common understanding of the term."[59] Then, referring back to the political accountability grounds underlying *Chevron*, Stevens observed,

> Even if the 1934 Congress did not define the scope of the Commission's modification authority with perfect scholarly precision, this is surely a paradigm case for judicial deference to the agency's interpretation, particularly in a statutory regime so obviously meant to maximize administrative flexibility. Whatever the best reading of § 203(b)(2), the Commission's reading cannot in my view be termed unreasonable.[60]

b. FDA v. Brown & Williamson Tobacco Corp.

In the even more well-known case of *Brown & Williamson*, the Court confronted whether the Food and Drug Administration (FDA), pursuant to

54. *Id.* at 234.
55. *Id.* at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151 (1994)).
56. *Id.*
57. *Id.* at 237.
58. *Id.* at 241.
59. *Id.* at 241–42 (footnote and citation omitted).
60. *Id.* at 244 (footnote omitted).

its authority to regulate "drugs" and "devices" under the Food, Drug, and Cosmetic Act (FDCA), could regulate tobacco. The Court said no, despite a very strong textual argument to the contrary. In fact, the Court openly acknowledged its construction of the Act was "extraordinary."[61]

The text is expansive:

> The Act defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article . . . which is . . . intended to affect the structure or any function of the body."[62]

It also "grants the FDA the authority to regulate so-called 'combination products,' which 'constitute a combination of a drug, device, or biological product.'"[63] Looking at this broad language, the Clinton Administration saw an opportunity to effect policy—the regulation of tobacco—without having to navigate a hostile Congress.[64] To the President, the FDA did not need more power; Congress had already given enough. Thus, "On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents,"[65] and "determined that nicotine is a 'drug' and that cigarettes and smokeless tobacco are 'drug delivery devices,' and therefore it had jurisdiction under the FDCA to regulate tobacco products as customarily marketed—that is, without manufacturer claims of therapeutic benefit."[66]

In the regulations that followed, the FDA stopped short of forbidding tobacco sales. Instead, it created three broad types of restrictions. First, the regulations beefed up the protections against underage smoking.[67] Second, they restricted how tobacco could be advertised.[68] Finally, "The labeling

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61. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

62. *Id.* at 126 (quoting 21 U.S.C. § 321 (1994)) (first alteration in original) (citation omitted).

63. *Id.*

64. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("Faced . . . with a hostile Congress . . . Clinton . . . turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals [including tobacco regulation].").

65. *Brown & Williamson*, 529 U.S. at 126.

66. *Id.* at 127.

67. *Id.* at 128 ("The access regulations prohibit[ed] the sale of cigarettes or smokeless tobacco to persons younger than 18; require[d] retailers to verify through photo identification the age of all purchasers younger than 27; prohibit[ed] the sale of cigarettes in quantities smaller than 20; prohibit[ed] the distribution of free samples; and prohibit[ed] sales through self-service displays and vending machines except in adult-only locations.").

68. *Id.* at 128–29 ("The promotion regulations require[d] that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit[ed] outdoor advertising within 1,000 feet of any public playground or school; prohibit[ed] the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and prohibit[ed] a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its

regulation require[d] that the statement, 'A Nicotine-Delivery Device for Persons 18 or Older,' appear on all tobacco product packages."[69]

The regulations were challenged. Aside from invoking the statutory provisions already mentioned, the FDA contended,

> Under 21 U.S.C. § 360j(e), the [FDA] may "require that a device be restricted to sale, distribution, or use . . . upon such other conditions as [the FDA] may prescribe in such regulation, if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness."[70]

Here, "The FDA reasoned that its regulations fell within the authority granted by § 360j(e) because they related to the sale or distribution of tobacco products and were necessary for providing a reasonable assurance of safety."[71]

Despite the strong case for *Chevron* deference, the Court vacated the FDA's regulations. The Court's reasoning is "puzzling," especially "[f]or a Court that has become increasingly textualist in its orientation to statutes."[72] After setting forth the general contours of *Chevron*, Justice O'Connor for the Court explained, "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."[73] Relying on structure to understand how to read a statute, while obviously difficult, is something that courts frequently do.[74] But the Court's next move was more provocative, as the Court asserted "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[75] Justice O'Connor also observed that "[i]n addition, we must be guided to a degree by common sense as to the manner in which

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brand name.").

69. *Id.* at 129.

70. *Id.* (quoting 21 U.S.C. § 360j(e) (2000)).

71. *Id.*

72. *See* Manning, *supra* note 17, at 226 (questioning the Court's textual analysis of the Food, Drug, and Cosmetic Act (FDCA) in *Brown & Williamson*); *see also id.* at 234 ("Perhaps most strikingly, the Court found that Congress had spoken to the precise question at issue, not on the basis of the FDCA, but on the basis of implied 'intent' from legislative acts occurring decades after the FDCA's enactment.").

73. *Brown & Williamson*, 529 U.S. at 132.

74. *See, e.g.*, Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1443–44 (1994) ("[R]esort to structure and structuralism as interpretive tools is increasingly becoming the approach of choice by judges on the bench—at least when faced with seemingly difficult issues of statutory interpretation.") (footnote omitted).

75. *Brown & Williamson*, 529 U.S. at 133.

Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency," citing, with a "*cf.*," to the *MCI* case.[76]

In its "common sense" analysis, the Court argued if the FDA had jurisdiction over tobacco, it would have to ban the sale of tobacco itself, not just regulate its method of sale. But "Congress . . . has foreclosed the removal of tobacco products from the market," given that the *United States Code* explicitly states "'[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare,'"[77] and that "[m]ore importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965."[78] "When Congress enacted these [other] statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects," but still, "Congress stopped well short of ordering a ban."[79] Thus, "Considering the [Act] as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction."[80]

Then, in closing, the Court explained what drove its conclusion that deference was inappropriate:

> [O]ur inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.
>
> . . . .
>
> As in *MCI*, 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*.[81]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented, noting—correctly—"that tobacco products fit within [the

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76. *Id.*
77. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (2000)).
78. *Id.*
79. *Id.* at 138; *see also id.* at 144 (noting that during the period after the adverse health effects of tobacco use were known, "Congress considered and rejected bills that would have granted the FDA such jurisdiction," and thus it would seem that "Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products").
80. *Id.* at 142.
81. *Id.* at 159–60 (citation omitted) (emphasis added).

FDCA's] statutory language."[82] Justice Breyer observed that even "[i]n its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally," and "[s]econd, the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope."[83]

Justice Breyer then averred that the FDA's power to regulate can include methods short of absolute bans. Justice Breyer noted that the Court's reliance on intervening statutes that do not purport to remove FDA jurisdiction do not deprive the FDA of the jurisdiction that Congress gave it, especially given that "the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history . . . establish that the FDA has authority to regulate tobacco."[84] In Breyer's view,

> where linguistically permissible, [the Court] should interpret the FDCA in light of Congress' overall desire to protect health. That purpose requires a flexible interpretation that both permits the FDA to take into account the realities of human behavior and allows it, in appropriate cases, to choose from its arsenal of statutory remedies.[85]

Put differently, *Chevron* deference is particularly appropriate in the drug context given the agency's broad jurisdiction over public health—a highly complex field that is in constant technological flux. And Justice Breyer answered the majority's concern for unintended delegation with an assurance that highly consequential agency decisions, by virtue of their importance, will generate political accountability through the Executive Branch.[86]

2. Emergence

Although the elephants-in-mouseholes doctrine was at work in *MCI* and

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82. *Id.* at 161 (Breyer, J., dissenting).
83. *Id.* at 162.
84. *Id.* at 163.
85. *Id.* at 181.
86. Justice Breyer explained,

> [O]ne might claim that courts, when interpreting statutes, should assume in close cases that a decision with "enormous social consequences," should be made by democratically elected Members of Congress rather than by unelected agency administrators. If there is such a background canon of interpretation, however, I do not believe it controls the outcome here.
>
> Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.

Id. at 190 (citations omitted).

Brown & Williamson, it took definite form in a subsequent case, *American Trucking*.

a. Whitman v. American Trucking Ass'ns

In *American Trucking*, the Court addressed § 109(b)(1) of the Clean Air Act (CAA) and the EPA's authority under that section to set national ambient air quality standards or NAAQS (an acronym all too familiar to the D.C. Circuit).[87] The CAA gives the EPA expansive authority. In particular, § 109(b)(1) commands the EPA to set NAAQS, "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[88] This broad statutory language poses two questions. First, does the Act delegate too much lawmaking power to the EPA? And second, can the EPA consider implementation costs as part of its "public health" determination?

In a creative decision, the D.C. Circuit held "§ 109(b)(1) delegated legislative power to the Administrator in contravention of the United States Constitution, Art. I, § 1," and "the EPA had interpreted the statute to provide no 'intelligible principle' to guide the agency's exercise of authority."[89] Because in the circuit's view, "the EPA could perhaps avoid the unconstitutional delegation by adopting a restrictive construction of § 109(b)(1)," the court remanded the NAAQS to the agency rather than declaring the statute unconstitutional.[90] On the second issue, the court of appeals unanimously refused to permit the EPA to consider costs.[91]

Justice Scalia, again writing for the Court, first addressed whether economic considerations may play a part in the EPA's decisionmaking.[92] The Court agreed with the D.C. Circuit that such considerations are irrelevant under the plain language of the statute. The text does not refer to economic costs and so the EPA cannot consider them.[93] Though phrases like "public health," "requisite," and "adequate" are open-ended—suggesting liberal agency authority—the Court rejected the argument that "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air—for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those

87. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462 (2001).
88. 42 U.S.C. § 7409 (2006).
89. *Am. Trucking Ass'ns*, 531 U.S. at 463 (citing Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).
90. *Id.*
91. *Id.*
92. *Id.* at 464–65.
93. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1) (2006)).

industries."[94]

Because Congress had instructed the agency to consider economic costs in many other sections of the Act but not explicitly in this one, Justice Scalia invoked the elephants-in-mouseholes principle. Just as it was "highly unlikely" in *MCI* that Congress would have so indirectly authorized so extensive an agency power, Scalia reasoned, it was equally "implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."[95] After all, considering costs "is *both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned . . . had Congress meant it to be considered."[96]

Then, Scalia directed his attention to the nondelegation doctrine, summarily rejecting the D.C. Circuit's novel notion that, if there was a constitutional problem, the EPA, rather than Congress, could fix it:

> The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.[97]

The Court therefore faced the nondelegation question directly, holding "[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents," and noting,

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[98]

Justice Scalia further noted that "even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[99]

Only Justice Thomas, in a concurrence, questioned whether the nondelegation doctrine should be effectively interred. He was "not

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94. *Id.* at 466.
95. *Id.* at 468.
96. *Id.* at 469.
97. *Id.* at 473.
98. *Id.* at 474.
99. *Id.* at 475 (quoting Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power," as "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[100] However, because no party requested the Court to overrule precedent, Justice Thomas left "the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers" for "a future day."[101] Justice Stevens, joined by Justice Souter, also concurred, "wholeheartedly endors[ing] the Court's result and . . . reasons,"[102] though urging the Court to "frankly acknowledg[e]" that "the power delegated to the EPA is 'legislative,'"[103] and that such delegations of legislative power are constitutional.[104]

Interestingly, Justice Breyer also concurred, but he did not focus on the nondelegation doctrine. Instead, he challenged Justice Scalia's elephants-in-mouseholes doctrine, offering his own meta-interpretative rule that "other things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation."[105] He nonetheless concurred, however, because he found that in this *particular* case, the specific "legislative history, along with the statute's structure, indicate[d] that § 109's language reflect[ed] a congressional decision not to delegate to the agency the legal authority to consider economic costs of compliance."[106]

3. Application

In the wake of *American Trucking*, the elephants-in-mouseholes doctrine has made four significant appearances—once as the justification for a majority opinion and three more times in dissent.

a. Gonzales v. Oregon

In *Gonzales v. Oregon*, the Court confronted the hot-button question of "whether the Controlled Substances Act [CSA] allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[107] The State of Oregon legalized assisted suicide, but "[t]he

100. *Id.* at 487 (Thomas, J., concurring).
101. *Id.*
102. *Id.* at 488 (Stevens, J., concurring).
103. *Id.*
104. *Id.* at 490.
105. *Id.* (Breyer, J., concurring).
106. *Id.*
107. 546 U.S. 243, 248–49 (2006).

drugs Oregon physicians prescribe under [the Oregon statute] are regulated under [the CSA]. The CSA allows these particular [pain] drugs to be available only by a written prescription from a registered physician. In the ordinary course the same drugs are prescribed in smaller doses for pain alleviation."[108] Could Oregon allow its doctors to use these pain drugs to help patients end their own lives, or was that contrary to the federal statute?

Again, the relevant statutory text is encompassing:

> To issue lawful prescriptions of Schedule II drugs, physicians must "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." The Attorney General may deny, suspend, or revoke this registration if . . . the physician's registration would be "inconsistent with the public interest."[109]

Since the 1970s, the Justice Department had interpreted this to mean "that every prescription for a controlled substance 'be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'"[110]

Using this broad power, in 2001, Attorney General John Ashcroft issued an "Interpretive Rule" that "addresse[d] the implementation and enforcement of the CSA with respect to [the Oregon law]."[111] Ashcroft, relying on advice from the Office of Legal Counsel, ruled "that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the CSA."[112] The question the Court faced was whether that interpretive rule was a valid execution of the statute.

The Court, this time with Justice Kennedy writing, rejected the Attorney General's position—finding *Chevron* deference inappropriate. The Court held that the Attorney General's power did not extend so far as to allow him "to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[113] Invoking the elephants-in-mouseholes doctrine, Kennedy rejected the "idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision," explaining,[114]

> The importance of the issue of physician-assisted suicide, which has been the subject of an "earnest and profound debate" across the country, makes the oblique form of the claimed delegation all the more suspect. Under the

108. *Id.* at 249 (citation omitted).
109. *Id.* at 250–51 (quoting 21 U.S.C. §§ 822(a)(2), 824(a)(4) (2006)).
110. *Id.* at 250 (quoting 21 C.F.R. § 1306.04(a) (2005)).
111. *Id.* at 249.
112. *Id.*
113. *Id.* at 258.
114. *Id*. at 267.

> Government's theory, moreover, the medical judgments the Attorney General could make are not limited to physician-assisted suicide. Were this argument accepted, he could decide whether any particular drug may be used for any particular purpose, or indeed whether a physician who administers any controversial treatment could be deregistered. This would occur, under the Government's view, despite the statute's express limitation of the Attorney General's authority to registration and control, with attendant restrictions on each of those functions, and despite the statutory purposes to combat drug abuse and prevent illicit drug trafficking.[115]

In dissent, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, argued deference was appropriate. Responding to the majority's invocation of the elephants-in-mouseholes doctrine, Scalia rejoined,

> This case bears not the remotest resemblance to *Whitman*, which held that "Congress . . . does not alter the *fundamental details* of a regulatory scheme in vague terms or ancillary provisions." The Attorney General's power to issue regulations against questionable uses of controlled substances in no way alters "the fundamental details" of the CSA.[116]

Scalia claimed that enforcing the statute against "assisted suicide" would nowise "interfere[] with the prosecution of 'drug abuse' as the Court understands it. Unlike in *Whitman*, the Attorney General's *additional* power to address other forms of drug 'abuse' does *absolutely nothing* to undermine the central features of this regulatory scheme."[117] Scalia then argued "it was critical to our analysis in *Whitman* that the language of the provision did not bear the meaning that respondents sought to give it. Here, . . . the provision is most naturally interpreted to incorporate a uniform federal standard for legitimacy of medical practice."[118]

b. Ali v. Federal Bureau of Prisons

The next sustained invocation of the elephants-in-mouseholes doctrine was not in an administrative law opinion.[119] In *Ali v. Federal Bureau of Prisons*,[120] Justice Breyer cited the doctrine in dissent in a more run-of-the-

115. *Id.* at 267–68 (citation omitted).
116. *Id.* at 290 (Scalia, J., dissenting) (citation omitted).
117. *Id.* at 291.
118. *Id.* (citation omitted).
119. In *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008), an Employee Retirement Income Security Act (ERISA) case, Justice Breyer, joined by Justices Stevens, Ginsburg, Souter, and Alito, analogized the case to *American Trucking* "to support the claim Congress did not intend courts to review *de novo* 'the lion's share of ERISA plan claims denials,'" for "[h]ad Congress intended such a system of review, . . . it would not have left to the courts the development of review standards but would have said more on the subject." *Id.* at 2350–51. None of the other opinions touched on the elephants-in-mouseholes doctrine. *See id.* at 2352 (Roberts, C.J., concurring); *id.* at 2355–56 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2356–57 (Scalia, J., dissenting).
120. 128 S. Ct. 831 (2008).

mill civil case. The issue was whether Bureau of Prison (BOP) officers fall within the Federal Tort Claims Act (FTCA) exemption for "any other law enforcement officer."[121] A prisoner's property vanished during a transfer. The prisoner sued, alleging BOP officers lost it. The FTCA, however, exempts negligent or wrongful acts arising with respect to "detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[122] Justice Thomas, for the Court, found BOP officers are covered by the exemption's language. Rejecting the claim that "'any other law enforcement officer' includes only law enforcement officers acting in a customs or excise capacity," Thomas noted the word *any* "suggests a broad meaning."[123] Indeed, "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' . . . ."[124]

The Court declined to apply canons of interpretation like *ejusdem generis* or *noscitur a sociis* because "the phrase 'any officer of customs or excise or any other law enforcement officer'" "is disjunctive, with one specific and one general category, not . . . a list of specific items separated by commas and followed by a general or collective term."[125] Moreover, "no relevant common attribute immediately appears from the phrase 'officer of customs or excise.'"[126] Finally, the Court noted that

> [the holding] does not necessarily render "any officer of customs or excise" superfluous; Congress may have simply intended to remove any doubt that officers of customs or excise were included in "law enforcement officers." Moreover, petitioner's construction threatens to render "any other law enforcement officer" superfluous because it is not clear when, if ever, "other law enforcement officer[s]" act in a customs or excise capacity.[127]

Justice Kennedy, writing for Justices Stevens, Souter, and Breyer, dissented. "Statutory interpretation, from beginning to end, requires respect for the text. The respect is not enhanced, however, by decisions that foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature's intent."[128] Kennedy rejected the notion that "there is only one possible way to read the statute"[129] and argued that because of the canons of construction, the text should be understood in reference to the phrase that proceeded it; "[t]he common attribute of officers of customs and excise and other law

121. *Id*. at 833.
122. 28 U.S.C. § 2680(c) (2006).
123. *Ali*, 128 S. Ct. at 835.
124. *Id.* at 837.
125. *Id.* at 839.
126. *Id.*
127. *Id.* at 840 (citation omitted).
128. *Id.* at 841 (Kennedy, J., dissenting).
129. *Id.*

enforcement officers is the performance of functions most often assigned to revenue officers, including, *inter alia*, the enforcement of the United States' revenue laws and the conduct of border searches."[130]

Justice Breyer also dissented, joined by Justice Stevens, in order "to emphasize, . . . that the relevant context extends well beyond Latin canons and other such purely textual devices."[131] He explained,

> As with many questions of statutory interpretation, the issue here is not the *meaning* of the words. The dictionary meaning of each word is well known. Rather, the issue is the statute's *scope*. What boundaries did Congress intend to set? To what circumstances did Congress intend the phrase, as used in *this* statutory provision, to apply?[132]

For Justice Breyer, "The word 'any' is of no help because all speakers (including writers and legislators) who use general words . . . normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work."[133] He rejected a mechanical application of the canons as well: "canons of construction are not 'conclusive' and 'are often countered . . . by some maxim pointing in a different direction.'"[134] Relying on legislative history and the purposes of the FTCA, Breyer concluded the statute should be read narrowly. In closing, Breyer summed up his approach this way: the Court should be guided by "Justice Scalia's . . . easily remembered English-language observation that Congress 'does not . . . hide elephants in mouseholes.'"[135]

c. Entergy Corp. v. Riverkeeper, Inc.

In 2009, the elephants-in-mouseholes doctrine appeared in two major environmental cases. In *Entergy Corp. v. Riverkeeper, Inc.*, the question was whether the EPA can consider costs in promulgating Clean Water Act (CWA) regulations.[136] The CWA requires the EPA to set standards for power plants that "reflect the best technology available for minimizing adverse environmental impact" from their operations.[137] In a way seemingly similar to what happened in *American Trucking*, the EPA promulgated standards for power plants that considered costs—not just what is technologically possible.

For the Court, Justice Scalia—reversing a Second Circuit decision

130. *Id.* at 843.
131. *Id.* at 849 (Breyer, J., dissenting).
132. *Id.*
133. *Id.* at 849–50.
134. *Id.* at 850 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).
135. *Id.* at 851–52 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
136. 129 S. Ct. 1498 (2009).
137. 33 U.S.C. § 1326(b) (2006).

authored by then-Judge Sonia Sotomayor[138]—held the EPA can consider such costs.[139] Scalia held the agency's approach was valid under *Chevron*, noting that "if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts," then it must be sustained.[140] The EPA's interpretation was reasonable because "[t]he 'best' technology—that which is 'most advantageous'—may well be the one that produces the most of some good, here a reduction in adverse environmental impact. But 'best technology' may also describe the technology that *most efficiently* produces some good."[141] "'Minimize,'" moreover,

> is a term that admits of degree and is not necessarily used to refer exclusively to the "greatest possible reduction." For example, elsewhere in the Clean Water Act, Congress declared that the procedures implementing the Act "shall encourage the drastic minimization of paperwork and interagency decision procedures." If respondents' definition of the term "minimize" is correct, the statute's use of the modifier "drastic" is superfluous.[142]

Likewise, other provisions of the Act use words like *elimination*, which go further than merely minimizing something.[143]

Justice Scalia then rejected the claim that statutory silence about cost–benefit analysis should be understood as forbidding it, even though in other places in the Act Congress authorized the EPA to conduct such cost–benefit analysis. Scalia parried by noting the section at issue gave absolutely no instructions about how it should be applied:

> [It] is silent not only with respect to cost–benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the section]—an obvious logical impossibility. It is eminently reasonable to conclude that [this] silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost–benefit analysis should be used, and if so to what degree.[144]

American Trucking, moreover, did not bind the Court's holding, because that case merely "stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."[145]

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138. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d Cir. 2007), *rev'd sub nom.* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009).
139. *Entergy Corp.*, 129 S. Ct. at 1510.
140. *Id.* at 1505.
141. *Id.* at 1506 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 258 (2d ed. 1953)).
142. *Id.* (quoting 33 U.S.C. § 1251(f) (2006)) (citation omitted).
143. *Id.*
144. *Id.* at 1508.
145. *Id.*

Justice Breyer concurred.[146] Relying on legislative history, he noted "the statute reflects a compromise. . . . The final statute does not *require* the Agency to compare costs to benefits when determining '*best available* technology,' but neither does it expressly *forbid* such a comparison."[147] Breyer observed that

> it would make no sense to require plants to "spend billions to save one more fish or plankton." That is so even if the industry might somehow afford those billions. And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.[148]

Reading the section differently would unreasonably threaten "to impose massive costs far in excess of any benefit."[149]

Justice Stevens, with Justices Souter and Ginsburg, dissented, claiming the EPA's regulations were contrary to the "plain text" of the provision.[150] Justice Stevens explained,

> Unless costs are so high that the best technology is not "available," Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost–benefit analysis when setting regulatory standards; fairly read, it prohibits such use.[151]

Justice Stevens also questioned whether cost–benefit analysis is appropriate in environmental cases, as "a regulation's financial costs are often more obvious and easier to quantify than its environmental benefits. And cost–benefit analysis often, if not always, yields a result that does not maximize environmental protection."[152] He continued, "Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost–benefit analysis in crafting regulations," so the Court "should not treat a provision's silence as an implicit source of cost–benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation."[153] Calling the command to minimize environmental harm "an integral part of the statutory scheme," Justice Stevens argued that upholding the EPA's approach was an error, as "Congress . . . 'does not alter the fundamental

146. *Id.* at 1512 (Breyer, J., concurring).
147. *Id.* at 1512–13.
148. *Id.* at 1513 (citation omitted).
149. *Id.* at 1514.
150. *Id.* at 1516 (Stevens, J., dissenting).
151. *Id.*
152. *Id.*
153. *Id.* at 1517.

details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[154]

d. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

In *Coeur Alaska*, the elephants-in-mouseholes doctrine emerged once more, this time in relation to the messy topic of "slurry"—i.e., mine waste.[155] In an extraordinarily complicated area of the law, the Court first addressed "whether the [Clean Water] Act gives authority to the United States Army Corps of Engineers [Corps], or instead to the Environmental Protection Agency (EPA), to issue a permit for the discharge of . . . slurry."[156] Section "404(a) of the CWA grants the Corps the power to 'issue permits . . . for the discharge of . . . fill material.' But the EPA also has authority to issue permits for the discharge of pollutants."[157] The issue then, in *Coeur Alaska*, was whether § 404 applied, and if so, whether the Corps acts contrary to law when it issues permits for "fill" that conflict with EPA rules for "pollutants."[158]

The Court's majority, with Justice Kennedy writing, held the Corps properly issued the permit, noting, "The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402" and the EPA's regulations become inapplicable.[159] Environmental groups argued "§ 404 contains an implicit exception . . . [that] does not authorize the Corps to permit a discharge of fill material if that material is subject to an EPA" standard, but Justice Kennedy noted § 404's text was not amenable to this argument: "[Section] 404 refers to all 'fill material' without qualification."[160] Justice Breyer concurred, noting that the majority opinion "reflects the difficulty of applying [the CWA] literally to *every* new-source-related discharge of a 'pollutant.'"[161]

Justice Ginsburg, for herself and Justices Stevens and Souter, dissented, claiming that Congress intended the EPA to have power to regulate slurry given "[t]he statute's text, structure, and purpose."[162] She concluded by invoking the elephants-in-mouseholes doctrine:

154. *Id.* at 1517–18 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
155. Coeuer Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2463 (2009).
156. *Id.*
157. *Id*.
158. *Id.*
159. *Id.* at 2467.
160. *Id.* at 2469.
161. *Id.* at 2477 (Breyer, J., concurring).
162. *Id.* at 2480 (Ginsburg, J., dissenting).

> Congress, we have recognized, does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Yet an alteration of that kind is just what today's decision imagines. Congress, as the Court reads the Act, silently upended, in an ancillary permitting provision, its painstaking pollution-control scheme. Congress did so, the Court holds, notwithstanding the lawmakers' stated effort "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States; their assignment to EPA of the Herculean task of setting strict effluent limitations for many categories of industrial sources; and their insistence that new sources meet even more ambitious standards, not subject to exception or variance. Would a rational legislature order exacting pollution limits, yet call all bets off if the pollutant, discharged into a lake, will raise the water body's elevation? To say the least, I am persuaded, that is not how Congress intended the Clean Water Act to operate.[163]

II. THE TROUBLE WITH ELEPHANTS AND MOUSEHOLES

The elephants-in-mouseholes doctrine presents problems *as a doctrine*. Elephants and mouseholes are in the eye of the beholder, meaning, as a rule of statutory interpretation, the doctrine cannot be applied in a consistent fashion. How do we know whether an agency interpretation *alters* the *fundamental* details of a regulatory scheme rather than simply defining or clarifying those details? And how do we know that the relied-upon statutory provision is "ancillary" to the aim of the statute rather than constituent of it? In other words, we cannot easily know that what we find in the mousehole is truly an elephant—and not just a rather plump mouse. Nor can we easily determine that a statutory provision is sufficiently unimportant to be a mousehole—and not just a rather cramped circus tent. But where an ordinary observer might see ambiguity and uncertainty, the elephants-in-mouseholes doctrine finds antiregulatory certainty. It should be no surprise, then, that the Court applies the elephants-in-mouseholes doctrine seemingly haphazardly; those in the majority one day are in the dissent the next, and vice versa.

This uncertainty is unacceptable for a judicial doctrine. After all, "The reason why [law] is a profession, why people will pay lawyers to argue for them or to advise them," is because they "want to know under what circumstances" they must fear the force of the state[164] and "[t]he . . . notion of unknowable law is *literally* Orwellian."[165] Justice Scalia has noted,

> Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law

163. *Id.* at 2484 (citations omitted).

164. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

165. NetworkIP, LLC v. FCC, 548 F.3d 116, 122 n.5 (D.C. Cir. 2008) (citing GEORGE ORWELL, ANIMAL FARM (1946)).

> must have the means of knowing what it prescribes. . . . There are [thus] times when even a bad rule is better than no rule at all.[166]

It is obvious that there is a problem when a line of cases fails to produce a workable rule that can guide the decisionmaking of the regulated public. This problem plagues the elephants-in-mouseholes doctrine, as it is far from clear in practice when the doctrine applies and when it does not. The reason, moreover, why the elephants-in-mouseholes doctrine cannot be consistently applied is also obvious: its focus on "structure" quickly devolves into "strongly purposiv[ist] interpretative techniques,"[167] which, following from his dissent in *Ali*, is how Justice Breyer expressly understands the doctrine.[168] To interpret specific text by reference to a broad statutory purpose is to treat lightly one of the key insights of modern textualism, namely, that statutes often have no *one* overarching purpose that can explain each clause. Indeed, once a court starts looking for purposes instead of looking at words, the zone of possible disagreement expands, as *many* purposes—even conflicting purposes—may be found in complex regulation.[169]

A. Inconsistent Application

As the preceding tour through the Court's jurisprudence illustrates, the Court has failed to offer a clear rule for when the elephants-in-mouseholes doctrine applies. For instance, in *MCI*, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas found an elephant in a mousehole, but Justices Blackmun, Stevens, and Souter did not.[170] In *Brown & Williamson*, the same majority spotted another elephant hiding in the wall, but Justices Stevens, Souter, Ginsburg, and Breyer saw nothing of the sort.[171] On the other hand, in *Gonzales*, Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer trapped big game, but this time Chief Justice Roberts and Justices Scalia and Thomas said it was just a regular rodent.[172] In other decisions, only a dissenting minority could discern an elephant in a mousehole—Justices Breyer and Stevens in *Ali*,[173]

166. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

167. *See* Manning, *supra* note 17, at 235.

168. Ali v. Federal Bureau of Prisons, 128 S. Ct. 831, 849–52 (2008) (Breyer, J., dissenting) (describing how Justice Breyer would have approached the issue in question in *Ali* using a purposive interpretative method).

169. *See id.* at 850–51 (noting that different canons of construction contradict each other and concluding that the Latin canons are not helpful in this situation).

170. *See supra* Part I.B.i.1.

171. *See supra* Part I.B.i.2.

172. *See supra* Part I.B.iii.1.

173. *See supra* Part I.B.iii.2.

and Justices Stevens, Souter, and Ginsburg in *Entergy*[174] and *Coeur Alaska*.[175] All of the Justices said there was an elephant and a mousehole in *American Trucking*, but Justice Breyer's concurrence suggests that to him that was a special case.[176] Quite curiously, the only members of the Court who were in the majority in every one of these cases were Justices O'Connor and Kennedy, the "so-called swing Justices."[177]

But if these cases are viewed carefully, it becomes clear that it was not the "swing Justices" who swung—it was the rest of the Court. Until 2009, Justice Kennedy consistently found elephants in mouseholes, and during her years on the Court, Justice O'Connor always did. It was the other Justices who oscillated. In many of these cases, Justices Scalia and Thomas saw elephants in mouseholes, but in *Gonzales*, *Ali*, *Entergy*, and *Coeur Alaska*, they just saw an ordinary mouse. On the other hand, Justices Stevens and Souter saw unlawful mouseholes in *Gonzales*, *Entergy*, and *Coeur Alaska* (and Stevens saw another in *Ali*), but both Justices perceived ample regulatory room in *MCI* and *Brown & Williamson*. Justices Breyer and Ginsburg also saw an elephant hiding in a mousehole in *Gonzales* (and Breyer saw another in *Ali*, not to be outdone by Ginsburg spotting two, in *Entergy* and *Coeur Alaska*), but neither found one in *Brown & Williamson*.[178] So who was right? Were the respective agency's policy choices just "too big"? Were the respective statutory hooks just "too small"? The difficulty, of course, is that reasonable minds can, and quite evidently do, disagree. No position taken by any of the Justices in any of these cases is obviously correct. This is a problem if the rule of law is the law of rules.[179] How can lower courts follow this line of authority? What advice can a lawyer give a client?

In *MCI*, the Court rejected the FCC's rule because it held the term *modify* suggests a small regulatory change, not a statutory overhaul. But why? The dissenters argued that even under the majority's narrow definition of *modify*, the FCC's rule was permissible because the regulatory

174. *See supra* Part I.B.iii.3.

175. *See supra* Part I.B.iii.4.

176. *See supra* Part I.B.ii.1.

177. *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 349–50 (2003) ("On issues of social policy and federalism, Rehnquist Court decision making is largely defined by two Justices—Sandra Day O'Connor and Anthony Kennedy.").

178. Chief Justice Rehnquist was replaced by Chief Justice Roberts before *Gonzales* was decided, so we do not know whether he would have sided with Justices Scalia and Thomas or Justices O'Connor and Kennedy, the other members of the majority in *MCI* and *Brown & Williamson.*

179. Scalia, *supra* note 166, at 1179 ("Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.").

change was not *that* dramatic.[180] Justice Stevens also argued that Congress intended the FCC to have elephantine discretion, so there was no mousehole problem at all. The best the majority could say in response was the agency's view violated the "heart" of the statute. Likewise, in *Brown & Williamson*, the Court, relying on "common sense," held, *despite* the language of the relevant statute, that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[181] The Court thought regulating tobacco was an elephant, but there was no elephant pen, no circus, no trumpets and fanfare—and thus rejected the FDA's authority.[182] The dissenters, however, while agreeing that regulating tobacco is an elephant, nonetheless argued the plain language of the statute did not create a mousehole. By using broad language, Congress deliberately empowered the FDA to make these kinds of policy decisions in order to protect the public health.

In *Gonzales*, Justice Kennedy and the majority saw both an elephant—the regulation of assisted suicide—and a mousehole—the Attorney General's registration authority. But Justice Scalia merely saw an everyday mouse.[183] Indeed, even *American Trucking* raises questions, despite the fact that the entire Court found both an elephant and a mousehole.[184] After all, is the notion that the EPA can consider costs in setting air-quality standards really an honest-to-goodness elephant? And are seemingly broad words like *public health*, *adequate*, and *requisite* just mouseholes, or do they reflect congressional authorization for the EPA to consider a wide variety of factors in making its decision? And is *American Trucking*, which prohibited considering costs, consistent with *Entergy Corp.*, which allowed it?

As one reviews the short history of the elephants-in-mouseholes doctrine, it becomes apparent that those who are in the majority one day are in the dissent the next, and vice versa, and that no consistent doctrinal rule for the Court has emerged. It is exceedingly difficult, for instance, to reconcile *Brown & Williamson* with *Gonzales*, yet nearly the entire Court flipped positions. To apply *Chevron* in this puzzling way puts the Court on a dangerous path to "I know it when I see it"—indeed, ironically, if an agency's own decisionmaking were so muddled, a court might strike its test down as arbitrary and capricious.[185]

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180. *See supra* Part I.B.i.1.
181. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 160 (2000).
182. *See supra* Part I.B.i.2.
183. *See supra* Part I.B.iii.1.
184. *See supra* Part I.B.ii.1.
185. Ne. Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166–67 (D.C. Cir. 1990) (holding arbitrary and capricious the FCC's waiver of financial qualification for cellular company because the agency did "not articulate any standard by which [the court could] determine the

B. Tension with Textualism

Modern textualist theory explains why the elephants-in-mouseholes doctrine is doomed to incoherence. The doctrine depends on there being an overarching statutory purpose that can explain each specific provision of a statute; what else does it mean to say a statute has a "heart" or a change is "fundamental"? But that purposivist premise collides into the insights of textualist theory, which says that often statutory "schemes" have no single purpose. As Manning has explained, given the realities of the legislative process, each statutory phrase must stand by itself, and to read specific language in reference to broad statutory purposes (which the Court somehow must divine) is to upset or even undermine Congress's precise bargain.[186] Because there often is no one purpose, it is not surprising that judges cannot agree on what the purpose is. In other words, the elephants-in-mouseholes doctrine's entire premise rings false. *Of course* Congress hides elephants in mouseholes, or at least tries to.

In this age of textualism,[187] it is now well understood that often "statutes [are] products of innumerable and sometimes hasty and pragmatic compromises,"[188] and the "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."[189] After all, "Congress may be unanimous in its intent

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policy underlying the waiver").

186. *See* Manning, *supra* note 17, at 247–48 (describing the implications of narrow construction of statutes on the legislative process).

187. *See, e.g.*, Marjorie O. Rendell, *2003—A Year of Discovery:* Cybergenics *and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) ("We are all textualists now. No doubt the major methodological development in Supreme Court jurisprudence over the last few decades has been the ascendancy of the plain meaning approach to interpreting statutes.").

188. Abbott Labs. v. Young, 920 F.2d 984, 994 (D.C. Cir. 1990).

189. Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986).

> Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved. Whether these issues have been identified (so that the lack of their resolution might be called intentional) or overlooked (so that the lack of their resolution is of ambiguous portent) is unimportant. What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

> Modern textualism, which emerged in the late twentieth century, maintains that, contrary to the tenets of strong intentionalism, respect for the legislative process requires judges to adhere to the precise terms of statutory texts. In particular, textualists argue that the (often unseen) complexities of the legislative process make it meaningless to speak of 'legislative intent' as distinct from the meaning conveyed by a clearly expressed statutory command.

John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."[190] Thus, the "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."[191] In short, for modern textualists, "Congress has no intent or purpose distinct from those explicitly stated in the statutory text."[192] Under this compromise-heavy conception of legislation, democratic theory requires courts to enforce specific text and not attempt to find unifying coherence where there is none.[193]

One need not be a card-carrying textualist, however, to acknowledge that the legislative process is complicated and that legislation is often the result of many congressional compromises, which are reflected in statutory text.[194] Indeed, anyone who watched even in passing the legislative debates surrounding the economic stimulus packages in late 2008 and early 2009 can have no doubt that legislating is an untidy business, full of hard-nosed politics in every sense of the term.[195] But once one acknowledges statutes are often the result of compromises, a serious theoretical flaw in the Court's elephants-in-mouseholes doctrine is exposed: On what basis can it be said that Congress "does not alter the fundamental details of a regulatory

190. *Dimension Fin. Corp.*, 474 U.S. at 374.

191. *Id.*

192. Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 552 (2009); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997) ("Intent is elusive for a natural person, fictive for a collective body." (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994))); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984).

193. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997) ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

194. Then-Judge Scalia's opening in *Community Nutrition Institute v. Block* is only funny because this complexity is so well understood. *See* 749 F.2d 50, 51 (D.C. Cir. 1984) ("This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'").

195. To be clear, we cast no aspersions towards these "political" aspects of the legislative process. Legislation, after all, may have its faults, but "critical analysis is misleading if it proceeds on the premise that those defects should be measured by the 'nirvana' standard, where any deviation from an unobtainable ideal is grounds for criticism." Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 109–110 (1991). Instead, the true basis for putting one's faith in the democratic process is not a naive belief that it will always produce the best results, but a lack of naiveté about the alternatives. Or, as Winston Churchill once put it, "democracy is the worst form of Government except all those other forms that have been tried from time to time." *Id.* at 110 (quoting OXFORD DICTIONARY OF MODERN QUOTATIONS 55 (Tony Augarde ed., 1991)).

scheme in vague terms or ancillary provisions"? How can a court decide what is "fundamental" and what is "ancillary," if there is no one purpose that explains each specific provision of the statute?

Think about it this way. Does anyone doubt that "Congress" inserts clauses in bills that agencies can use to produce profound policy shifts? It has been observed, for example, that legislatures attempt to avoid criticism for policy choices by transferring the blame to other entities.[196] If so, it would be hardly surprising for legislators to add provisions in omnibus bills that, employing ordinary *Chevron* analysis, can be used by the administering agency to implement a consequential policy change, but to do so while deliberately seeking not to leave *too* many congressional fingerprints. Or, in a scenario that ought to be familiar to all transactional lawyers trading redlines in the midst of a frenzied deal, it is realistic to assume that some congressional faction might try to "pull a fast one" on others by injecting into a bill a provision with far-reaching effects.[197]

These sorts of things obviously happen, but the elephants-in-mouseholes doctrine pretends otherwise.[198] There may be reasons to craft such a legal

196. *See, e.g.*, Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 477 & n.281 (1999) (noting "legislators will try to shift blame to the IRS for the embarrassment of Congress's own making" as "Senators and Representatives vote to add new incentives, subsidies, anti-abuse rules, exemptions, transitional rules, and obscurities to the law—then thunder against the complexity of the 'IRS Code,' as if the IRS, not Congress, enacted those complexities"); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–57 (1982) ("But by having an agency enforce the regulation the congressman can shift some degree of both the credit and blame to the agency. The degree to which a legislator succeeds in shifting credit or blame to the agency can vary, and will determine his choice of agency or judicial enforcement. If he succeeds in shifting to the agency a preponderantly large part of the blame, then the legislator will prefer agency regulations to judicially enforced statutes. Conversely, if delegation shifts credit for the benefits to the agency, then the legislator will prefer the judicially enforced statutes to regulation by agency.")

197. *See, e.g.*, John M. Baker, *Dr. Strangebill or How the Last Congress Learned to Stop Worrying and Love Substantive Due Process*, 54 FED. LAW., Oct. 2007, at 42 (explaining how a clause directing courts to apply a robust substantive due process doctrine in property rights cases passed the House of Representatives, with speculation that

> some unidentifiable person—a staff member, a developer, a lobbyist, or perhaps even a member of Congress—had included th[e] language in the takings bill . . . hoping that the unusual political dynamics created by the *Kelo* [*v. City of New London*, 545 U.S. 469 (2005)] backlash and an election year, plus the congressional Republicans' renowned party discipline, created a once-in-a-lifetime opportunity to pull a fast one. Indeed, the failure of this provision to attract any flak from any member of the majority party during the subcommittee hearing or floor consideration—and the unwillingness of any member of any party to offer any amendments to the bill on the House floor—make such a strategy seem brilliant.

(endnote omitted)).

198. Indeed, if conduct of this sort did not happen, the lobbyists who read carefully the countless iterations of bills being debated during the legislative process may be doing so for no real reason and clients may be paying those lobbyists for no real reason. We will trust the market on this one. Moreover, consistent with "the interest-group branch of public

fiction,[199] but pretending away reality makes it difficult to give effect to Congress's compromise, as reflected in the specific textual provisions of a statute.[200] After one acknowledges that legislation often is the result of "back-room deals"[201] and diverse individual compromises, as the Court has done and its theoretical defense of textualism in part presupposes, then no one should be surprised that searching for a comprehensive purpose is often a futile exercise, as different textual clauses may be motivated by different purposes. It consequently is not at all surprising that the Court has found it difficult to apply the elephants-in-mouseholes doctrine or that Justice Breyer has unambiguously linked the elephants-in-mouseholes doctrine to purposivism.[202]

III. A NONDELEGATION JUSTIFICATION FOR THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE

The elephants-in-mouseholes doctrine is contrary to traditional *Chevron* analysis. Even in the face of text that supported the regulations, as in *Brown & Williamson*, the Court nullifies agency action, and even when the statute is ambiguous, as in *MCI* and *Gonzales*, the Court denies deference. The doctrine also is in tension with modern textualism. It in effect requires a court to posit a statutory purpose and then evaluate whether agency action is consistent with that posited statutory purpose. With these theoretical difficulties lurking in the background, it should be unsurprising that courts have trouble applying this doctrine in a consistent manner.

Why, then, has the Court created the elephants-in-mouseholes doctrine instead of simply deferring under *Chevron*? Is not a broad but ambiguous

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choice theory, which argues that legislation is an economic good purchased by interest groups," many consider "[*a*]*ctual statutory language* [*to be*] *the dearest legislative commodity*" up for grabs. Manning, *supra* note 192, at 687 (emphasis added) (citing, inter alia, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971)).

199. *See, e.g.*, Sunstein, *supra* note 9, at 232 ("The most plausible source of the idea that courts should not defer to agencies on larger questions is the implicit delegation principle accompanied by an understanding of what reasonable legislators would prefer. Judge Breyer appeared to think that Congress should be understood to want agencies to decide interstitial questions, but to prefer that courts resolve the larger ones, which are necessary to clarify and stabilize the law."); *see also* Bressman, *supra* note 192, at 555–56 (arguing that the majority's approach in *Gonzales* was "based on realistic assumptions about legislative behavior").

200. *See* Manning, *supra* note 17, at 228 ("Narrowing a statute in this way . . . threatens to unsettle the legislative choice implicit in adopting a broadly worded statute.").

201. *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1006 (2006) (suggesting that the Judiciary should not allow individual rights to be subjected to the public policies implemented by Congress through these sort of behind-the-scenes deals).

202. Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 850–51 (2008) (Breyer, J., dissenting).

statutory provision a paradigmatic case for *Chevron* deference? We contend the explanation is not results-orientated decisionmaking but instead is found in long-standing principles of administrative law. Although the Court has effectively given up policing the nondelegation doctrine directly, the Court is still concerned about agencies making important policy choices. So the Court has attempted to craft a new canon of statutory construction to minimize what it perceives to be excessive delegation. It surely is no coincidence that the same decision heralding the death of the nondelegation doctrine also simultaneously announced the birth of the elephants-in-mouseholes doctrine.[203] Even if Congress has enacted a broadly phrased statute, and even if under traditional *Chevron* principles the agency's policy choice is permissible, when the Court believes that the agency's use of its discretion is too substantial vis-à-vis the asserted statutory hook, it will void that agency action and require Congress to affirmatively grant the specific power at issue. Accordingly, while not striking down statutes under the nondelegation doctrine, the Court has nonetheless wielded the elephants-in-mouseholes doctrine to limit delegations of authority.

A. The Nondelegation Doctrine

Whether accurately or not,[204] the Court has reasoned that because the Constitution vests "all legislative Powers" in Congress, "Congress generally cannot delegate its legislative power to another Branch."[205] As the Court has emphasized, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the

203. *See supra* Part I.B.ii.1.

204. Eric Posner and Adrian Vermeule have argued there is no constitutional basis for this doctrine. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1331 (2003) ("[T]he standard nondelegation doctrine has no real pedigree in constitutional text and structure"). This argument, unsurprisingly, has not gone unrefuted. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1328 (2003) (supplying "some reasons for doubting" the theory put forth by Posner and Vermeule); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 237 (2005) (arguing that the Constitution does contain limitations on the extent to which Congress can delegate discretion to agencies). Though not necessary for our purposes (it is not relevant whether we believe in the constitutional foundation of the nondelegation doctrine, only that the Court does), we think, for the reasons set forth in this Part, the doctrine is more than just "a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn't clearly adopted by the Supreme Court until 1892, and even then only in dictum." Posner & Vermeule, *Interring the Nondelegation Doctrine*, *supra*, at 1722.

205. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (citations and internal quotation marks omitted).

integrity and maintenance of the system of government ordained by the Constitution."[206] Hence, "the conventional doctrine requires Congress to supply something like an 'intelligible principle' to guide and limit executive discretion."[207]

In addition to the Constitution's separation-of-powers principle, the nondelegation doctrine has found numerous policy justifications.[208] And its historical roots run deep—from John Locke to John Marshall. In his *Second Treatise of Government*, published in 1690, John Locke wrote,

> The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.[209]

Chief Justice Marshall also distinguished between "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[210]

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206. Field v. Clark, 143 U.S. 649, 692 (1892). Indeed, as Justice Scalia has put it:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

Mistretta, 488 U.S. at 415 (Scalia, J., dissenting). Justice Scalia's formulation of the doctrine, focusing as it does on the legislative branch making policy with the executive branch having a limited role, invites the question of the judiciary's role as recipient of delegated power. Margaret Lemos recently has offered a compelling argument that the nondelegation doctrine should also apply when the federal judiciary makes important policy decisions, such as in the antitrust context. *See* Lemos, *supra* note 14, at 463–64 (arguing that Courts provide the content and substantive meaning of the Sherman Act and, in doing so, contravene "the formal nondelegation doctrine").

207. Sunstein, *supra* note 16, at 318.

208. Justice Rehnquist observed,

> [T]he nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (citations omitted).

209. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 75 (C.B. Macpherson ed., 1980) (1690).

210. Lawson, *supra* note 204, at 236 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

Additionally, "by virtue of requiring legislators to agree on a relatively specific form of words, the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law."[211] Though this may create a "status quo bias [in] administrative law,"[212] these "burdens and costs" can also be seen as "an important guarantor of individual liberty, because they ensure that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words."[213] As Manning puts it, "Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking."[214] Indeed, "the cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the 'more is better' attitude that has come to be almost an unconscious assumption of public law."[215] Because delegation enables "lawmaking on the cheap," adherence to the nondelegation doctrine safeguards important "interests by forcing specific policies through the process of bicameralism and presentment."[216] Moreover, "the nondelegation doctrine also promotes rule of law values" similar to those protected by "the void for vagueness doctrine" in the criminal context.[217] For instance, "By ensuring that those asked to implement the law be bound by intelligible principles, the nondelegation doctrine" serves the purpose of "provid[ing] fair notice to affected citizens and also to discipline the enforcement discretion of unelected administrators and bureaucrats."[218]

Despite the arguments in favor of applying the nondelegation doctrine (especially for "highly sensitive decisions"),[219] however, the Court has applied it only twice to invalidate statutes—both in 1935, one of which "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"[220] This is so despite many ripe opportunities, including a statute giving an "agency power to fix the prices of commodities at a level that 'will be generally fair and equitable and will effectuate

211. Sunstein, *supra* note 16, at 320.
212. Sunstein, *supra* note 9, at 246.
213. Sunstein, *supra* note 16, at 320.
214. John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198 (2007).
215. *Id*. at 199.
216. Manning, *supra* note 17, at 240.
217. *See* Sunstein, *supra* note 16, at 320.
218. *Id.*
219. *Id.* at 317.
220. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

the . . . purposes of th[e] Act,'"[221] statutes "authorizing regulation in the 'public interest,'"[222] and a statute granting the "Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not 'unduly or unnecessarily complicate[d]' and do not 'unfairly or inequitably distribute voting power among security holders.'"[223] As Sunstein sees it, for nondelegation, "the conventional doctrine has had one good year, and 211 bad ones (and counting)."[224]

The principal reason that the Court does not enforce the nondelegation doctrine more vigorously is that no method has been created that can police the boundary between law execution and delegation in an analytically coherent and principled way.[225] As explained by Justice Scalia,

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[226]

No judicially administrable test has been created that captures this nuance, "hence [enforcing] the nondelegation doctrine . . . violate[s] its own aspirations to discretion-free law."[227] For instance, the best articulation that Chief Justice Taft could come up with is that "the limits of delegation 'must be fixed according to common sense and the inherent

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221. *Id.* (citing Yakus v. United States, 321 U.S. 414, 420 (1944)).

222. *Id.* (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–27 (1943); N.Y. Cent. Secs. Corp. v. United States, 287 U.S. 12, 24–25 (1932)).

223. *Id.* (citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)).

224. Sunstein, *supra* note 16, at 322.

225. Justice Scalia has argued that it is a misunderstanding of the nondelegation doctrine to distinguish between "unconstitutional delegations of legislative authority" and "lawful delegations of legislative authority," because "the latter category does not exist." Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring). Instead, "[l]egislative power is [always] nondelegable," but Congress can "*assign responsibilities* to the Executive . . . as the agent of the People," though "[a]t some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power." *Id.* at 777. This position has not gone unrebutted. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 490 (2001) (Stevens, J., concurring) ("[W]hen Congress enacted § 109, it effected a constitutional delegation of legislative power to the EPA.").

226. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). Just as the theory of the nondelegation doctrine has a long-standing pedigree, the practice of actual delegation has been occurring since the earliest days of the Republic. For instance, "The first Congress granted military pensions, not pursuant to legislative guidelines, but 'under such regulations as the President of the United States may direct.'" Sunstein, *supra* note 16, at 322 (citing An Act Providing for the Payment of the Invalid Pensioners of the United States, 1 Stat. 95 (1789)).

227. Sunstein, *supra* note 16, at 321.

necessities of the governmental co-ordination.'"[228] Some help. Because there is no easily administered test to distinguish constitutional execution from unconstitutional delegation, in *American Trucking*, the Court, with the exception of Justice Thomas, in effect gave up on directly enforcing nondelegation as a constitutional doctrine, noting that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[229] Moreover, aside from these "serious problems of judicial competence," directly enforcing the doctrine "would greatly magnify the role of the judiciary in overseeing the operation of modern government," and might not "do anything to improve the operation of the regulatory state."[230] For these reasons, and because enforcing the nondelegation doctrine would "embroil[] courts in direct conflict with Congress"—thus causing "destabilizing effects on . . . the government, the regulated parties, and the public" and forcing Congress to either reenact the statute or accept a gap in regulation—the Court is reluctant to do so, especially with nothing more to rest on than a difficult-to-administer test.[231]

B. Nondelegation Canons

While the Court has stopped directly policing the line between what is permissible and what is not, it has not surrendered the principles that underlie the nondelegation doctrine. Instead, the doctrine "has been relocated rather than abandoned."[232] Because it cannot be judicially administered in a principled way, the Court has had to look for proxies to enforce the nondelegation doctrine. One common method has been to interpret broadly phrased statutes more narrowly than their text suggests, thus avoiding nondelegation concerns. Indeed, the Court itself has stated, "In recent years, our application of the nondelegation doctrine principally

228. *Mistretta*, 488 U.S. at 415–16 (Scalia, J. dissenting) (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)). This is similar to Justice O'Connor's statement in *Brown & Williamson* that courts "must be guided to a degree by common sense" in determining whether "Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

229. Whitman v. Am. Trucking Ass'ns, 531 U.S. at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

230. Sunstein, *supra* note 16, at 321; *see also id.* at 327 (noting that giving the Judiciary power to enforce the nondelegation doctrine might itself violate the principles of the nondelegation doctrine, as there are no "clear standards" the Judiciary can employ when exercising this power "to second-guess legislative judgments").

231. Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1419 (2000).

232. *See* Sunstein, *supra* note 16, at 315–16 (arguing that the nondelegation doctrine is thriving and still used by federal courts, albeit as a series of smaller, specific rules rather than as a doctrine per se).

has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise be thought to be unconstitutional."[233]

For instance, in the oft-cited *Benzene* case,[234] Justice Stevens, writing for a plurality (and using language reminiscent of the elephants-in-mouseholes cases), was confronted with 28 U.S.C. § 655(b)(5), which stated that the Secretary of Labor,

> in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life.[235]

The Court noted,

> Wherever the toxic material to be regulated is a carcinogen, the Secretary [of Labor] has taken the position that no safe exposure level can be determined and that [the statute] require[d] him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated.[236]

Despite the Act's broad language,[237] Stevens rejected this view, holding the Department was required to "find, as a threshold matter, that the [toxin] poses a significant health risk in the workplace and that a new, lower standard is therefore 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'"[238] Stevens noted, "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view," and if the Department's view was upheld, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under [principles of nondelegation]."[239]

Consistent with this approach, Cass Sunstein has argued that the nondelegation doctrine has not been interred but "merely . . . renamed and relocated" to "a set of nondelegation canons, which forbid executive

233. *Mistretta*, 488 U.S. at 373 n.7.

234. Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980); *see also* Lemos, *supra* note 14, at 455 n.240 (citing other cases decided along similar grounds, i.e., constructing textually broad statutes narrowly so as to avoid nondelegation problems).

235. *Benzene*, 448 U.S. at 612.

236. *Id*. at 613.

237. *See* Manning, *supra* note 17, at 244 (describing § 6(b)(5) of the Occupational Safety and Health Act as containing "very open-ended regulatory criteria").

238. *Benzene*, 448 U.S. at 614–15 (citing 28 U.S.C. § 652(8) (2000)).

239. *Id.* at 645–46.

agencies from making certain decisions on their own."[240] For instance, according to Sunstein, under these canons "Congress must affirmatively authorize the extraterritorial application of federal law" and "[w]hen treaties and statutes are ambiguous, they must be construed favorably to Native American tribes."[241] Similarly, "agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts," "to interpret ambiguous provisions so as to preempt state laws," "to apply statutes retroactively," or to exempt some from taxes or withhold benefits from veterans.[242] Also, as illustrated by the *Benzene* case, there is "a genuinely novel nondelegation principle" (unlike the others, this one is wholly "a creation of the late twentieth century") that says "agencies are sometimes forbidden to require very large expenditures for trivial or de minimis gains. If Congress wants to be 'absolutist' about safety," it must make a clear statement, but by themselves "agencies will not be allowed to take ambiguous language in this direction."[243]

Sunstein favors the use of these easily administrable canons, at least compared to directly enforcing the nondelegation doctrine, "because they are subject to principled judicial application, and because they do not threaten to unsettle so much of modern government."[244] In other words, for courts, nondelegation canons are "a more cautious way of promoting the relevant concerns."[245] In theory, by these canons, which "find[] clarity in ambiguity in order to deprive an agency of discretion," "the Court effectively may block the delegation of policymaking authority" but without directly standing in the way of congressional will.[246] Though they are "barriers" when applied ex post, going forward they need not be "[s]o long as government is permitted to act when Congress has spoken clearly."[247] "In this way, the nondelegation canons [can be] understood as a species of judicial minimalism, indeed democracy-forcing minimalism . . . ."[248]

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240. Sunstein, *supra* note 16, at 315.

241. *Id.* at 316 (explaining that in these circumstances the agency's own judgment is not relevant to the determination of the meaning of the treaty or statute).

242. *Id.* at 331–32, 334.

243. *Id.* at 334–35 (footnote omitted).

244. *Id.* at 315.

245. *Id.* at 332.

246. Bressman, *supra* note 231, at 1411–12.

247. Sunstein, *supra* note 16, at 335.

248. *Id.* David Driesen argues, with some force, that it is improper to characterize most of Sunstein's normative canons as *nondelegation* canons. David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 24 (2002). For instance, he contends these canons "reflect no particular concern with the problem that Sunstein focuses upon, delegation to administrative agencies"; instead, they implicate substantive values, "regardless of whether an agency has an interpretative role." *Id.* (citation omitted). Though this point is well taken, we think Sunstein's canons can be

C. The Elephants-in-Mouseholes Doctrine as a Nondelegation Canon

Despite the criticism of some of these cases—particularly *Brown & Williamson*, which has been called "an unalloyed act of judicial activism, the sort of activism that conservatives normally decry"[249]—the elephants-in-mouseholes doctrine was not created to enable the Court's pursuit of its own policy preferences, nor does it inevitably do so. For instance, as Richard Pierce has observed, *MCI* is noteworthy because it "does not seem to fit the conservative agenda."[250] Likewise, the policy in *American Trucking* was almost certainly contrary to *Justice* Scalia's policy preferences: "[T]he Clean Air Act emerge[d] looking much like it did when enacted, placing health above all other interests, pursuing (unreachable) risk-free goals—in short, a classic example of '1970s environmentalism'"[251] of the sort derided by *Professor* Scalia.[252] Nonetheless, for the Court, Scalia's "methodological commitments compelled the interpretation the statute received."[253] Unfortunately, because the elephants-in-mouseholes doctrine cannot be administered in a consistent way, its invocation "[is] likely to suffer from the appearance, and perhaps the reality, of judicial hostility to the particular program at issue."[254]

Instead of being a cloak for judicial policymaking, we contend the elephants-in-mouseholes doctrine is the Court's latest attempt to implement

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deemed to reflect nondelegation concerns as well. In particular, because the interests implicated by these canons are important, the Court will allow them to be set aside, but only if Congress itself so states. In other words, the Court has determined that these questions are for Congress alone to decide.

249. David C. Vladeck & Alan B. Morrison, *The Roles, Rights, and Responsibilities of the Executive Branch*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 169, 175 (Herman Schwartz ed., 2002).

250. *See* Pierce, *supra* note 18, at 780 n.185.

251. Herz, *supra* note 12, at 342.

252. *See, e.g.*, *id.* at 338 (noting that prior to becoming a judge, Justice Scalia was the editor of *Regulation* magazine and his "strong deregulatory convictions . . . were on prominent display"). Though Scalia expressed muscular criticisms of many federal laws, *see, e.g.*, JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA 15 (2006) (As editor of *Regulation*, Scalia labeled an amendment to the Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost/Benefit Analysis Ignored." (quoting Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.–Apr. 1982, at 15)), it is, of course, an unfair caricature—to be clear, not one we ascribe to Professor Hertz—to say Justice Scalia categorically opposes *all* federal regulation. *See, e.g.*, Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 22 (1982) (There is an "unfortunate tendency of conservatives to regard the federal government, at least in its purely domestic activities, as something to be resisted, or better yet (when conservatives are in power) undone, rather than as a legitimate and useful instrument of policy. Such an attitude is ultimately self-defeating, since it converts the instrument into a tool that cuts only one way.").

253. Herz, *supra* note 12, at 342.

254. Sunstein, *supra* note 16, at 327.

a delegation-policing approach similar to that used in the *Benzene* case. In particular, as in *Benzene*, to minimize excessive delegation, the Court uses statutory interpretation instead of judicial invalidation, thereby avoiding direct enforcement of the nondelegation doctrine. Following *American Trucking*, the Court will not actively forbid nondelegation qua nondelegation, but the Court still believes it can protect the values served by the nondelegation doctrine.

There is, however, an important difference, and one that has not been appreciated in the literature,[255] between the elephants-in-mouseholes doctrine and the most aggressive statutory approach to the problem of delegation. The elephants-in-mouseholes doctrine is an *intermediate* doctrine. The Court has not given up on delegation, but it does not use statutory construction in the most forceful possible way to confine it either. Instead, the Court has limited this canon to only a particular subset of nondelegation cases. In this way, the elephants-in-mouseholes doctrine is designed to be a more judicially manageable and less controversial method of limiting excessive delegation.

We will be precise. The most aggressive version of a nondelegation canon would require the Court itself to "posit[] a plausible background purpose to restrict otherwise broad and unqualified statutory language"[256] in *all* cases where the Court confronts a broad delegation of authority, no matter how the text actually reads, and no matter how difficult it is to find such a plausible principle. The elephants-in-mouseholes doctrine does not do this. Instead, it aspires to a more mechanical and more modest application. The elephants-in-mouseholes doctrine purports to apply *whenever* there is (1) a broad exercise of power (2) premised upon an ancillary statutory provision. Likewise, though the Court did so in *Brown & Williamson* and *Gonzales*, under the elephants-in-mouseholes doctrine, it is not logically necessary to consider legislative history or postenactment congressional action.[257] Instead, again at least in theory, the Court can just examine the statutory text, guided by "common sense,"[258] to determine if the proffered interpretation greatly expands agency authority on the basis

255. Sunstein, for instance, has articulated his theory of "major questions"—which omits *Gonzales* and *American Trucking*—but does not reference this two-part test. *See* Sunstein, *supra* note 9, at 236–47. Likewise, in her excellent article on the major question doctrine, Abigail Moncrieff does not address this feature of the Court's doctrine, in fact failing to mention elephants-in-mouseholes at all. *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 607–20 (2008).

256. *See* Manning, *supra* note 17, at 244.

257. *See, e.g.*, Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 773 (2007) (noting that in both cases the Court "considered subsequent legislative history").

258. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

of minor statutory authorization and, if so, forbid the action. This is intended as a more manageable test.

At the same time, the elephants-in-mouseholes doctrine's intermediacy also renders it more modest. Because the doctrine only applies when there is *both* a significant expansion of agency authority *and* an ancillary statutory hook, many potential violations of the nondelegation doctrine cannot be averted by this particular canon. As long as the cited statutory authorization is not a mere "mousehole," the elephants-in-mouseholes doctrine is irrelevant, even for very broad delegations of legislative authority. Instead, under the doctrine's logic, the broader the delegation's terms, the less appropriate is the elephants-in-mouseholes inquiry.[259] But the Court nonetheless accepts this underinclusiveness as the necessary cost of manageability.

An example of the elephants-in-mouseholes doctrine's underinclusiveness is found in *Massachusetts v. EPA*.[260] There, Justice Stevens for the Court "held that EPA contravened the Clean Air Act [] when it *refused* to regulate vehicular emissions of greenhouses gases."[261] Whether EPA can regulate such gases, with the resulting costs on the economy, is surely a major policy question,[262] and the agency, in fact, disavowed such authority on the grounds that it was too much power.[263] No member of the Court, however, cited the elephants-in-mouseholes doctrine, including Justice Scalia in his *Chevron*-heavy dissent.[264] The reason, we contend, the elephants-in-mouseholes doctrine was not invoked in *Massachusetts v. EPA* is that the statutes at issue there empower the EPA Administrator to set emission standards for "any air pollutant . . . which in his judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," with *air pollutant* defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or

259. In fact, applying the elephants-in-mouseholes doctrine may actually *encourage* broad delegations. If Congress wants to delegate with confidence, it will be forced to "use meaningless standards in statutes that delegate power to agencies in order to avoid the high risk of judicial interpretations inconsistent with Congress's intent." Pierce, *supra* note 18, at 777.

260. 549 U.S. 497 (2007).

261. Moncrieff, *supra* note 255, at 603.

262. *See, e.g.*, WILLIAM W. BEACH ET AL., HERITAGE FOUND. CTR. FOR DATA ANALYSIS, THE ECONOMIC COSTS OF THE LIEBERMAN–WARNER CLIMATE CHANGE LEGISLATION (2008), http://www.heritage.org/Research/EnergyandEnvironment/cda08-02.cfm (estimating the costs of EPA regulation of greenhouse gases to be "at least $1.7 trillion and [up to] $4.8 trillion by 2030 (in inflation-adjusted 2006 dollars)").

263. 549 U.S. at 512; *see also* Moncrieff, *supra* note 255, at 603–07 (discussing EPA's argument for refusing to regulate greenhouse gases).

264. Massachusetts v. EPA, 549 U.S. at 558–60 (Scalia, J., dissenting).

matter which is emitted into or otherwise enters the ambient air."[265] This is capacious agency authorization. Regulating greenhouse gases is obviously an "elephant," but no member of the Court found the broad statutory language to be a "mousehole." Consequently, even for a significant and highly costly expansion of agency authority, the elephants-in-mouseholes doctrine could do no work.[266]

IV. WHY THE ELEPHANTS-IN-MOUSEHOLES DOCTRINE SHOULD STILL BE ABANDONED

Though the intermediate elephants-in-mouseholes doctrine may appear to be a better proxy for the nondelegation doctrine than the most aggressive statutory approach to nondelegation, the elephants-in-mouseholes doctrine still should be abandoned. Better does not mean good enough. Just as with the most aggressive statutory approach, the elephants-in-mouseholes doctrine still poses problems for judicial legitimacy and judicial administration that are too serious to be allowed to persist.

First, there are legitimacy problems. The notion that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" is premised more in normative aspiration than legislative reality and is startlingly out of sync with the Court's modern approach to statutory language. As reflected in the Court's theoretical justifications of textualism, the legislative process is complicated, and in the rough-and-tumble of democratic politics it is not at all unthinkable that Congress *does* "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—if only the Court will let it. The Court's conclusion to the contrary, therefore, raises profound questions about the judicial function: Is it really the Court's place to upend Congress's bargain by reading a statute to mean something other than what Congress understood it to mean, as expressed in the text?

The elephants-in-mouseholes doctrine's failure to reflect realistically the legislative process matters a great deal because reading a statute in an unusual way to achieve normative goals apart from those selected by Congress imposes costs on the lawmaking process. Given "[legislative] inertia and multiple demands on Congress's time," it is likely that Congress

265. 42 U.S.C. §§ 7521(a)(1), 7602(g) (2000).

266. Abigail Moncrieff argues that *Massachusetts* "unceremoniously killed [the] fledgling" *Brown & Williamson* line of cases because "[t]he substantive logic in *Massachusetts* is, in the end, fundamentally incompatible" with the Court's "major question" doctrine. *See Moncrieff*, *supra* note 255, at 595, 598. This is not necessarily true, if *Massachusetts* is seen as a non-mousehole case and thus distinguishable from *Brown & Williamson*. Of course, it is difficult to find the statutory language in *Brown & Williamson* to be a mere mousehole, so this distinction may not be warranted.

will simply retain the Court's construction of the statute, meaning the canons, "in practice, [may] operate as more than presumptions" but actually as "barriers . . . with respect to purely administrative (or executive) judgment on the matters in question."[267] For the Court to impose such lawmaking costs raises questions about judicial legitimacy.[268]

Some might argue that it need not matter whether the elephants-in-mouseholes doctrine reflects what actually happens in Congress. They may point out that, like other canons of construction, the elephants-in-mouseholes doctrine protects a normative value apart from merely discerning legislative meaning—and that this is an acceptable judicial practice.[269] That counterargument, however, is unsatisfactory because we doubt it is ever appropriate for a court to implement constitutional "values" if it requires setting aside an otherwise-normal reading of a statute. To be sure, if a statute is unconstitutional, a court must not let it stand. But it is a different question altogether whether a court can modify an otherwise-standard reading of a statute in its pursuit of something else. As put by Justice Scalia, "Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it."[270] So do we. And even if a court can set aside otherwise standard readings in some instances to protect some values, this is neither such an instance nor value. Again as put by Justice Scalia, some normative canons—for instance, the rule of lenity—may be justified by "sheer antiquity."[271] But even though the nondelegation doctrine has been a feature of American law since, at the latest, Chief Justice Marshall,[272] no such historical pedigree supports the elephants-in-mouseholes doctrine as a normative canon of construction.[273] While Sunstein finds it "easy to

267. Sunstein, *supra* note 16, at 335, 339.

268. *See* Manning, *supra* note 17, at 238 (noting that the nondelegation doctrine prevents Congress from delegating its legislative powers to the Judiciary).

269. For instance, as noted by Kenneth Bamberger, it is well accepted that methods of statutory interpretation "also implicate a variety of background norms—like respect for the rights of regulated parties, protection of the interests of states and Native American tribes, avoidance of government bias, and separation of powers—inspired, not by Congress's command, but by the substantive and structural concerns of the Constitution." Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008).

270. SCALIA, *supra* note 193, at 29; *see also* Manning, *supra* note 17, at 256 ("[I]f the Court alters the meaning of an open-ended statute in order to avoid nondelegation concerns, it apparently disturbs whatever choice or compromise has emerged from that process. This creates the perverse result of attempting to safeguard the legislative process by explicitly disregarding the results of that process.").

271. SCALIA, *supra* note 193, at 29.

272. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (holding that Congress cannot delegate to the courts those "powers which are strictly and exclusively legislative").

273. Sunstein, *supra* note 16, at 341 (noting that the nondelegation canon is generally

imagine the introduction of new canons" to address new "problems in regulatory law,"[274] we are less enthusiastic.

Another counterargument in favor of the elephants-in-mouseholes doctrine is that it is used in response to *Chevron*, a pro-delegation canon. Since *Chevron* also does not have a historical pedigree, on what basis can one condemn as illegitimate the Court's failure to apply *Chevron* in an instance where there are countervailing issues at stake? But if the Court finds an elephant in a mousehole, it does more than merely decide the question de novo. Instead, it categorically denies the agency action.[275] Moreover, this counterargument is better understood as an argument against *Chevron* altogether, for if an antidelegation canon of construction is suspect as contrary to congressional intent, then why isn't a pro-delegation canon also suspect? The appropriateness of *Chevron* in *any* case is a question we leave for another day, though we do agree that *Chevron* Step One must receive more than a cursory nod.

Second, and in any event, the elephants-in-mouseholes test is not judicially administrable. When it comes to actually implementing the doctrine, judges acting in good faith will not agree—the line between rodent and pachyderm is not definable. The elephants-in-mouseholes doctrine is thus anything but "easily administrable."[276] Indeed, problems of judicial administration similar to those that plague the nondelegation doctrine also afflict its more evanescent proxy, as there is no consistent way to determine when the doctrine should apply. For instance, applying the canon that "unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear,"[277] is much easier to do than asking whether an otherwise-permissible construction of a statute is nonetheless invalid because the resulting policy implications are "too important."[278] When we leave *Chevron*'s world of words and enter into a realm of purposivism by asking questions like "what is the heart of this statute?"[279]—which the search for elephants in mouseholes requires—consistent, predictable adjudication is no longer possible. What results instead is more reminiscent of *Church of*

"no longer reflected in current law").

274. *Id.* at 341–42.

275. *See* Sunstein, *supra* note 9, at 244 (explaining that if the Court construes ambiguities as against regulatory authority, the major questions doctrine can be viewed as outside the *Chevron* framework altogether).

276. *Id.* (describing the nondelegation canons as "easily administrable, pos[ing] a less severe strain on judicial capacities, and risk[ing] far less in the way of substantive harm").

277. *Id.* at 332 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

278. Moncrieff, *supra* note 255, at 600.

279. *See, e.g.*, MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229 (1994) (holding that the FCC does not have the power to make tariff filing optional because the tariff-filing requirement is "the heart of the common-carrier section of the Communications Act.").

the Holy Trinity v. United States[280]—Justice Scalia's favorite example of unprincipled statutory interpretation[281]—than of the Court's modern jurisprudence.[282]

Indeed, because the Court's cases are not consistent on their own terms, scholars have attempted to find the *real* rule that explains them. These efforts, however, actually further demonstrate why the elephants-in-mouseholes doctrine has to go. One of the most impressive academic defenses of the Court's cases is offered by Lisa Bressman. Noting the apparent conflict between *Gonzales*, *Brown & Williamson*, and *Massachusetts v. EPA*, she attempts to reconcile the cases by isolating "precisely what makes those questions extraordinary."[283] Her conclusion "is that these cases are best understood to tell administrations that they may not disregard larger governmental or public interests and still expect to command judicial deference," meaning "an administration may not issue a rule knowing that Congress opposes its substance and would need supermajority support to reverse it," nor may an administration "resolve a politically charged issue essentially by fiat, knowing that the people presently are engaged in active debate."[284] Under Bressman's view, which is similar to Abigail Moncrieff's,[285] the Court should consider signals sent by "subsequent legislative history" and other sources as to "the likely preferences of Congress," as well as the robustness of "public debate" and other factors speaking to the "current legal or social context," such as whether the "authority is exercised in a manner that serves the interests of all and not just some."[286] "Put differently, political accountability must contain a functional component as well as a formal one,"[287] and agency actions that raise "moral, legal, and practice issue[s]" should receive less deference than merely "technical" decisions by the agency.[288]

Bressman's attempt to reconcile these cases strikes us as plausible, but

280. 143 U.S. 457 (1892).

281. *See* SCALIA, *supra* note 193, at 18–23 (criticizing *Church of the Holy Trinity* by stating "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

282. *See* Manning, *supra* note 17, at 227 n.24 (likening an elephant-in-mousehole case to *Church of the Holy Trinity*).

283. Bressman, *supra* note 257, at 765.

284. *Id.*

285. *See* Moncrieff, *supra* note 255, at 596, 642–45 (2008) (explaining that courts should not defer when there are "simultaneous efforts" by "the Executive and in Congress to effect change[] in a single regulatory domain," and should consider what Congress was doing before the agency's announced action, after the actual action, and the substance of agency oversight).

286. Bressman, *supra* note 257, at 773–81 (describing factors the Court should consider in answering these challenging questions).

287. *Id.* at 782.

288. Bressman, *supra* note 192, at 598.

that is hardly comforting, and we have little doubt that her analysis—as it requires judges to don the hats of political scientists—would be distasteful to a more formalist judge. She herself acknowledges this "nuanced" approach to *Chevron* may be a "cure . . . worse than the disease," as it requires, among other things, for "judges to read an administrator's (and the President's) mind," raising both separation of powers and practical issues, especially as the facts necessary to make the requisite evaluations may be difficult to acquire.[289] Her attempt to reconcile the cases also requires "attribut[ing] to Congress the intent that agencies interpret statutes in light of current congressional preferences,"[290] but this is a form of "legislative self-delegation"[291] that is prohibited by *INS v. Chadha*,[292] as it allows a subsequent Congress to exercise authority outside of bicameralism and presentment.[293]

Aside from constitutional concerns, moreover, any approach like that proposed by Bressman to explain the Court's precedent is also not amenable to consistent implementation. Courts are not equipped to play political prognosticator, evaluating just how seriously the public is debating an issue or what Congress's likely views are on the subject. How would a court even begin to articulate a doctrinal rule that could encompass these factors? How much public discussion and "consensus" is necessary, and how intense and widespread must that public discussion be before the Court should stop deferring to the Executive Branch?[294] And just when does a "technical" issue become a "moral" one?[295] Though it may be able to explain the Court's decisions, Bressman's approach is hardly the stuff of which enduring doctrine is made.

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289. Bressman, *supra* note 257, at 784–85.

290. *Id.* at 788.

291. Manning, *supra* note 192, at 675.

292. 462 U.S. 919, 944–59 (1983) (holding that the congressional veto provision is unconstitutional).

293. For instance, what if Congress intended the President to interpret statutes according to the preferences of a congressional committee? Such a possibility seems squarely foreclosed by *Chadha*. If so, what is the principled difference between that scenario and one where Congress intends the President to interpret statues according to the preferences of a later Congress?

294. Bressman, *supra* note 257, at 797–98 (considering the role public opinion played in recent Supreme Court decisions).

295. *See, e.g.*, Posting of Eoin O'Carroll to Bright Green Blog, http://features.csmonitor.com/environment/2009/02/16/us-considers-pika-protection-due-to-warming/ (Feb. 16, 2009) (explaining the debate over whether to classify the pika—what you get if you "cross a rabbit with a hamster, make it very sensitive to heat, and deposit it on mountains throughout the western United States"—as an endangered species due to global warming affecting its habitat).

CONCLUSION

In a series of cases where deference was appropriate, at least under *Chevron* itself, the Court has forbidden agency action. Citing the principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes," the Court has invalidated agency interpretations, even going so far as to vacate an agency decision that was actually permitted under the best reading of the statutory text. The Court has done this to protect nondelegation values without having to directly enforce the nondelegation doctrine. In fact, *American Trucking*, the case where the Court first explicitly announced the elephants-in-mouseholes doctrine, is also the case where the Court effectively abandoned directly enforcing the line between constitutional execution and unconstitutional delegation. The elephants-in-mouseholes doctrine thus is best understood as an example of what Sunstein has dubbed nondelegation canons.

Good intentioned though it is, the elephants-in-mouseholes doctrine is doomed to failure because it cannot be administered in a principled way. The cases employing the doctrine have been inconsistent and will ever be so. Just as administering the nondelegation doctrine itself has proven impossible, applying this test is a task that judges just cannot do. At the same time, the Court's imposition of this canon is of dubious legitimacy given that this doctrine's premise does not accurately reflect the legislative process. The Court must decide whether it wants to continue down this dead-end street or whether instead it will defer to the Executive Branch, a "political branch" that is "directly accountable to the people."[296] While the perfect solution would be for Congress to make important policy decisions itself, the best available solution is for courts to defer to the Executive Branch by applying traditional *Chevron* principles. Though we acknowledge the compelling constitutional concerns driving the Court's analysis, we reluctantly conclude that the hunt for elephants-in-mouseholes should be abandoned as a failed doctrine.

296. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

ADMINISTRATIVE LAW IN THE ROBERTS COURT: THE FIRST FOUR YEARS

ROBIN KUNDIS CRAIG*

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* Attorneys' Title Professor of Law and Associate Dean for Environmental Law Programs, the Florida State College of Law, Tallahassee, Florida. This Article grows out of my continuing "Supreme Court News" contributions to *Administrative & Regulatory Law News*, a quarterly publication of the American Bar Association's Section of Administrative Law and Regulatory Practice. I may be reached at rcraig@law.fsu.edu.

INTRODUCTION

When John G. Roberts took over as Chief Justice of the Supreme Court of the United States on September 29, 2005, he ushered in a new phase of the Court's history. Of course, there were two changes of Justices that fall, given Chief Justice William Rehnquist's death and Associate Justice Sandra Day O'Connor's retirement, resulting in the confirmations of both Chief Justice Roberts and Associate Justice Samuel Alito.

Four years later, the Supreme Court is again changing. At the end of the 2008–2009 Term, Associate Justice David Souter retired from the Court. As a result, the four Terms from October 2005 to June 2009 represent a distinct phase in the Court's history: the first iteration of the Roberts Court.

In those four years, the Supreme Court decided a number of core administrative law cases and many other cases relevant to administrative law practice. The Court decided issues ranging from constitutional questions, such as standing and federalism, to more basic administrative law questions such as federal court review of federal agency actions,

contested issues of statutory interpretation, and the ongoing refinement of the *Chevron* doctrine.

This Article reviews the first four years of the Roberts Court's administrative law decisions. Part I presents an overview of the cases that involved issues of access to the federal courts: standing and mootness; the federal courts' jurisdiction; statutes of limitation; and doctrines limiting federal courts' authority to review agency actions, such as exhaustion of administrative remedies. Part II reviews the Roberts Court's decisions dealing with the relationship between states and the federal government. These decisions grapple with due process requirements for the states, federal preemption of state laws, the dormant Commerce Clause, and the Court's use of federalism considerations in statutory interpretation.

Finally, Part III analyzes the Supreme Court's decisions that reveal the Roberts Court's perspective on the "proper" role of the federal courts within the federal government. Substantively, these cases cover constitutional review of federal legislation, the interpretation of the Constitution itself, "arbitrary and capricious" review of federal agency actions, and *Chevron* deference to agencies' interpretation of statutes. Attitudinally, however, these decisions reveal a Court majority that—except in a few contexts—is consciously, and perhaps overzealously, determined to constrain its own authority.

Specifically, this Article concludes that what emerges from these often-divided decisions is a Court that is generally deferential to the other two branches of government, except when constitutional rights and principles are at issue. This deference is most apparent in the *Chevron* cases, particularly in those where the Supreme Court wrestles with the relationship between agency decisions and federal court precedent.

I. ACCESS TO THE FEDERAL COURTS

A. Standing and Mootness

Over the course of many decades, the Supreme Court determined that the federal courts' Article III restriction to hearing only "cases" and "controversies"[1] requires plaintiffs both to have "standing" before their cases can be heard in federal court and to maintain a "live" controversy throughout the litigation. As the Court describes the standing analysis in its 1992 decision in *Lujan v. Defenders of Wildlife*, a federal court plaintiff must meet a three-part test: (1) the plaintiff must have an injury that is concrete, particularized, and either actual or imminent; (2) that injury must

1. U.S. CONST. art. III, § 2.

be "fairly traceable" to the defendant's conduct; and (3) it must be likely that the federal courts can redress the injury.[2] In turn, the Court polices the live-controversy requirement through the doctrine of mootness, which requires the federal courts to dismiss litigation when legal relief is futile. As is classically the case, standing and mootness issues before the first iteration of the Roberts Court were most prominent in public interest litigation.

1. Taxpayer Standing

Taxpayer standing is a long-discredited theory whereby plaintiffs attempt to challenge government action on the basis that they are taxpayers.[3] Given the very limited circumstances under which federal courts allow taxpayer standing, it was unsurprising that the Supreme Court unanimously decided in May 2006, in an opinion by Chief Justice Roberts, that state taxpayers lacked standing to challenge Ohio's franchise tax credit on Commerce Clause grounds.[4] Noting that it had an obligation to assure itself that standing exists, the Supreme Court reviewed the taxpayer standing theory and concluded that it was generally a poor theory that would not work in this case because the plaintiffs' injuries were too generalized and hypothetical.[5] Moreover, while the Court recognized that taxpayer standing can be sufficient in an Establishment Clause challenge to government action,[6] it refused to create a similar rule for Commerce Clause challenges.[7]

Similarly, in its March 2007 decision in *Lance v. Coffman*, the Supreme Court analyzed the standing of four citizens to challenge, pursuant to the Elections Clause of the United States Constitution, both a Colorado state court's redrawing of congressional districts following the Colorado legislature's failure to do so after the 2000 census and the Colorado Supreme Court's injunction against a subsequent 2003 legislative

2. 504 U.S. 555, 560–61 (1992).

3. *See, e.g.*, Doremus v. Bd. of Educ., 342 U.S. 429, 434–35 (1952) (placing strict special-injury requirements on taxpayer standing).

4. DaimlerChysler Corp. v. Cuno, 547 U.S. 332, 354 (2006).

5. *See id.* at 340, 342–46 (noting that state policymakers retain "broad discretion" to make state fiscal policy decisions).

6. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968) (holding that because "the Establishment Clause . . . specifically limit[s] the taxing and spending power conferred by Art. I, § 8," "[a] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of" the Establishment Clause).

7. *See DaimlerChrysler*, 547 U.S. at 347–49 (noting the special importance of the purpose of the Establishment Clause to limit taxing and spending to favor one religion over another as the primary justification for conferring taxpayer standing in such cases, a concern not present in Commerce Clause decisions).

redistricting.[8] Plaintiffs asserted that the Colorado Supreme Court's decision denied them their federal constitutional right to have the Colorado legislature control elections.

In a unanimous per curiam decision, the Supreme Court decided that the plaintiffs lacked standing because they failed to assert a particularized stake in the litigation.[9] Using the *Lujan* framework[10] and providing a thorough review of the Court's taxpayer standing decisions, the Court emphasized that "[o]ur refusal to serve as a forum for generalized grievances has a lengthy pedigree."[11] The four plaintiffs failed to allege anything other than a generalized grievance because "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."[12]

In June 2007, however, the Court was far less in agreement regarding taxpayer standing in an actual Establishment Clause case, *Hein v. Freedom from Religion Foundation*.[13] In a 5–4 decision by Justice Alito, the Supreme Court concluded that the Freedom from Religion Foundation did not have standing under the taxpayer standing doctrine to bring an Establishment Clause challenge to President Bush's Faith-Based and Community Initiatives Program.[14] Emphasizing "that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government,"[15] the majority concluded that the organization did not meet the "narrow exception" created in *Flast v. Cohen*.[16] In *Hein*, "*Congress* did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general *Executive Branch* appropriations."[17] As a result, the *Flast* exception allowing taxpayer standing did not apply.[18]

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8. 549 U.S. 437, 437–38 (2007).
9. *Id.* at 442.
10. *See supra* note 2 and accompanying text.
11. *Lance*, 549 U.S. at 439.
12. *Id*. at 442.
13. 551 U.S. 587 (2007).
14. *See id.* at 605 (concluding that the same "link between congressional action and constitutional violation that supported taxpayer standing in *Flast* is missing" in the present case).
15. *Id*. at 593.
16. *Id.* at 603 (citing *Flast*, 392 U.S. at 105–06). The Court concluded, "Under *Flast*, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause." *Id.* at 593.
17. *Id*. (emphases added).
18. *See id*. at 603–15 (emphasizing the rigor with which the "narrow" exception

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. They questioned the majority's distinction between the Legislative and Executive Branches, arguing "that when [any branch of] the Government spends money for religious purposes a taxpayer's injury is serious and concrete enough to be 'judicially cognizable.'"[19]

2. Environmental Standing

Standing decisions in environmental cases traditionally divide the Supreme Court, and this remains true for the Roberts Court. For example, standing was a contentious issue in the Court's April 2007 decision in *Massachusetts v. EPA*,[20] the so-called global warming case. In that case, twelve states, four local governments, and thirteen public interest organizations challenged the Environmental Protection Agency's (EPA's) refusal to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the federal Clean Air Act.[21] The EPA challenged the plaintiffs' standing to bring the lawsuit.

In a 5–4 decision by Justice Stevens, the Supreme Court concluded that at least the State of Massachusetts had standing to bring its action.[22] Quickly dismissing arguments that the case involved a political question, an advisory opinion, or a mooted issue, the majority announced that *Lujan v. Defenders of Wildlife* provided the proper analytical framework to assess standing.[23]

Nevertheless, the majority emphasized Justice Kennedy's concurring opinion from *Lujan*, especially his approval of Congress's power to define new injuries.[24] The majority pointed out that the Clean Air Act itself provides plaintiffs with "the right to challenge agency action unlawfully withheld"[25] and that "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."[26]

However, the majority's treatment of standing for states in *Massachusetts v. EPA* will likely generate more standing litigation in cases

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created by *Flast* should be applied).

19. *Id*. at 643 (Souter, J., dissenting).

20. 549 U.S. 497 (2007).

21. *See* 42 U.S.C. § 7521(a)(1) (2006) (establishing the EPA Administrator's authority to set standards for the emission of air pollutants from new motor vehicles).

22. Massachusetts v. EPA, 549 U.S. at 526.

23. *Id*. at 517.

24. *Id*. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

25. *Id.* at 517 (citing 42 U.S.C. § 7607(b)(1) (2006)).

26. *Id*. at 518.

with state plaintiffs and limit the decision's applicability in the federal courts more generally. Despite its alleged adherence to the *Lujan* analysis, the majority stressed "the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."[27] Citing *Georgia v. Tennessee Copper Co*. for the proposition "that States are not normal litigants for the purposes of invoking federal jurisdiction" and may sue to protect their territory from outside harms,[28] the majority argued that the fact "[t]hat Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."[29]

The majority then proceeded through the *Lujan* three-part test for standing. With respect to injury, it emphasized that "[t]he harms associated with climate change are serious and well recognized"[30] and that Massachusetts's unchallenged evidence showed that climate change was causing sea-level rise that has "already begun to swallow Massachusetts' coastal land."[31] As for causation, the "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming."[32] While regulating car emissions in the United States might not solve the entire climate change problem, "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."[33] Moreover, "reducing domestic automobile emissions is hardly a tentative step" because "[c]onsidering just emissions from the transportation sector, which represent less than one-third of this country's total carbon dioxide emissions, the United States would still rank as the third-largest emitter of carbon dioxide in the world, outpaced only by the European Union and China."[34] Finally, with respect to redressability, the majority concluded that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[35] Thus, Massachusetts had standing.

Writing for the four dissenters on the standing issue, Chief Justice Roberts argued that "[r]elaxing Article III standing requirements because

27. *Id*.
28. *Id.* (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).
29. *Id.* at 519.
30. *Id*. at 521.
31. *Id*. at 522.
32. *Id*. at 523.
33. *Id.* at 524.
34. *Id*. at 524–25.
35. *Id*. at 525.

asserted injuries are pressed by a State . . . has no basis in our jurisprudence."[36] In applying the *Lujan* test, moreover, the dissenters argued that if the majority were to accept Massachusetts's "asserted loss of coastal land as the injury in fact[,]" then "they must ground the rest of the standing analysis in that specific injury."[37] The dissenters questioned whether Massachusetts's injury was either "actual" in the face of debates over the extent of sea-level rise or "imminent" given that the computer models relied on by Massachusetts predicted the seas would continue to rise through 2100.[38] Moreover, the complexities of climate change made direct causation nearly impossible to prove.[39] Finally, "[r]edressability is even more problematic," given the long causation chains and the fact that 80% of greenhouse gas emissions originate outside the United States.[40] Overall, according to the dissenters, the majority had engaged in "sleight of hand" by "failing to link up the different elements of the three-part standing test."[41]

In March 2009, the Roberts Court returned to the issue of environmental standing in *Summers v. Earth Island Institute*,[42] this time in the context of the Forest Service Decisionmaking and Appeals Reform Act of 1992.[43] This statute requires the U.S. Forest Service to establish notice, comment, and appeals processes for "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974."[44] In regulations implementing this requirement,[45] the U.S. Forest Service established that certain public participation procedures—notice, comment, and appeal—do not apply to projects categorically excluded from the Environmental Impact Statement requirement of the National Environmental Policy Act.[46] As a result, fire rehabilitation activities on less than 4,200 acres and salvage timber sales of 250 acres or less were excluded from public notification, comment, and

36. *Id*. at 536 (Roberts, C.J., dissenting).
37. *Id*. at 540.
38. *See id*. at 541–42 (arguing that a finding of standing under such circumstances "renders requirements of imminence and immediacy utterly toothless").
39. *Id*. at 544–45.
40. *Id*. at 545.
41. *Id*. at 546.
42. 129 S. Ct. 1142 (2009).
43. Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419 (codified at 16 U.S.C. § 1612 note (2006)).
44. *Id.* § 332(b)(1).
45. *See* 36 C.F.R. § 215.4(a) (2008) (exempting projects from the notice-and-comment requirement); 36 C.F.R. § 215.12(f) (exempting projects from being subject to appeal).
46. *See* 42 U.S.C. § 4332(C) (2006) (requiring that every recommendation or report on legislation and major federal action affecting the environment be accompanied by a detailed statement on the environmental impact of the proposed action).

challenge.[47]

Environmental organizations originally sought to challenge these regulations in the specific context of the September 2003 Burnt Ridge Project, a salvage sale of timber on 238 acres of fire-damaged land in the Sequoia National Forest. All parties admitted that the plaintiffs established standing to challenge that specific project through the affidavit of a member who used the relevant area for recreation.[48] However, after the district court granted a preliminary injunction against the Burnt Ridge Project, the parties settled that part of the litigation. The plaintiffs then pursued a general challenge to the regulations on the ground that those regulations would inevitably be applied to future Forest Service projects. The Court first noted that it must determine whether the plaintiffs had standing to continue.[49]

In a 5–4 decision by Justice Scalia (Justices Breyer, Stevens, Souter, and Ginsburg dissented), the Supreme Court concluded that the plaintiffs failed to allege adequate injury-in-fact to challenge the regulations outside the context of the Burnt Ridge Project.[50] The majority began by reciting the standing test from *Lujan*.[51] It then emphasized that "[t]he regulations under challenge here neither require nor forbid any action on the part of [Earth Island]. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning."[52] As a result, because they were parties not directly regulated by the Forest Service, the plaintiffs had the burden of demonstrating injury-in-fact, the only standing element at issue.

The majority concluded that the environmental challengers did not establish an injury-in-fact sufficient to support a facial challenge to the regulations. While affidavits from members of the plaintiff organizations established individual injury with respect to the Burnt Ridge Project, that aspect of the case settled, and

> [w]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.[53]

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47. *Summers*, 129 S. Ct. at 1147.
48. *Id*. at 1149.
49. *Id*. at 1147–48.
50. *See id*. at 1152–53 (analogizing the instant matter to Sierra Club v. Morton, 405 U.S. 727 (1972)).
51. *Id*. at 1149 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180–81 (2000)).
52. *Id.*
53. *Id*. at 1149–50.

The only other affidavit that the majority considered, the Bensman affidavit, alleged past injury from Forest Service developments but failed to challenge any particular future timber sale or to connect Bensman's injury to specific tracts of national forests.[54] As a result, the majority noted,

> [W]e are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation.[55]

This chain of causation, the majority concluded, was too tenuous to support standing.

The majority also rejected plaintiffs' procedural injury argument even though the plaintiff organizations argued that the Forest Service illegally denied them congressionally mandated participation in the agency's decisionmaking processes. According to the Court, "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."[56] Justice Kennedy concurred specifically on this point, stating, "This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'"[57] More forcefully, the dissenters argued that if Congress enacted a statutory provision that allowed plaintiffs to sue if they participated in public processes with the Forest Service in the past and were likely to do so in the future, that provision would be constitutional; thus, a constitutional bar on standing was inappropriate here.[58]

Beyond this fairly routine debate over injury-in-fact, however, three aspects of the case are noteworthy. First, after settling as to the Burnt Ridge Project and the entry of the district court's judgment on those claims, the plaintiffs submitted additional affidavits that the dissenters argued would have established standing for the remaining issues in the case and that the Supreme Court should have considered given the procedural posture of the standing challenge.[59] The majority, however, refused to

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54. *See id*. at 1150 (asserting that these allegations of past injury fail to link Bensman's injuries to the challenged regulations).

55. *Id*.

56. *Id*. at 1151.

57. *Id*. at 1153 (Kennedy, J., concurring) (alteration in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

58. *Summers*, 129 S. Ct. at 1154–55 (Breyer, J., dissenting).

59. *See id*. at 1157–58 (asserting that "the Constitution does not bar the filing of further affidavits" and that "[t]hese allegations and affidavits more than adequately show a 'realistic threat' of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and *admits* will reoccur").

consider these affidavits, concluding that "[i]f respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively."[60] Thus, *Summers* suggests that, in procedurally convoluted administrative challenges, proper application of the Federal Rules of Civil Procedure may be critical to plaintiffs' standing.

Second, and reflecting an issue that has been prominent in lower federal courts since *Laidlaw* and *Massachusetts v. EPA*, the majority and the dissent debated the role of probability in assessing injury-in-fact. According to the dissent, past injury *is* relevant to evaluating current standing: "Where the Court has directly focused upon the matter, *i.e.*, where, as here, a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."[61] Moreover, "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."[62] The dissenters emphasized that "[t]he Forest Service admit[ed] that it intend[ed] to conduct thousands of further salvage-timber sales and other projects exempted under the challenged regulations 'in the reasonably near future'" and that "the Government has conceded[] that the Forest Service took wrongful actions (such as selling salvage timber) 'thousands' of times in the two years prior to suit."[63] As a result, the dissenters argued, the majority could not credibly claim that it was unlikely that the Forest Service would injure the plaintiff groups and their members in the foreseeable future with illegal salvage timber sales.[64]

According to the majority, however, "The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury."[65] It rejected the dissent's attempt to "replace the requirement of 'imminent' harm . . . with the requirement of 'a *realistic* threat' that reoccurrence of the challenged activity would cause [the plaintiff] harm 'in the reasonably near future.'"[66]

60. *Id*. at 1150 n.* (majority opinion).
61. *Id*. at 1155–56 (Breyer, J., dissenting).
62. *Id*. at 1156.
63. *Id*.
64. *Id*. at 1155.
65. *Id*. at 1151.
66. *Id*. at 1152–53 (bracketed alteration in original).

3. Parents Involved in Community Schools v. Seattle School District No. 1

In June 2007, the Supreme Court concluded that parents had standing to bring an Equal Protection Clause challenge against the Seattle School District's student assignment plan, which relied on racial classifications as tiebreakers to assign students to oversubscribed high schools.[67] In an 8–1 decision by Chief Justice Roberts, the Court determined that the parents had sufficient injuries-in-fact to support standing. The school district argued that members of the group Parents Involved in Community Schools (Parents Involved) "will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing."[68] According to the Court, however,

> The group's members have children in the district's elementary, middle, and high schools, and the complaint sought declaratory and injunctive relief on behalf of Parents Involved members whose elementary and middle school children may be "denied admission to the high schools of their choice when they apply for those schools in the future." The fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed.[69]

Moreover, "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, an injury that the members of Parents Involved can validly claim on behalf of their children."[70]

At the time of the Court's decision, the Seattle school district had ceased to use its racial tiebreaker policy, raising a secondary argument that the case was moot. According to the Court, however, the change in school district policies neither destroyed standing nor mooted the case, because "[v]oluntary cessation does not moot a case or controversy."[71] Because the school district vigorously defended the constitutionality of its policy and could resume using the racial tiebreaker if it received a judgment in its favor, the Court found that it had jurisdiction to hear the controversy.[72]

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67. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007).
68. *Id*. at 718.
69. *Id*. at 718–19 (citations omitted).
70. *Id*. at 719 (citations omitted).
71. *Id*.
72. *Id*. at 719–20.

4. Federal Election Commission v. Wisconsin Right to Life, Inc.

Mootness was also relevant in an elections advertisement decision. Despite concurrences and dissents, the Justices apparently unanimously agreed that the "capable of repetition, yet evading review" exception to the mootness doctrine applied to Wisconsin Right to Life, Inc.'s (WRTL's) claim against the Federal Elections Commission (FEC) that the "electioneering communications" provisions of the Bipartisan Campaign Reform Act violated the First Amendment.[73] The Act makes it illegal for banks, corporations, and labor organizations to broadcast candidate-specific campaign advertisements shortly before an election.[74]

The FEC argued that the cases, which were based on three advertisements that the WRTL ran in the 2004 elections and did not intend to use again, were moot.[75] According to the Supreme Court, in a 5–4 decision by Chief Justice Roberts, "these cases fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."[76] First, it was unreasonable to expect that the WRTL could obtain full judicial review of its claims in time to air its ads during the relevant election blackout periods, especially given that "groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period."[77] Second, the "WRTL credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period."[78] The Court concluded that "[u]nder the circumstances, particularly where WRTL sought another preliminary injunction based on an ad it planned to run during the 2006 blackout period, we hold that there exists a reasonable expectation that the same controversy involving the same party will recur."[79]

Justices Alito[80] and Scalia[81] concurred in the opinion, the latter joined by Justices Kennedy and Thomas. Justice Souter dissented,[82] joined by Justices Stevens, Ginsburg, and Breyer. None of these opinions, however, quibbled with the mootness analysis.

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73. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007).
74. 2 U.S.C. § 441b(a) (2006).
75. *Wisconsin Right to Life*, 551 U.S. at 462.
76. *Id*. (citing Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).
77. *Id.*
78. *Id*. at 463.
79. *Id*. at 463–64 (citation omitted).
80. *Id*. at 482–83 (Alito, J., concurring) (emphasizing that he believed the Act to be unconstitutional).
81. *Id.* at 483–504 (Scalia, J., concurring) (arguing that the Court should rework the relevant precedents).
82. *Id.* at 504–36 (Souter, J., dissenting) (arguing in favor of upholding the law).

5. Horne v. Flores

Late in the 2009 Term, in *Horne v. Flores*,[83] the Supreme Court briefly considered whether a school district superintendent had standing to request relief from a continuing federal district court injunction regarding the Nogales Unified School District's implementation of § 204(f) of the Equal Educational Opportunities Act of 1974 (EEOA)[84] through its English Language Learner programs. Relying on the *Lujan* three-part constitutional standing test and *Summers v. Earth Island Institute*, the Court agreed with the Ninth Circuit that the superintendent had standing "because he 'is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of the EEOA, and the current injunction runs against him.'"[85]

The challenge to the superintendent's standing was based on a chain-of-command argument—specifically, respondent argued "that the superintendent answers to the State Board of Education, which in turn answers to the Governor, and that the Governor is the only Arizona official who 'could have resolved the conflict within the Executive Branch by directing an appeal.'"[86] The Court avoided directly ruling on this argument, noting that the Governor of Arizona had, in fact, directed an appeal.[87] Moreover, "Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so."[88]

6. Overall Developments in the Supreme Court's Standing Jurisprudence

The Supreme Court's standing cases over the last three years make it clear that the injury-in-fact element of standing remains the most contentious. Moreover, the Court clearly prefers readily identifiable, individualized harms over less-concrete assertions of injury. Thus, the Court in both *Lance v. Coffman* and *Hein v. Freedom from Religion Foundation* found that generalized grievances based on taxpayer status were insufficient to establish standing, while the Court in *Summers v. Earth Island Institute* required the plaintiff to connect injury-in-fact to specific

83. 129 S. Ct. 2579 (2009).

84. *See* 20 U.S.C. § 1703(f) (2006) (providing that "[n]o State shall deny equal educational opportunity to an individual" by failing to take "appropriate action" to overcome language barriers that might inhibit equal participation by students).

85. *Horne*, 129 S. Ct. at 2592 (quoting Flores v. Arizona, 516 U.S. 1140, 1164 (9th Cir. 2008)) (alteration in original).

86. *Id.* (quoting Brief for Respondent Flores at 22, Horne v. Flores, 129 S. Ct. 2579 (2009)).

87. *Id.*

88. *Id.*

federal agency projects rather than to general federal regulations.

At the same time, however, the Supreme Court's conception of what should qualify as an injury can sometimes waiver, particularly in cases that involve constitutional considerations. In *Massachusetts v. EPA*, for example, the majority emphasized both the high probability of harm to Massachusetts from climate change and, with a nod to federalism concerns, its special status as a state to find sufficient injury-in-fact. Specifically, despite the potentially long-term timeline of the impact of climate change and the many uncertainties as to the specifics of those impacts, generalized loss of coastline to sea-level rise was sufficient, according to the Court. Similarly, the EPA's inability to single-handedly redress all of Massachusetts's harms was irrelevant: it was good enough that the EPA could potentially help to reduce those harms. Even more decisively, the Supreme Court found standing in *Parents Involved in Community Schools* for the plaintiffs to challenge a racial preference system for high school, which raised equal protection concerns, even though it was far from clear that the school district would ever apply that system to any of their children.

In light of these other cases, therefore, the two standing decisions from these three years that are most difficult to reconcile are *Massachusetts v. EPA* and *Summers v. Earth Island Institute*. One can read into the Court's jurisprudence a reluctance to allow challenges to executive branch actions unless fundamental rights are involved, an explanation that makes sense in light of *Hein v. Freedom from Religion Foundation*, *Federal Election Commission v. Wisconsin Right to Life*, and *Summers v. Earth Island Institute*—but not *Massachusetts v. EPA*. Alternatively, one can suggest that the distinction between standing and mootness, a distinction that the Court first emphasized in *Laidlaw*, appears to have been critical in both *Parents Involved in Community Schools* and *Wisconsin Right to Life*, so that once these plaintiffs established a concrete injury-in-fact, the Court was reluctant to dismiss the case. However, that explanation does not fully square with the Court's standing analysis in *Summers v. Earth Island Institute*, especially in light of the fact that the plaintiffs offered additional affidavits. Thus, at the end of the 2008–2009 Term, standing jurisprudence in the Supreme Court remains a quandary.

B. Federal Courts' Jurisdiction

Absent constitutional problems, Congress can restrict access to the federal courts. The issue of whether Congress actually did so was the subject of eight Supreme Court opinions in the first four years of the Roberts Court.

1. Federal Court Jurisdiction over the Guantanamo Bay Detainees

Section 1005(e)(1) of the Detainee Treatment Act of 2005 (DTA)[89] amends 28 U.S.C. § 2241 to provide that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States."[90] The Act also vested the U.S. Court of Appeals for the D.C. Circuit with exclusive jurisdiction to review decisions of the Combat Status Review Tribunals, which the Department of Defense established to determine detainees' status as "enemy combatants."[91] These provisions eliminated the federal courts' authority to hear many kinds of actions involving the Guantanamo Bay detainees, including habeas petitions, which had become the major vehicle for detainees to gain access to the courts.

Nevertheless, despite the DTA's limitations, in its June 2006 decision in *Hamdan v. Rumsfeld*,[92] the Supreme Court upheld federal court jurisdiction over the *pending* habeas claims of Guantanamo Bay enemy combatants.[93] It further held that the Executive Branch's proposed military commissions to try those prisoners were illegal.[94] Mr. Hamdan is a Yemeni national captured in Afghanistan and held by the United States at Guantanamo Bay. He filed a habeas petition to challenge the military commission that the United States intended to use to try him on conspiracy charges.

In a 5–3 decision by Justice Stevens (Chief Justice Roberts did not participate), the Supreme Court held that the military commission lacked authority to proceed "because its structure and procedures violate[d] both the [Uniform Code of Military Justice] and the Geneva Conventions."[95] Before reaching that substantive conclusion, however, the Court addressed the Government's motion to dismiss on the grounds that the DTA stripped federal courts of the authority to hear habeas petitions from Guantanamo Bay prisoners. Hamdan challenged this provision on both constitutional and statutory grounds, but the Court resolved the issue purely through statutory interpretation, invoking the presumption against the retroactive

89. Pub. L. No. 109–148, § 1005, 119 Stat. 2680, 2741–42 (2005).
90. 28 U.S.C. § 2241(e)(1) (2006).
91. 28 U.S.C. § 2241(e)(2).
92. 548 U.S. 557 (2006).
93. *See id*. at 583–84 (concluding that the Government's argument that Congress could "have no good reason" for preserving jurisdiction over pending habeas petitions is not only without merit, but is contradicted by the legislative history of the DTA).
94. *See id*. at 590–635 (concluding that although the President has authority to convene military commissions where justified under certain circumstances, such as to try violations of the laws of war, none of Hamdan's alleged actions violated the laws of war and nothing in the particular circumstances rendered it impracticable to apply the rules set forth for regular courts-martial proceedings).
95. *Id*. at 567.

application of statutes.[96] It noted that § 1005(e)(2) and § 1005(e)(3) of the DTA both explicitly apply to pending habeas petitions, while § 1005(e)(1) was silent on the "pending vs. future" issue.[97] In addition, the majority concluded that there was no reason to abstain until the commission reached a final decision.[98]

2. Federal District Courts' Jurisdiction and Other Tribunals

In *Whitman v. Department of Transportation*, an employee of the Federal Aviation Administration (FAA) sued in federal court to challenge the FAA's alcohol and drug testing policies, claiming that they violated employees' First Amendment rights, without first pursuing the grievance procedures in his collective bargaining agreement.[99] An FAA statute incorporates the provision of the Civil Service Reform Act of 1976[100] that gives exclusive jurisdiction over federal-employee grievances for most employment-related claims to the grievance bodies established through collective bargaining agreements.[101]

Given these statutory provisions, both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed the FAA employee's case for lack of subject-matter jurisdiction. In a unanimous per curiam opinion (Justice Alito did not participate), the Supreme Court vacated the lower courts' decisions because, although both the petitioner and the FAA stipulated that the collective bargaining agreement's grievance procedure covered the claim, neither the FAA nor the Court of Appeals made any findings to that effect.[102] As a result, the Court remanded to the Court of Appeals for a more explicit determination that the statutory exclusivity provisions actually applied to the case and for determinations on two issues: (1) whether the employee is actually appealing a final agency action and (2) how the doctrine of exhaustion of administrative remedies should apply (or not) to the lawsuit.[103]

In May 2007, in a unanimous opinion by Chief Justice Roberts, the Supreme Court determined in *Hinck v. United States* that the Tax Court

96. *Id*. at 575–78.
97. *Id.* at 578.
98. *See id*. at 584–88 (dismissing the Government's two arguments that civilian courts should await final judgment in ongoing military proceedings before "entertaining an attack on those proceedings" (internal quotation marks omitted)).
99. 547 U.S. 512 (2006).
100. 5 U.S.C. § 7121(a)(1) (2006).
101. *See Whitman*, 547 U.S. at 513 (outlining the operation of the FAA's framework for the resolution of employee claims).
102. *Id*. at 514 ("It may be, for example, that the FAA's actions . . . constitute a 'prohibited personnel practice,'" but concessions on matters of jurisdiction "ought not to be accepted out of hand.").
103. *Id.* at 514–15.

was the exclusive venue for challenging the Internal Revenue Service's (IRS's) interest abatement decisions; plaintiffs could not challenge the IRS's decisions in federal district court or the Court of Federal Claims.[104] The Court relied on two principles to reach this conclusion. First, it emphasized "the well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies.'"[105] Second, the Court cited its "past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were 'problematic,' the remedy provided is generally regarded as exclusive."[106] Because the new interest abatement remedy was both precisely drawn and designed to provide a remedy to taxpayers after courts said that none existed, the Tax Court's jurisdiction was exclusive, despite the statute's silence on the issue of exclusivity.[107]

3. Statutes of Limitation and the Federal Government

In December 2006, in a unanimous decision by Justice Alito (Chief Justice Roberts and Justice Breyer did not participate), the Supreme Court determined in *BP America Production Co. v. Burton* that, in the absence of clear indications to the contrary, "actions" and "complaints" refer only to court proceedings, not to administrative enforcement actions.[108] More specifically, the Court held that the six-year statute of limitations in 28 U.S.C. § 2415(a) did *not* apply to the Minerals Management Service's (MMS's) administrative royalty payment orders regarding pre-September 1, 1996 oil and gas production on non-Indian federal lands.[109]

The statute of limitations in § 2415(a) states that

> every *action* for money damages brought by the United States . . . founded upon any contract . . . shall be barred unless the *complaint* is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.[110]

In 1997, the MMS issued royalty payment orders to BP's predecessor Amoco regarding oil and gas production on federal lands from January 1989 through December 1996. Amoco, and then BP, argued that the six-year statute of limitations in § 2415(a) barred these agency orders.

Both the district court and the U.S. Court of Appeals for the D.C. Circuit

104. Hinck v. United States, 550 U.S. 501, 506 (2007).
105. *Id*. (quoting EC Term of Years Trust v. United States, 550 U.S. 429, 433 (2007)).
106. *Id.* (citing Block v. N.D. *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 285 (1983)) (internal quotation marks omitted).
107. *Id*. at 506–10.
108. BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91–95 (2006).
109. *Id*. at 101.
110. 28 U.S.C. § 2415(a) (2006) (emphases added).

held that the statute of limitations did *not* bar the MMS's administrative orders, and the Supreme Court agreed.[111] The Supreme Court viewed its decision as primarily one of statutory construction. Under its plain meaning analysis, it concluded, "The key terms in this provision—'action' and 'complaint'—are ordinarily used in connection with judicial, not administrative, proceedings."[112] Moreover, "[n]othing in the language of § 2415(a) suggests that Congress intended these terms to apply more broadly to administrative proceedings," especially given the fact that § 2415(a) specifically refers to both general accrual and the termination of administrative proceedings.[113]

The Court then expanded its interpretation by looking at the terms *action* and *complaint* individually. It noted that when Congress intends the word *action* to refer to administrative proceedings, it tends to qualify that word, citing as examples uses of the phrases "administrative action, a civil or administrative action, or administrative enforcement actions."[114] In contrast, § 2415(a) contained no such qualifications, indicating that *action* refers only to court proceedings.[115] Similarly, "the occasional use of the term [*complaint*] to describe certain administrative filings does not alter its primary meaning, which concerns the initiation of 'a civil action.'"[116] This limitation was especially appropriate for the MMS's royalty payment orders because those orders function as final administrative enforcement orders, not as the initiation of enforcement proceedings.[117]

The Supreme Court reinforced its interpretation of § 2415(a) with "the rule that statutes of limitation are construed narrowly against the government."[118] "A corollary of this rule is that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous."[119]

In light of the statute's plain meaning and the sovereignty canon, the Court rejected all of BP's structural and policy arguments in favor of applying the six-year statute of limitations to the MMS's administrative payment orders—subsections rendered superfluous, peculiarities in record-keeping requirements, and frustration of the statute's purpose of providing repose.[120] Instead, the Court emphasized that Congress could have

111. *BP America*, 549 U.S. at 90.
112. *Id.* at 91.
113. *Id*. at 92.
114. *Id*. at 92–93 (internal quotation marks omitted).
115. *Id*. at 93.
116. *Id*. at 95 (quoting BLACK'S LAW DICTIONARY 356 (9th ed. 2009)).
117. *Id.*
118. *Id*. (citation omitted).
119. *Id*. at 96.
120. *See id*. at 95–101 (summarizing and dispensing with BP's primary arguments).

amended the relevant statutes so that they clearly applied to administrative actions, that BP's arguments "must be considered in light of the traditional rule exempting proceedings brought by the sovereign from any time bar," and that the focus of the Court's inquiry "is simply how far Congress meant to go when it enacted the statute of limitations in question."[121] As a result, the Court upheld MMS's right to seek the additional royalty payments for pre-September 1, 1996 oil and gas production.[122]

The exact holding of *BP America* may be limited in import: Congress amended the relevant minerals leasing statutes in 1996 to impose seven-year statutes of limitation on both judicial and administrative royalty payment proceedings occurring after September 1, 1996. However, the underlying logic and interpretive analysis of *BP America* establishes a clear presumption against the application of general statutes of limitations to federal administrative enforcement proceedings.

The Supreme Court also emphasized federal sovereign immunity in the context of statutes of limitations in its January 2008 decision in *John R. Sand & Gravel Co. v. United States*.[123] This case involved the special statute of limitations governing suits against the United States in the Court of Federal Claims, and the Court concluded, 7–2 (Justices Stevens and Ginsburg dissented), that the federal courts must consider sua sponte whether the plaintiff violated the statute of limitations even if the United States technically waived its statute of limitations defense.[124]

The Supreme Court emphasized that because lawsuits in the Court of Federal Claims involved the federal government by definition, and hence federal sovereign immunity, the special statute of limitations seeks "to achieve a broader system-related goal" than just encouraging timeliness of lawsuits.[125] As a result, the Court treats these kinds of statutes of limitation as "more absolute" than the normal kind.[126] The Court's precedents—some dating to the 19th century—support that reading.[127] Moreover, subsequent modifications to the statutory language did not require a different outcome.[128] Finally, the plaintiffs offered no convincing arguments for overruling the Court's prior decisions.[129]

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121. *Id*. at 100.
122. *Id*. at 101.
123. 552 U.S. 130 (2008).
124. *Id*. at 132, 134.
125. *Id*. at 133.
126. *Id*. at 134.
127. For a list of the Court's relevant precedents, see *id*. at 134–35.
128. *Id*. at 135–36.
129. *See id*. at 136–39 (rejecting plaintiffs' arguments that the Court already overturned the earlier precedent and that the Court explicitly considered the court of claims limitations statute, describing it as unexceptional).

4. Sovereign Immunity and the Federal Tort Claims Act

Federal sovereign immunity has been important in other contexts besides statutes of limitation, such as the Federal Tort Claims Act's (FTCA's) waiver of immunity. The FTCA generally waives the federal government's sovereign immunity for tort lawsuits.[130] However, the Act also creates several exceptions to that waiver.[131]

As one example, the FTCA specifies that its provisions, including its waivers of federal sovereign immunity, do not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."[132] In February 2006, in *Dolan v. United States Postal Service*, seven Justices decided, in an opinion by Justice Kennedy, that this FTCA provision does *not* shield the U.S. Postal Service from claims that a postal carrier acted negligently in leaving mail on a porch, causing the plaintiff to trip and fall, resolving a conflict between the Second and Third Circuits.[133]

What is most interesting about this case is that the seven-Justice majority consciously rejected a plain meaning interpretation of *negligent transmission*. This phrase, the majority acknowledged, could

> in isolation . . . embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination.[134]

However, the majority decided that context was more important than the isolated plain meaning of the statutory phrase:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude both context and precedent require a narrower reading, so that "negligent transmission" does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address.[135]

As a result, the majority concluded that "Congress intended to retain immunity, as a general rule, only for injuries arising, directly or

130. *See* 28 U.S.C. § 2674 (2006) (establishing that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances").

131. *See id.* § 2680 (listing such exceptions).

132. § 2680(b).

133. Dolan v. U.S. Postal Serv., 546 U.S. 481, 482, 492 (2006).

134. *Id*. at 486 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2429 (1971)).

135. *Id*.

consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address."[136]

Justice Thomas, the lone dissenter (Justice Alito did not participate in the decision), would have applied the broad plain meaning of *negligent transmission*.[137] Moreover, if that phrase is ambiguous, Justice Thomas would have resolved the ambiguity by applying the normal rule that waivers of the federal government's sovereign immunity should be construed narrowly and in favor of the government.[138]

In late January 2008, the Supreme Court again addressed the FTCA's waiver of sovereign immunity and its exceptions in *Ali v. Federal Bureau of Prisons*.[139] In this case, a prisoner brought an FTCA claim against various prison officials who lost the prisoner's personal property in the course of prison transfers. The Bureau of Prisons officials claimed that the prisoner's lawsuit fell within another of the exceptions to the FTCA's waiver of sovereign immunity—this time, for a "claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*."[140]

The Supreme Court split 5–4 in deciding that this exception *did* apply to the Bureau of Prisons officials and hence that the lawsuit was barred.[141] In an opinion by Justice Thomas (Justices Kennedy, Stevens, Souter, and Breyer dissented), the question for the majority was whether Bureau of Prisons officials qualified as "any other law enforcement officer[s]" under the Act.[142] This time, the majority relied on a plain meaning interpretation, emphasizing that Congress repeatedly referred to "any" other law enforcement officer and that the term *any* "suggests a broad meaning."[143] Moreover, the majority invoked separation-of-powers considerations in its interpretation, concluding that "[w]e are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted . . . ."[144]

The dissenters would have given the FTCA that "more desirable" interpretation through the use of canons of statutory construction that would have connected the phrase "any other law enforcement officer" to

136. *Id*. at 489.
137. *Id*. at 493 (Thomas, J., dissenting).
138. *Id*.
139. 552 U.S. 214 (2008).
140. 28 U.S.C. § 2680(c) (2006) (emphasis added).
141. *Ali*, 552 U.S. at 216.
142. *Id*. (quoting § 2680(c)).
143. *Id*. at 218–19.
144. *Id*. at 228 (footnote omitted).

the exception's focus on the collection of taxes and customs duties.[145] In particular, Justice Kennedy emphasized that

> [s]tatutory interpretation, from beginning to end, requires respect for the text. The respect is not enhanced, however, by decisions that foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature's intent. To prevent textual analysis from becoming so rarefied that it departs from how a legislator most likely understood the words when he or she voted for the law, courts use certain interpretative rules to consider text within the statutory design.[146]

Applying the contextual principles embodied in the *ejusdem generis* and *noscitur a sociis* canons of construction, the dissenters concluded that, in order for this exception to the FTCA's waiver of sovereign immunity to apply, the phrase *other law enforcement officers* had to be acting like the "officers of customs or excise"—that is, detaining property in connection with the collection of taxes or customs duties.[147] Because the Bureau of Prisons officials had no connection to taxes or customs duties, the dissenters would have held the exception inapplicable and allowed the lawsuit to proceed.[148]

5. Implied Private Rights of Action

Also in January 2008, a divided Supreme Court (Justice Breyer did not participate) held that the private right of action judicially implied into § 10(b) of the Securities Exchange Act of 1934[149] could not be extended to a securities fraud class action brought by investors against two cable TV services corporations, Scientific–Atlanta and Motorola, whose knowingly fraudulent actions caused Charter Communications to inflate its own revenue statements, when the investors relied on those statements.[150] In his opinion for the five-Justice majority in *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, Justice Kennedy emphasized that the implied right of action did not extend to the two companies "because the investors did not rely upon their statements or representations" when deciding to invest in Charter.[151] Citing to its own precedent, Congress's reactions, and the common law tradition that underlies § 10(b), the majority concluded that the implied right of action does not extend to aiders and abettors. Instead, the plaintiffs had to show that each defendant engaged in

145. *Id*. at 231–32 (Kennedy, J., dissenting).
146. *Id*. at 228–29.
147. *Id*. at 232.
148. *Id*. at 228–33.
149. *See* 15 U.S.C. § 78j(b) (2006) (outlawing manipulative and deceptive practices).
150. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 153 (2008).
151. *Id*. at 153.

a deceptive practice before the implied right of action applied.[152]

The majority also relied on separation-of-powers principles to avoid extending the scope of the private right of action. Noting that judicially implied private rights of action impinge on Congress's legislative authority, the majority concluded that these "[c]oncerns with the judicial creation of a private cause of action caution against its expansion."[153]

Justice Stevens wrote the dissenting opinion, joined by Justices Souter and Ginsburg. The dissenters did not oppose the majority's interpretation of the scope of the implied right of action; rather, they focused on the argument that Scientific–Atlanta and Motorola engaged in deceptive practices for purposes of the Securities Exchange Act because Charter inflated its revenue statements in reliance on their knowingly fraudulent actions, on which the investors then relied through reliance on Charter's revenue statements when deciding to invest.[154] As a result, the dissenters would have concluded that the investors' suit fell within the scope of the implied right of action.

C. Other Doctrines Limiting Federal Court Review of Federal Agency Action

1. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is largely a court-made doctrine. At common law, this doctrine requires persons challenging administrative agency action to exhaust their administrative remedies before proceeding to federal court.[155] Section 704 of the Administrative Procedure Act (APA) sets out the exhaustion requirements for lawsuits brought under the APA:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.[156]

The Supreme Court previously concluded that the last clause in § 704 limits the applicability of the exhaustion requirement in lawsuits brought

152. *Id*. at 158.

153. *Id*. at 164–65.

154. *See id*. at 167–69 (Stevens, J., dissenting) (distinguishing between this case and *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which, unlike the present case, involved no allegations of deceptive conduct and, therefore, "did not *itself* violate § 10(b)").

155. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144–46 (1992) (discussing the doctrine of exhaustion of administrative remedies).

156. 5 U.S.C. § 704 (2006).

under the APA.[157]

Exhaustion requirements can arise from several kinds of statutes. For example, the Prisoner Litigation Reform Act (PLRA) states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[158] In its June 2006 decision in *Woodford v. Ngo*, the Supreme Court considered whether an untimely or otherwise procedurally defective administrative challenge could satisfy this exhaustion requirement.[159] The Court determined, 6–3, that the PLRA requires prisoners to *properly* exhaust all available remedies before challenging prison conditions in federal courts,[160] even though California's prison system allowed prisoners only fifteen working days to file grievance appeals.[161]

Justice Alito authored the opinion, which more specifically concluded that the PLRA requires prisoners to exhaust all "available" remedies in *any* lawsuit challenging prison conditions, not just those suits brought under § 1983.[162] The majority noted that "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[163] The majority added that, as a statutory matter, § 1997e(a) appeared to use *exhausted* in the administrative law sense and that requiring exhaustion fits with the general scheme of the PLRA, which "attempts to eliminate unwarranted federal-court interference with the administration of prisons."[164] In addition, exhaustion is the normal requirement in habeas-type litigation.[165]

Justices Stevens dissented, joined by Justices Souter and Ginsburg. The dissenters considered California's deadlines too short to benefit from a strict exhaustion requirement, emphasizing that

> [t]he citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted. A state statute that purported to impose a 15-day period of

157. *See* Darby v. Cisneros, 509 U.S. 137, 145–47 (1993) (concluding that § 704 requires exhaustion of "all intra-agency appeals mandated either by statute or by agency rule," and thus that "it would be inconsistent with the plain language of [§ 704] for the courts to require litigants to exhaust optional appeals as well").

158. 42 U.S.C. § 1997e(a) (2006).

159. 548 U.S. 81 (2006).

160. *Id*. at 83–84.

161. *See id*. at 85–86 (describing a prisoner's appeal process).

162. *Id*. at 85.

163. *Id*. at 90–91.

164. *Id*. at 93.

165. *Id*. at 92–93.

> limitations on the right of a discrete class of litigants to sue a state official for violation of a federal right would obviously be unenforceable in a federal court.[166]

The dissenters would have allowed any pursuit of administrative remedies, even if procedurally defaulted, to confer access to the federal courts.[167]

2. Limiting Challenges to Agency Action

In June 2007, the Supreme Court concluded in *Wilkie v. Robbins*, a 7–2 decision by Justice Souter, that Robbins, the owner of a commercial guest ranch in Wyoming, could not bring claims against the Bureau of Land Management (BLM) pursuant to either the *Bivens* doctrine or the Racketeer Influenced and Corrupt Organizations Act (RICO).[168] Robbins's challenges focused on the retaliatory conduct of BLM officials as they tried to reestablish an easement over Robbins's property, which BLM lost as a result of its failure to record the relevant deed.[169] The Court concluded that a *Bivens* remedy was inappropriate because "Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints" and because "any damages remedy for actions by Government employees who push too hard for the Government's benefit may come better, if at all, through legislation."[170] Robbins's RICO claim turned on whether the BLM committed acts of extortion that violated the Hobbs Act. The Court emphasized that "[t]he importance of the line between public and private beneficiaries for the common law and Hobbs Act extortion is confirmed by our own case law, which is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government."[171] As a result, Robbins lacked a cause of action for either claim.[172]

Justice Ginsburg, joined by Justice Stevens, dissented. They argued that given the BLM's seven-year pattern of harassment and interference with Robbins's property rights, and given the inadequacy of piecemeal administrative remedies, the Court should recognize a *Bivens* cause of action based on the federal government's alleged violations of the Fifth

166. *Id*. at 104 (Stevens, J., dissenting).
167. *See id*. at 113–16, 123 (concluding that the "correct interpretation of the [PLRA] would recognize that . . . Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty 'to respect the dignity of all persons'" (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005))).
168. Wilkie v. Robbins, 551 U.S. 537, 537–41 (2007).
169. *See id*. at 541–49 (recounting the facts and procedural posture of the case).
170. *Id*. at 553, 562.
171. *Id*. at 564–65.
172. *Id*. at 567–68.

Amendment.[173]

D. Actions Against the Federal Government and Agencies Under the Roberts Court: An Overall Summary

Although individual cases can vary considerably, the overall trend of the Roberts Court seems to be to shield the federal government, including federal agencies, from lawsuits in the federal courts. The Court has accomplished this through a variety of means. First, this first iteration of the Roberts Court limited the federal courts' availability as a forum, suggesting in *Whitman v. Department of Transportation* that employees suing the FAA must proceed through the dispute resolution mechanisms of collective bargaining agreements, deciding in *Hinck v. United States* that the IRS can be challenged only in Tax Court, and requiring proper exhaustion of remedies in *Woodford v. Ngo* in attempted suits against federal prison authorities. Second, the Court limited the causes of action available against the federal government and federal agencies, such as in *Wilkie v. Robbins* when it concluded that a *Bivens* action was not available against the BLM. Finally, as its standing decisions generally suggested, the Court is also willing to limit the people who can sue to challenge federal action.

Perhaps the pairing of cases most indicative of this trend is *BP America Production Co. v. Burton* and *John R. Sand & Gravel Co. v. United States*. In the former case, involving the MMS's administrative royalty payment orders, the Court interpreted the relevant statute of limitations so that it would not prohibit the agency's enforcement action, despite the passage of time. In contrast, in *John R. Sand & Gravel Co.*, the Court strictly enforced the Court of Federal Claims' statute of limitations against a private challenger even though the United States technically waived its statute of limitations defense. In both cases, the federal government won.

There have been two prominent exceptions to this trend of limiting the availability of federal lawsuits against the federal government and federal agencies. First, as was true in the standing context, the Roberts Court is less willing to cede federal court jurisdiction when Congress attempts to limit those courts' authority to hear civil rights and constitutional challenges, as in *Hamdan v. Rumsfeld*. Second, the Court will generally respect Congress's waivers of federal sovereign immunity when Congress clearly states an intent to subject the federal government to certain kinds of lawsuits, such as through the FTCA.

Nevertheless, the Supreme Court's interpretation of Congress's statutory

173. *See id*. at 568–70 (Ginsburg, J., dissenting) (arguing that this was "no ordinary case of 'hard bargaining'" (quoting *id.* at 560 (majority opinion)).

language is still a significant factor in the implementation of those statutes. One clear example of the importance of the Court's statutory construction is the significant difference in interpretive methodologies that the Court used for FTCA exceptions in *Dolan v. U.S. Postal Service* and *Ali v. Federal Bureau of Prisons.* The Court's purpose-based approach to the exception at issue in *Dolan* produced a result arguably at odds with the Court's stricter plain meaning approach to the exception at issue in *Ali*, producing anomalous results regarding how FTCA exceptions should apply.

II. FEDERALISM AND INTERACTIONS BETWEEN STATES AND THE FEDERAL GOVERNMENT

Federalism concerns the proper allocation of authority and responsibilities between the federal government, on the one hand, and the state governments, on the other. Issues of federalism can arise in a variety of litigation contexts. Moreover, the Supreme Court was already becoming more attentive to federalism concerns even before Chief Justice Roberts was confirmed.

Perhaps the first significant indication that federalism was assuming a more important role came in 1995 with the *United States v. Lopez* decision.[174] In this 5–4 decision, the Rehnquist Court limited Congress's regulatory authority under the Commerce Clause for the first time in several decades, striking down the Gun-Free School Zones Act as being outside Congress's Commerce Clause power.[175] The Court also delineated the three categories of Congress's authority to legislate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[176]

Five years after *Lopez*, the Supreme Court underscored that the Commerce Clause imposes real limits on federal power when it invalidated part of the Violence Against Women Act as also being beyond Congress's Commerce

174. 514 U.S. 549 (1995).

175. *See id.* at 559–63 (pointing out that the Government failed to demonstrate the required connection between the Act and interstate commerce, that the Act, on its face, has nothing to do with commerce or economic enterprises, and that the Act contains no jurisdictional element limiting its reach that is explicitly connected with or affects interstate commerce).

176. *Id*. at 558–59 (citations omitted).

Clause authority.[177]

Closely related to Congress's Commerce Clause limitations are its Tenth Amendment limitations. The Supreme Court emphasized this relationship in 1997 in *Printz v. United States*[178] when it struck down part of the Brady Handgun Violence Prevention Act[179] because the Act allowed the federal government to unconstitutionally commandeer state and local police.[180] However, three years later, the Court found no such Tenth Amendment violation in the Driver's Privacy Protection Act[181] because that statute did not commandeer state resources.[182] Although the Act "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent,"[183] it "does not require the States in their sovereign capacity to regulate their own citizens[,] . . . to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."[184]

A more specialized form of federalism and respect for state sovereignty is found in the Eleventh Amendment, which the Supreme Court interpreted to deprive federal courts of jurisdiction over citizens' suits against states and arms of the states,[185] subject to the *Ex parte Young* exception.[186] Thus, while the Supreme Court continues to acknowledge that Congress has the power to abrogate states' Eleventh Amendment sovereign immunity pursuant to the Fourteenth Amendment,[187] it has, since 1996, eliminated

177. *See* United States v. Morrison, 529 U.S. 598, 609–17 (2000) (analogizing and relying upon the Court's reasoning in *Lopez*).

178. 521 U.S. 898 (1997).

179. Pub. L. No. 103-159, 107 Stat. 1536 (1993), *invalidated in part by* Printz v. United States, 521 U.S. 898 (1997).

180. *See Printz*, 521 U.S. at 932–34 (noting that the "whole *object* of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty").

181. 18 U.S.C. §§ 2721–2725 (2006).

182. *See* Reno v. Condon, 528 U.S. 141, 149–51 (2000) (arguing that while the Driver's Privacy Protection Act will indeed require some time and effort on the part of state employees, the Act does not violate the principles established in *Printz*).

183. *Id*. at 144.

184. *Id*. at 151.

185. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004) (noting that "we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment"); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (confirming that the Eleventh Amendment prohibits lawsuits in federal courts against states based on federal-question jurisdiction or diversity jurisdiction unless they consent to such suits).

186. *See Ex parte* Young, 209 U.S. 123, 155–56, 159–60 (1908) (setting out the exception that the Eleventh Amendment does not bar suits against states or state officials acting in violation of federal constitutional law); Green v. Mansour, 474 U.S. 64, 68 (1985) (describing the exception created in *Ex parte Young*).

187. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003) (acknowledging that Congress can abrogate state immunity in federal court "if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a

almost all other claims of federal power to abrogate states' Eleventh Amendment immunity.[188]

Another constitutional influence on the proper outlines of federalism is the Supremacy Clause, which gives Congress the authority to preempt state law. Preemption is especially likely when Congress explicitly preempts state law,[189] the state law actively conflicts with federal law,[190] or the state is trying to legislate in an area where the federal government occupies the field.[191] Thus, under the Rehnquist Court, Massachusetts's Burma law was invalid under the Supremacy Clause because the President had exclusive authority to level economic sanctions against the nation of Burma.[192] Similarly, the Federal Cigarette Labeling and Advertising Act[193] preempted Massachusetts's regulation of outdoor and point-of-sale cigarette advertising.[194]

Beyond these constitutional precepts, however, federalism concerns among the Rehnquist Court Justices also influenced the Supreme Court's decisions in cases not dealing with constitutional issues. For example, federalism concerns prompted the Court to outline specific conditions

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valid exercise of its power under § 5 of the Fourteenth Amendment").

188. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–56 (1996) (holding that although Congress stated clearly its intent to abrogate Florida's Eleventh Amendment immunity, it nevertheless lacked authority to abrogate state Eleventh Amendment immunity pursuant to the Indian Commerce Clause or the Interstate Commerce Clause, overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–36 (1999) (holding that neither the Patent Clause nor the Commerce Clause allowed Congress to abrogate states' Eleventh Amendment immunity).

189. *See, e.g.*, Ray v. Atl. Richfield Co. 435 U.S. 151, 157 (1978) (noting that the Court's precedents recognize an assumption that "the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) and Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

190. *See id.* at 158 ("Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("State action may be foreclosed by . . . implication because of a conflict with a congressional enactment.").

191. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942) (noting that "[w]here the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application").

192. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (identifying the Massachusetts Burma law as an "obstacle to the accomplishment of Congress's full objectives under the federal Act").

193. 15 U.S.C. §§ 1331–1341 (2006).

194. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550 (2001) (holding narrowly that the FLAA preempts only state regulation of cigarette advertising, not state regulation of cigarette sales and use).

under which consent decrees involving state Medicaid programs could be enforced in federal courts.[195] Federalism concerns also influenced the Rehnquist Court's interpretation of statutes and agency regulations, even if the Court did not find those provisions unconstitutional. Perhaps most obviously in the 2001 decision of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court emphasized proper respect for the states' traditional authority over land and water use as a reason for limiting the Army Corps' and the EPA's regulatory authority under the Clean Water Act.[196]

Federalism issues, being constitutionally based, continue to be issues of concern in the Roberts Court. Moreover, as in the Rehnquist Court, federalism concerns can also carry over into statutory interpretation.

A. Local Sovereign Immunity

As noted, state sovereign immunity derives from the Eleventh Amendment. Nevertheless, lingering questions persist regarding the extent to which local governments can claim sovereign immunity.

In April 2006, a unanimous Supreme Court opinion by Justice Thomas in *Northern Insurance Co. of New York v. Chatham County, Georgia* resolved this issue, overturning precedent from the U.S. Courts of Appeals for the Fifth and Eleventh Circuits in the process.[197] These two circuits allowed municipalities to claim "residual" common law sovereign immunity based solely on delegations of state power, even when the municipality in question did not qualify as an "arm of the state" for Eleventh Amendment purposes.[198]

In *Northern Insurance Co.*, Chatham County owned, operated, and maintained the Causton Bluff drawbridge under authority delegated from the State of Georgia. When a party whose boat was injured by the malfunctioning bridge and that party's insurance company sought damages in admiralty against the county, Chatham County defended on the basis of state sovereign immunity. The Supreme Court acknowledged its "recognition of preratification sovereignty as the source of immunity from suit," but it emphasized that all remaining state sovereign immunity is

195. *See* Frew *ex rel.* Frew v. Hawkins, 540 U.S. 431, 441–42 (2004) (noting that "principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion").

196. *See* 531 U.S. 159, 172–74 (2001) (explaining that the Supreme Court will not allow an agency's interpretation of a statute to encroach upon traditional state powers unless Congress clearly states its intent to do so).

197. *See* N. Ins. Co. of New York v. Chatham County, 547 U.S. 189, 196–97 (2006) (overruling Broward County v. Wickman, 195 F.2d 614 (5th Cir. 1952)) (finding that the county was unprotected by sovereign immunity).

198. *Id.* at 194.

encompassed within the Eleventh Amendment.[199] As a result, there exists no common law "residual immunity" test that is broader than the Eleventh Amendment.[200] Moreover, the "Court has repeatedly refused to extend sovereign immunity to counties" "even when, as respondent alleges here, such entities exercise a slice of state power."[201] The Court also refused to create a special immunity for suits in admiralty.[202] Therefore, because "[t]he County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Court of Appeals appear to have understood this concession to be based on the County's failure to qualify as an arm of the State under our precedent," the County enjoyed no immunity from suit.[203]

B. Due Process Limitations on States

Constitutional requirements can impose federal law limitations on how states behave even when they do not define the relationship between the federal government and the states per se. In contrast to much of its other federalism jurisprudence, the Roberts Court repeatedly showed no hesitation in prescribing requirements for, and limitations upon, the states pursuant to the Due Process Clause of the Fourteenth Amendment.

1. Jones v. Flowers

In the April 2006 case of *Jones v. Flowers*, the Supreme Court resolved a conflict among the states' highest courts and the federal courts of appeals regarding states' due process duties when mailed notices of tax foreclosure sales are returned to the state.[204] In a 5–3 decision (Justice Alito did not participate) written by Chief Justice Roberts, the Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so."[205] While due process does not require the property owner to actually receive notice, it does require states to give notice in a manner reasonably calculated to reach the recipient.[206] "We do not think that a person who actually desired

199. *Id*. at 193–94.
200. *See id*. at 194 (holding that Chatham County's only claim to immunity arises if it was acting as an arm of the state in operating the drawbridge).
201. *Id*. at 193–94 (internal quotation marks omitted).
202. *Id*. at 195–96.
203. *Id*. at 194.
204. 547 U.S. 220 (2006).
205. *Id*. at 225.
206. *Id*. at 226 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."[207] Because additional reasonable steps were in fact available to the state in this case, the Court reversed the tax sale.[208]

Justice Thomas dissented, joined by Justices Scalia and Kennedy, arguing that "the State's notice methods clearly satisfy the requirements of the Due Process Clause" under the Court's precedents.[209] Moreover, as a policy matter, "The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate ground for imposing additional constitutional obligations on the State."[210]

2. Philip Morris USA v. Williams

In February 2007, in a 5–4 decision by Justice Breyer, the Supreme Court held in *Philip Morris USA v. Williams*[211] that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit juries from imposing punitive damages on civil defendants to punish those defendants for injuries to third parties not represented in the litigation.[212] Punitive damages, the majority concluded, can undermine notions of due process in several ways: by depriving defendants of fair notice of the range of punishment available in response to certain conduct, by threatening arbitrary punishments, and by allowing one state or one jury to impose its policy preferences unfairly.[213]

Using punitive damages to punish defendants for injuries to third parties similarly offends the Due Process Clause. "For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense,'" and that opportunity cannot exist if the defendant is to be punished for injuries to nonparties, against whom the defendant cannot establish the validity of the injury or the existence of any defense.[214] "For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."[215] "Finally," the Court noted, "we can find no authority supporting the use of

207. *Id*. at 229.
208. *Id*. at 234–35.
209. *Id*. at 240 (Thomas, J., dissenting).
210. *Id*. at 248.
211. 549 U.S. 346 (2007).
212. *See id*. at 349 (holding that such activity amounts to a taking of property without due process).
213. *Id*. at 352–53.
214. *Id*. at 353–54 (citation omitted).
215. *Id*. at 354.

punitive damages awards for the purpose of punishing a defendant for harming others."[216]

The majority did acknowledge that jurors *could* properly consider injuries to third parties when assessing the reprehensibility of the defendant's conduct, another prong of the punitive damages assessment.[217] However, because the Oregon Supreme Court had not clearly distinguished proper uses of third-party injuries from improper uses, the Court remanded the punitive damages award at issue for reconsideration.[218]

Justice Stevens, writing in dissent and joined by an unusual alliance of Justices Ginsburg, Thomas, and Scalia, acknowledged that "[t]he Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors."[219] However, he considered the majority's limitation on the consideration of third-party injuries to be "novel" and saw "no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court' should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct."[220] Justice Thomas, in turn, wrote separately to emphasize that due process considerations should not constrain the *size* of punitive damages awards, either.[221] Finally, Justice Ginsburg, writing for herself, Justice Scalia, and Justice Thomas, argued that the Oregon Supreme Court had properly applied the U.S. Supreme Court's rulings on punitive damages and would uphold the award of punitive damages in order to punish the defendant's reprehensibility.[222]

3. Tennessee Secondary School Athletic Ass'n v. Brentwood Academy

In a plethora of concurring opinions, the Supreme Court in June 2007 addressed the First Amendment and procedural due process rights of schools in the context of sanctions by state interscholastic athletic associations.[223] While the overall decision was fractured, six Justices joined Justice Stevens's analysis of the Brentwood School's claim that the

216. *Id*.
217. *Id*. at 355.
218. *See id*. at 356–58 (concluding that state courts cannot authorize procedures creating an unreasonable risk of confusion as to the permissible uses of third-party injuries by the jury).
219. *Id*. at 358 (Stevens, J., dissenting).
220. *Id*. (citation omitted).
221. *Id*. at 361–62 (Thomas, J., dissenting).
222. *See id*. at 362–64 (Ginsburg, J., dissenting) (noting that she would accord more respect for the proceedings below, arguing the majority reached beyond the "sole objection Philip Morris preserved").
223. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007).

Tennessee Secondary School Athletic Association (TSSAA) violated its procedural due process rights when the full board, "during its deliberations, heard from witnesses and considered evidence that the school had no opportunity to respond to."[224]

The district court and the court of appeals both "found that the consideration of the *ex parte* evidence influenced the board's penalty decision and contravened the Due Process Clause," but the Supreme Court disagreed.[225] It stressed that

> [t]he decision to sanction Brentwood for engaging in prohibited recruiting was preceded by an investigation, several meetings, exchanges of correspondence, an adverse written determination from TSSAA's executive director, a hearing before the director and an advisory panel composed of three members of TSSAA's Board of Control, and finally, a *de novo* review by the entire TSSAA Board of Directors."[226]

The Court was thus unconvinced by Brentwood's claim of prejudice, because "[d]espite having had nearly a decade since the hearing to undertake that cross-examination and review, Brentwood has identified nothing the investigators shared with the board that Brentwood did not already know."[227] The Court was skeptical that the ex parte evidence "increased the severity of the penalties leveled against Brentwood," but more importantly, Brentwood failed to show that it would have proceeded differently if it knew that the board was going to consider the evidence.[228]

4. Caperton v. A.T. Massey Coal Co.

The Roberts Court's most unusual due process case came at the end of the 2008–2009 Term and involved a state supreme court justice's refusal to recuse himself.[229] In this 5–4 decision by Justice Kennedy, the majority concluded that Justice Benjamin of the West Virginia Supreme Court violated the Due Process Clause of the Fourteenth Amendment by not recusing himself.[230]

The majority did stress that the facts of the case were extreme. First, the five-justice West Virginia Supreme Court voted 3–2 to reverse a trial court judgment against A.T. Massey Coal Company on a jury verdict of $50 million, and Justice Benjamin was part of that three-justice majority.

224. *Id*. at 301.
225. *Id*. at 303. The Court noted, "Even accepting the questionable holding that TSSAA's closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harmless beyond a reasonable doubt." *Id*.
226. *Id*. at 300–01 (citations omitted).
227. *Id*. at 304.
228. *Id*. at 303–04.
229. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).
230. *Id.* at 2256–57.

Second, after the original trial verdict, but before the appeal to the West Virginia Supreme Court, Don Blankenship, A.T. Massey's chairman, chief executive officer, and president, contributed $1,000 to Benjamin's campaign committee, $2.5 million to a political organization that supported Benjamin, and $500,000 for independent expenditures, such as direct mailings, in support of Benjamin's election to that court. Blankenship's contributions "were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[231] Third, Benjamin won the election for chief justice with 53.3% of the vote. Fourth, the coal company's appeal came before Justice Benjamin about two years after the election, with the reversal decision issuing about a year later.[232]

The U.S. Supreme Court's earlier rulings on judicial recusals held "that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case."[233] In *A.T. Massey*, the majority went beyond that common law rule, concluding that a due process violation can also arise when there "are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"[234] The Court concluded that

> there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[235]

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. They characterized the majority's new rule as requiring recusal for a "probability of bias," which the dissenters argued "provides no guidance to judges and litigants about when recusal will be constitutionally required."[236] They concluded that "the cure is worse than the disease."[237] Justice Scalia added in his own dissent that "[t]he Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution."[238]

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231. *Id*. at 2257–58.
232. *Id*. at 2257–58, 2274.
233. *Id*. at 2259 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
234. *Id*. (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
235. *Id*. at 2263–64.
236. *Id*. at 2267 (Roberts, C.J., dissenting) (internal quotation marks omitted).
237. *Id*. at 2274.
238. *Id*. at 2275 (Scalia, J., dissenting).

C. Federal Preemption of State Law

The Supremacy Clause of the U.S. Constitution specifies that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[239] This clause helps to define the relationship between the states and the federal government by allowing Congress to preempt state law through federal statute.[240]

Whether Congress has actually preempted state law has been the subject of a series of cases in the Roberts Court. Moreover, these cases are often as interesting for the unusual alignment of Justices in the resulting opinions as for the decisions themselves.

1. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit

In March 2006, a unanimous Supreme Court (Justice Alito did not participate), in an opinion by Justice Stevens, broadly interpreted a section of the Securities Litigation Uniform Standards Act of 1998 (SLUSA)[241] to preempt state law class actions by securities holders as well as purchasers and sellers, regardless of whether the plaintiffs had a federal claim.[242] The U.S. Court of Appeals for the Second Circuit had held that SLUSA preempts state law claims only if the plaintiffs have a private remedy under federal law,[243] while the U.S. Court of Appeals for the Seventh Circuit had held that SLUSA preempts *all* covered state law claims.[244] The Supreme Court agreed with the Seventh Circuit's reading, holding that "[t]he background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit."[245]

According to the Second Circuit, because the class action in question "alleged that brokers were fraudulently induced, not to sell or purchase, but to retain or delay selling their securities, it fell outside SLUSA's pre-emptive scope."[246] The Supreme Court disagreed, noting that multiple

239. U.S. CONST. art. VI, cl. 2.

240. *See supra* notes 189–91 and accompanying text.

241. *See* 15 U.S.C. § 78bb(f)(1)(A) (2006) (prohibiting the maintenance of any "class action based upon the statutory or common law of any State or subdivision thereof . . . in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security").

242. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006).

243. Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 43–44 (2d Cir. 2005), *vacated*, 547 U.S. 71 (2006).

244. Kircher v. Putnam Funds Trust, 403 F.3d 478, 484 (7th Cir. 2005), *vacated for lack of jurisdiction*, 547 U.S. 633 (2006).

245. *Dabit*, 547 U.S. at 74.

246. *Id*. at 77.

court cases and SEC rulings in other contexts interpreted the "in connection with" language to give it a broad construction.[247] As a result,

> Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision. And when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'[248]

Moreover, a narrow interpretation would "run contrary to SLUSA's stated purpose" of preventing class action lawsuits from frustrating the objectives of the 1995 Reform Act.[249]

The Court acknowledged the "general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.'"[250] However, it explained that broad preemption is appropriate because

> that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.[251]

2. Watters v. Wachovia Bank

In April 2007, the Supreme Court concluded, in a 5–3 decision by Justice Ginsburg (Justice Thomas did not participate), that the National Bank Act (NBA) preempts state law regulation of a national bank's state-law-chartered operating subsidiaries.[252] Wachovia Bank, a national bank, conducts its real estate lending business through a state-chartered corporation licensed by the Office of the Comptroller of the Currency (OCC) pursuant to the NBA as an "operating subsidiary" of the bank.[253] Both the NBA and the OCC's regulations allow for such operating subsidiaries.[254] In *Watters v. Wachovia Bank, N.A.*, the issue for the Court

247. *See id*. at 85 (noting that although a narrow construction would not be unreasonable, the Court consistently adopts the broader view).

248. *Id*. at 85–86 (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)).

249. *Id*. at 86.

250. *Id*. at 87 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (alteration in original).

251. *Id*.

252. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 18–19 (2007) (noting that the Court's historical focus in considering preemption and the NBA is on the powers of national banks, rather than their corporate structure).

253. *Id*. at 7.

254. 12 U.S.C. § 24a(g)(3)(A) (2006); *see also* 12 C.F.R. § 5.34(e)(1) (2009) (authorizing national banks to conduct activities in an operating subsidiary that are

was whether such operating subsidiaries are subject to state regulation.

National banks have historically been free from the burden of state regulation,[255] and the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law."[256] "Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA."[257] Moreover, because the NBA's preemption focuses on "a national bank's *powers*, not on its corporate structure,"[258] preemption of state regulation extends to OCC-licensed operating subsidiaries.[259] The Supreme Court sidestepped issues of deference and the OCC's independent authority to preempt state law because the regulation at issue, 12 C.F.R. § 7.4006, "merely clarifies and confirms what the NBA already conveys."[260] As a result, the OCC's regulation stating the same principle of preemption did not violate the Tenth Amendment or principles of federalism.[261]

More interesting for administrative law, federalism analyses, and statutory interpretation was Justice Stevens's dissent, joined, unusually, by Chief Justice Roberts and Justice Scalia. Arguing that "the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power," resulting in a "significant impact . . . on the federal–state balance,"[262] the dissenters reviewed the history of the NBA to conclude that "Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized the OCC to 'license' any state-chartered entity to do so."[263] Instead, Congress at best "acquiesced in the OCC's expansive interpretation of its authority," which "is a plainly insufficient basis for finding preemption."[264]

Unlike the majority, therefore, the dissenters considered the source of preemption to be the OCC's regulation and argued that, because of its

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permissible for national banks "either as part of, or incidental to, the business of banking").

255. *See Watters*, 550 U.S. at 10–11 (surveying the development of America's dual banking system, and Congress's preference for placing national banks beyond the reach of the States).

256. 12 U.S.C. § 484(a) (2006). "Visitorial powers" refer to the government's supervisory powers over banks. *See infra* notes 855–59 and accompanying text (discussing these powers in more detail).

257. *Watters*, 550 U.S. at 13.

258. *Id*. at 18.

259. *Id*. at 19.

260. *Id*. at 20–21.

261. *Id*. at 22.

262. *Id*. (Stevens, J., dissenting).

263. *Id*. at 30.

264. *Id*. at 30–31.

federalism implications, the OCC's regulation was not entitled to *Chevron* deference.[265] "No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal–state balance."[266] Moreover, the dissenters explicitly linked statutory preemption to the Tenth Amendment and to principles of constitutional federalism,[267] concluding, "Never before have we endorsed administrative action whose sole purpose was to pre-empt state law rather than to implement a statutory command."[268]

3. Preston v. Ferrer

In February 2008, the Supreme Court decided three preemption cases, two of which touch on the role of federal agencies in preemption analyses. *Preston v. Ferrer*[269] involved the relationship between the Federal Arbitration Act[270] and state agencies. Specifically, the California Talent Agencies Act (TAA)[271] lodges the initial dispute resolution authority for conflicts arising under the Act in the California Labor Commission, a state agency. In June 2005, Preston demanded arbitration of his TV-show contract with Ferrer in accordance with the arbitration clause in that contract. A month later, Ferrer petitioned the California Labor Commissioner, arguing that the contract was invalid and unenforceable under the TAA because Preston acted as a talent agent without the appropriate state license.[272]

The issue was therefore whether § 2 of the Federal Arbitration Act, which makes arbitration clauses enforceable despite state law, required the issue of the contract's validity to be heard before the arbitrator, or whether the courts should respect California's assignment of that task to the California labor commissioner.[273] The U.S. Supreme Court, in an 8–1 opinion by Justice Ginsburg (Justice Thomas dissented), swiftly concluded that the Federal Arbitration Act preempted state law.[274] According to the Court, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, *whether*

265. *See id*. at 41 (noting that "unlike Congress, administrative agencies are clearly not designed to represent the interests of States").
266. *Id*.
267. *Id*. at 43–44.
268. *Id*. at 44.
269. 128 S. Ct. 978 (2008).
270. 9 U.S.C. §§ 1–307 (2006).
271. CAL. LAB. CODE § 1700.44 (West 2003).
272. *Preston*, 128 S. Ct. at 982.
273. *See id*. at 981 (asking whether the Federal Arbitration Act preempts "state statutes that refer certain disputes initially to an administrative agency").
274. *Id.*

judicial or administrative, are superseded by the F[ederal] A[rbitration] A[ct]."[275] The Court emphasized that, under its previous Federal Arbitration Act jurisprudence, "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken."[276]

Ferrer tried to differentiate the administrative proceeding from court proceedings by arguing that the California statute merely required parties to exhaust their administrative remedies before proceeding to arbitration. The Supreme Court, however, was unconvinced, emphasizing that this interpretation would ignore conflicts between the TAA and the Federal Arbitration Act. Specifically, the Court found that

> [p]rocedural prescriptions of the TAA thus conflict with the F[ederal] A[rbitration] A[ct]'s dispute resolution regime in two basic respects: First, the TAA, in § 1700.44(a), grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate; second, the TAA, in § 1700.45, imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally."[277]

In light of these conflicts, the Federal Arbitration Act preempted the state law.[278]

4. Riegel v. Medtronic, Inc.

The Supreme Court's second preemption decision in February 2008 was *Riegel v. Medtronic, Inc*.[279] In this 8–1 decision by Justice Scalia (Justice Ginsburg dissented; Justice Stevens concurred in the judgment), the Court concluded that the Food and Drug Administration's (FDA's) premarket approval process under the 1976 Medical Device Amendments (MDA) to the Food, Drug, and Cosmetic Act[280] could impose device-specific "requirements" sufficient to trigger the MDA's express preemption provision and hence to preempt state negligence and strict liability torts related to the medical device so approved.[281]

After reviewing the extensive FDA premarket approval process, the Court reiterated prior case law concluding that federal preemption under the MDA is specific to particular medical devices. As a result, the FDA's

275. *Id*. (emphasis added).
276. *Id*. at 984 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967)).
277. *Id*. at 985 (citations omitted).
278. *Id*. at 989.
279. 128 S. Ct. 999 (2008).
280. 21 U.S.C. § 360c(a)–(i) (2006).
281. *See Riegel*, 128 S. Ct. at 1007 (noting that premarket approval is specific to individual medical devices and encapsulates the requirements resulting from a federal safety review).

regulations must impose specific duties with respect to particular devices before those regulations can preempt state law.[282] However, unlike in its general regulations, the FDA *does* impose device-specific requirements in its premarket approvals, and hence those requirements could be the basis of federal preemption of state law. [283]

Moreover, the Supreme Court affirmed its prior conclusion that state negligence and strict liability duties impose potentially contradictory state law requirements on the use of such medical devices.[284] As a result, the FDA's premarket approvals for medical devices preempt state law tort claims to the extent that tort duties conflict with duties imposed under the MDA.[285]

5. Rowe v. New Hampshire Motor Transport Ass'n

The third case of the February 2008 preemption trilogy was *Rowe v. New Hampshire Motor Transport Ass'n*.[286] In this unanimous opinion by Justice Breyer, with Justice Stevens concurring in part, the Court concluded that, pursuant to express preemption provisions, certain provisions of the Federal Aviation Administration Authorization Act (FAAAA)[287] preempted Maine laws regulating the delivery of tobacco to customers in Maine.[288]

The FAAAA prohibits states from enacting laws or regulations "related to a price, route, or service of any motor carrier," while the Maine statute "forbids anyone other than a Maine-licensed tobacco retailer to accept an order for delivery of tobacco" and requires licensed retailers to use a specific recipient-verification service.[289] The Court found that the FAAAA preempted the state requirements because the Maine tobacco statute focuses "on trucking and other motor carrier services . . . , thereby creating a direct 'connection with' motor carrier services."[290] Moreover, as the Court noted, the Maine law "has a 'significant' and adverse 'impact' in

282. *See id*. at 1006–07 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 493–501 (1996)) (discussing its holding in *Lohr* and noting that federal manufacturing and labeling requirements that applied across the board did not preempt common law negligence and strict liability claims).

283. *See id*. at 1007 (noting that this is so because the process of premarket approval is equivalent to federal safety review).

284. *See id*. at 1007–08 (stating the principal that "[a]bsent other indication, reference to a State's 'requirements' [in a federal enactment] includes its common-law duties").

285. *Id*. at 1011.

286. 128 S. Ct. 989 (2008).

287. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A) (2006).

288. *Rowe*, 128 S. Ct. at 996.

289. *Id*. at 993–94 (citing 49 U.S.C. § 14501(c) (2006); ME. REV. STAT. ANN. tit. 22, § 1555-C(1), (3)(c) (2004)).

290. *Id*. at 995 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

respect to the federal Act's ability to achieve its pre-emption-related objectives."[291]

D. The Commerce Clause and Federalism

1. Gonzales v. Oregon*: Congress's Authority over the Medical Profession*

As discussed above, limitations on Congress's Commerce Clause authority have been an important source of federalism decisions since 1995, when the Supreme Court decided *Lopez*. In its January 2006 opinion in *Gonzales v. Oregon*,[292] the Supreme Court again found limits on Congress's authority to intrude upon state affairs. The Court decided 6–3 that the U.S. Attorney General lacked authority to interpret the federal Controlled Substances Act (CSA)[293] to prohibit doctors from prescribing controlled substances for use in assisted suicides regulated under Oregon law.[294]

The case turned on the validity of the Attorney General's November 9, 2001 interpretive rule, and most of the decision discussed the proper standard of review for that rule.[295] However, the Court also extensively discussed federalism considerations in the context of the regulation of physicians. The CSA allows the Attorney General to register physicians to administer Schedule II drugs.[296] However, "The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers."[297] Congress expressly disclaimed any intent in the CSA to "occupy the field" of physician regulation,[298] and it expressed an intent for national uniform standards of medical practice with respect only to narcotic-addiction treatment.[299] Thus, "In the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the

291. *Id*. (citing *Morales*, 504 U.S. at 390).
292. 546 U.S. 243 (2006).
293. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).
294. *See* Gonzales v. Oregon, 546 U.S. at 269–71 (quoting relevant language from the Act announcing Congress's intent not to preempt the states' general regulation of medical practice absent express language to that effect).
295. *Id*. at 249. See also discussion *infra* notes 567–81 and accompanying text (discussing the standard of review portions of the opinion).
296. Gonzales v. Oregon, 546 U.S. at 250–51 (citing 21 U.S.C. §§ 822(a)(2), 824(a)(4) (2006)).
297. *Id*. at 270.
298. *See id*. at 270–71 (citing 21 U.S.C. § 903 (2006)) (discussing the CSA's preemption provision).
299. *See id.* at 271 (citing 42 U.S.C. § 290bb-2a (2006)) (noting that although the regulation of health and safety is primarily a matter of local concern, "there is no question" that the federal government may determine uniform national standards in these areas).

Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide."[300] Indeed, "The CSA's substantive provisions and their arrangement undermine [an] assertion of an expansive federal authority to regulate medicine,"[301] which would "effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality."[302] In other words, because medicine is an area traditionally left to the states to regulate, the Court wanted much clearer language from Congress than the CSA provides before it would assume a federal intrusion into this state-dominated sphere of activity.

2. The Dormant Commerce Clause

The dormant Commerce Clause is a judicially created doctrine arising by implication from the Interstate Commerce Clause, which provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[303] According to the U.S. Supreme Court, this clause "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'"[304]

In April 2007, the Supreme Court determined in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority* that state- and local-government-owned solid waste facilities are entitled to special consideration under the dormant Commerce Clause.[305] This 5–1–3 decision by Chief Justice Roberts was the latest entry in a long series of dormant Commerce Clause decisions by the Supreme Court involving solid waste. In *United Haulers*, the Supreme Court considered whether the public ownership of the destination waste-processing facility changed the constitutional validity of county flow-control ordinances.[306] Previously, in *C&A Carbone, Inc. v. Clarkstown*, the Court held that flow-control ordinances that required trash haulers to deliver solid waste to particular privately owned waste-processing facilities violated the dormant Commerce Clause.[307]

The *United Haulers* Court concluded that the ordinances at issue did not

300. *Id*. at 272.
301. *Id*. at 273.
302. *Id*. at 275.
303. U.S. CONST. art. I, § 8, cl. 3.
304. Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 (1994) (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)) (alteration in original).
305. 550 U.S. 330 (2007).
306. *Id*. at 342.
307. 511 U.S. 383, 393–95 (1994).

facially discriminate against interstate commerce because "[t]he flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same."[308] According to the Court, "States and municipalities are not private businesses—far from it,"[309] so "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism," particularly because "[l]aws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism."[310] In contrast, "The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government."[311]

Because there was no facial discrimination, the Court applied the balancing test from *Pike v. Bruce Church, Inc*.[312] Concluding that "any arguable burden does not exceed the public benefits of the ordinances,"[313] the majority emphasized that "[t]he ordinances give the Counties a convenient and effective way to finance their integrated package of waste disposal services" and "increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties."[314]

Justice Scalia refused to join the majority's balancing analysis and concurred to argue instead that the dormant Commerce Clause is "an unjustified judicial invention," to be limited to existing precedent.[315] Justice Thomas concurred in the judgment but argued that the *C&A Carbone* decision should be overruled.[316] Justice Alito, in a dissent joined by Justices Stevens and Kennedy, argued that the *C&A Carbone* rule should apply with equal force to the ordinances at issue in *United Haulers*.[317]

In May 2008, in *Department of Revenue v. Davis*,[318] the Roberts Court emphasized its holding in *United Haulers* by upholding the Commonwealth of Kentucky's income tax structure against dormant Commerce Clause challenges despite the fact that the tax scheme exempted interest income on Kentucky bonds while taxing interest income from bonds issued by other

308. *United Haulers*, 550 U.S. at 342.
309. *Id*.
310. *Id*. at 343.
311. *Id*.
312. *Id*. at 346.
313. *Id*.
314. *Id*. at 346–47.
315. *Id*. at 348 (Scalia, J., concurring in part).
316. *Id*. at 349 (Thomas, J., concurring).
317. *Id*. at 356 (Alito, J., dissenting).
318. 128 S. Ct. 1801 (2008).

states.[319] Justice Souter wrote this 7–2 decision, which emphasized that "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[320] The Court concluded that the logic of *United Haulers* "applies with even greater force to laws favoring a State's municipal bonds, given that the issuance of debt securities to pay for public projects is a quintessentially public function."[321] The Court also found applicable *United Haulers*' concern about "'unprecedented . . . interference' with a traditional government function," namely state taxation.[322] Finally, the Court considered the *Pike* balancing test inapplicable because "the rule in *Pike* was never intended to authorize a court to expose the States to the uncertainties of the economic experimentation the [plaintiffs] request."[323]

Justice Kennedy dissented, joined by Justice Alito. They argued that the majority weakened the dormant Commerce Clause by undermining the *Pike* substantial burden test and would have preferred a special *sui generis* rule for taxation of bonds.[324]

E. Federalism in Statutory Interpretation

1. Federalism, Statutory Construction, and Unanimous Results

When federal statutes implicate state interests, the Supreme Court will occasionally and consciously consider the federalism implications of various statutory meanings. Moreover, the Court's decision to consider a statute's federalism implications, or not, can occasionally bring unanimity to the Court's statutory interpretation decisions.

In May 2006, for example, the Supreme Court unanimously decided *S.D. Warren Co. v. Maine Board of Environmental Protection*.[325] In an opinion by Justice Souter, the Court affirmed the Supreme Judicial Court of Maine regarding the state's right to condition a Federal Energy Regulatory Commission (FERC) relicensing of hydroelectric dam projects.[326] Section 401 of the Clean Water Act requires applicants for federal licenses and permits to obtain water-quality certifications from the relevant state if the

319. *Id*. at 1810–11.
320. *Id*. at 1808 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).
321. *Id*. at 1810.
322. *Id*. at 1811.
323. *Id*. at 1819.
324. *Id*. at 1830 (Kennedy, J., dissenting).
325. 547 U.S. 370 (2006).
326. *Id*. at 375.

licensed or permitted activity may result in a "discharge" that can affect state water quality.[327] In *S.D. Warren*, the parties disputed whether a "discharge" would occur that would trigger § 401.

To interpret the term *discharge*, the Court looked first to statutory definitions, noting that the Act does not precisely define *discharge* but rather only states that the term "'includes a discharge of a pollutant, and a discharge of pollutants.'"[328] In accordance with its standard statutory interpretation methodology, therefore, the Court sought the term's plain meaning in dictionaries. According to *Webster's New International Dictionary*, the ordinary meaning of *discharge* when applied to water is "a 'flowing or issuing out'" or "'[t]o emit; to give outlet to; to pour forth; as, the Hudson *discharges* its waters into the bay.'"[329] The Supreme Court found support for its proposed interpretation of the word *discharge* in non-Clean Water Act cases,[330] in a prior § 401 decision,[331] and in statements by the EPA and FERC.[332]

The Court noted that the agencies were not entitled to deference regarding this definition "because neither the EPA nor FERC has formally settled the definition"; nevertheless, "the administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term."[333] The Court then rejected S.D. Warren's objections to its interpretation based on the canon of *noscitur a sociis*;[334] on the Court's interpretation of "discharge of a pollutant"—a defined term under the Act—for purposes of the § 402 permit program because § 401 and § 402 are separate provisions of the Clean Water Act with different statutory triggers;[335] and on legislative history, a part of the opinion Justice Scalia would not join, referring to S.D. Warren's highly technical argument about wording based on drafting amendments as "a lawyer's argument."[336]

Unusually and notably, the Court then extended its discussion beyond

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327. 33 U.S.C. § 1341(a) (2006).

328. *See S.D. Warren*, 547 U.S. at 375–76 (quoting 33 U.S.C. § 1362(16) (2006)) (reasoning that the term must therefore be construed in accord with its ordinary and natural meaning).

329. *Id*. at 376 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 742 (2d ed. 1954)).

330. *Id*.

331. *See id.* at 376–77 (discussing its holding in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994)).

332. *Id*. at 377–78.

333. *Id*. at 378.

334. *See id*. at 378–80 (discounting S.D. Warren's argument that based upon *noscitur a sociis* and the assertion that discharge includes a discharge of pollutants, there can thus be no discharge without the addition of a pollutant to the water).

335. *See id*. at 380–81 (noting that the statutory trigger is not a discharge alone, but more specifically and narrowly, a discharge of a pollutant).

336. *See id*. at 382–83 (determining that, if anything, the legislative history contradicts S.D. Warren's position).

the narrow issue of the meaning of *discharge*, which was all that was needed to decide the case, to emphasize the federalism implications of water-quality protection. Noting that S.D. Warren's technical arguments "miss the forest for the trees,"[337] the Court emphasized the states' role in implementing the Act's broader purposes: "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' the 'national goal' being to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'"[338] As a result, "Changes in the river like [those caused by the hydroelectric dam] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns."[339] In the Court's opinion, "Reading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended."[340]

In other decisions, however, the Supreme Court explicitly discounted federalism considerations in unanimous decisions. For example, in December 2007, a unanimous Court determined in *CSX Transportation, Inc. v. Georgia State Board of Equalization*[341] that, under a provision of the Railroad Revitalization and Regulatory Reform Act,[342] railroads may challenge state methods for determining the value of railroad property for *ad valorem* tax purposes.[343] The Court concluded that, in order to effectuate Congress's purpose in the Act, "district courts must calculate the true market value of in-state railroad property."[344] Such calculations, in turn, require that the federal courts be able to "look behind a State's valuation methods."[345]

In overturning the U.S. Court of Appeals for the Eleventh Circuit's decision, the Supreme Court discounted federalism arguments that the Eleventh Circuit found worthy of judicial consideration. First, the Supreme Court rejected Georgia's argument that federal court examination of state taxation valuation methodologies interfered with principles of federalism because the federal courts would be interfering with the states' sovereign power to tax. The Court emphasized instead that Congress mandated such "interference" (if it was truly interference at all) because "judicial scrutiny of [the States'] methodologies is authorized by the . . . Act's clear

337. *Id*. at 384.
338. *Id*. at 385.
339. *Id*. at 386 (citing 33 U.S.C. §§ 1251(b), 1256(a), 1370 (2006)).
340. *Id*. at 387.
341. 552 U.S. 9 (2007).
342. 49 U.S.C. § 11501 (2006).
343. *CSX Transportation*, 552 U.S. at 12.
344. *Id*. at 16.
345. *Id.* at 21.

command to find true market value."[346] Similarly, the Court rejected Georgia's argument that the Court's interpretation interfered with states' ability to choose a valuation methodology. According to the Court, states remain free to choose any valuation methodology they want, so long as they do not discriminate in the taxation of railroad property.[347] *CSX Transportation* thus suggests that federalism values are less important in federal court statutory interpretation when (1) Congress's intent and commands are clear and (2) clear federal interests, such as railroads, are involved.

Perhaps most dramatically, in 2009, in *Northwest Austin Municipal Utility District No. One v. Holder*,[348] the Supreme Court decided, 8–1 in part and 9–0 in part (Justice Thomas concurred in part and dissented in part), to avoid a constitutional evaluation of § 5 of the Voting Rights Act,[349] deciding instead on statutory grounds that a Texas municipal utility district was a "political subdivision" eligible to file suit to bail out of the Act's preclearance requirements. The utility district has an elected board, and § 5 requires it to preclear any changes in its election rules with federal authorities.[350] The Voting Rights Act's "bailout" provision allows courts to release a state or "political subdivision" from the preclearance requirement if the political subdivision meets a list of requirements. However, the Act defines *political subdivision* to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."[351] Because the utility district did not conduct its own registration for voting, the lower court concluded that it was not a "political subdivision" eligible for bailout.

The Supreme Court was very concerned about the federalism implications of § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, [and hence] imposes substantial federalism costs."[352] "The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"[353] As the Court noted, "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional

346. *Id*. at 20–21.
347. *Id*. at 21.
348. 129 S. Ct. 2504 (2009).
349. 42 U.S.C. § 1973c(a) (2006).
350. *Nw. Austin*, 129 S. Ct. at 2509–10.
351. 42 U.S.C. § 1973*l*(c)(2) (2006).
352. *Nw. Austin*, 129 S. Ct. at 2511 (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995))) (internal quotation marks omitted).
353. *Id*. at 2512 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

in another."[354]

Nevertheless, the Court opted for constitutional avoidance, deferring to both Congress and its own rules of decisional preferences. As for Congress, the Court noted that

> [i]n assessing those questions [of the constitutionality of the Voting Rights Act], we are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements . . . .[355]

In addition to respecting Congress's decisions, "'It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'"[356]

Nevertheless, lingering federalism concerns appear to have pushed the Court into a liberal—arguably even extratextual—construction of the Act. Thus, in addressing the statutory issue of whether the utility district could qualify as a "political subdivision," the Supreme Court began by announcing that "[s]tatutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case."[357] The Court's prior decisions already established that the statutory definition of *political subdivision* did not govern every use of that term in the Voting Rights Act.[358] In addition, the Court noted that a restrictive interpretation of *political subdivision* "has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act."[359] As a result, the Court concluded "that all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit."[360]

Thus, the *Northwest Austin* decision simultaneously demonstrated themes from both *S.D. Warren* and *CSX Transportation* to reach a nearly unanimous Supreme Court construction of a federal statute. As in *CSX Transportation*, the Court was conscious that it was issuing a decision in an area of strong federal interest and where deference to Congress was

354. *Id*.
355. *Id*. at 2513 (citations omitted).
356. *Id*. (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam)).
357. *Id*. at 2514 (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949)) (internal quotation marks omitted).
358. *Id*. at 2514–15.
359. *Id*. at 2516.
360. *Id*.

particularly warranted, given the Constitution's language. As in *S.D. Warren*, however, the significant federalism implications of the statute's construction in *Holder* prompted a broad interpretation that conferred more freedom and authority on states and their subdivisions vis-à-vis the federal government.

2. Federalism, Statutory Construction, and Split Decisions

Despite the occasional unanimous opinion, the conflicting impulses to consider and ignore the federalism implications of a particular statutory construction are far more likely to split the Roberts Court than to unify it. For example, the Supreme Court considered several federalism-related canons of construction in its June 2008 decision in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*[361] This 7–2 decision (Justices Breyer and Stevens dissented) involved the Bankruptcy Code's provision exempting assets transferred under a plan confirmed under Chapter 11 of the Code from the imposition of stamp and similar taxes.[362] The Court held that this tax exemption does not apply until after the plan is confirmed.[363]

The Court considered a number of interpretive tools in reaching this conclusion and exhibited far more solicitude for states and their taxation schemes than was evident in *CSX Transportation*, despite the prominent federal role in bankruptcy protections. In particular, the Court approved Florida's invocation of three canons of statutory construction that serve to protect state interests. First, Florida raised the canon "that 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.'"[364] Second, Florida argued "that courts should proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed."[365] Finally, "Florida notes that the canon also discourages federal interference with the administration of a State's taxation scheme."[366] As in *Northwest Austin*, therefore, the majority's interpretation essentially cabined the federal limitations on state authority as narrowly as the statutory language would allow.

Federalism was also relevant to the Supreme Court's 5–4 decision in

361. 128 S. Ct. 2326 (2008).

362. *Id*. at 2326, 2329; *see also* 11 U.S.C. § 1146(a) (2006) (exempting from the imposition of stamp taxes and similar taxes assets transferred under a plan confirmed under Chapter 11 of the Code).

363. *See Piccadilly Cafeterias*, 128 S. Ct. at 2330 (holding that the provision does not apply to transfers made before a plan is confirmed).

364. *Id*. at 2336 (quoting Lorillard v. Pons, 434 U.S. 575, 580–81 (1978)).

365. *Id*. at 2336–37 (quoting Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 851–52 (1989)) (internal quotation marks omitted).

366. *Id*. at 2337.

Horne v. Flores,[367] which involved the Nogales Unified School District's implementation of § 204(f) of the Equal Educational Opportunities Act of 1974 (EEOA).[368] This provision requires states "to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs."[369] Since 2000, the school district had been operating under a federal district court order to comply with the Act, which the court extended to the entire State of Arizona in 2001.[370]

In 2006, after Arizona enacted legislation to increase state funding for English Language Learner (ELL) students, the state and the school district moved for relief from the district court's order pursuant to Federal Rule of Civil Procedure 60(b)(5), arguing that changed circumstances warranted relief from the judgment. The district court denied the motion, concluding that the increased funding was not rationally related to effective ELL programming, that a two-year limit on the increased funding was irrational, and that the Arizona statute violated federal law by using federal funds to supplant rather than supplement state education funding.[371] The U.S. Court of Appeals for the Ninth Circuit affirmed,[372] but the Supreme Court reversed.

In an opinion by Justice Alito, the majority in *Horne v. Flores* concluded that the lower courts did not apply Rule 60(b)(5) flexibly enough in this situation and instead fixated improperly on the state funding provided for ELL programs.[373] The majority classified the case as "institutional reform litigation" and underscored the importance of Rule 60(b)(5) relief in such cases.[374] In particular, "institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education."[375] Moreover, "[f]ederalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities" and can constrain state and local officials in the exercise of their elected offices.[376] Finally, when state officials themselves disagree as to how to comply with the

367. 129 S. Ct. 2579 (2009).
368. *See* 20 U.S.C. § 1703(f) (2006) (prohibiting a state from denying equal educational opportunity to an individual by failing to take appropriate action to overcome language barriers).
369. *Id*.
370. *Horne*, 129 S. Ct. at 2584–85.
371. Flores v. Arizona, 480 F. Supp. 2d 1157, 1164–67 (D. Ariz. 2007), *aff'd*, 516 F.3d 1140 (9th Cir. 2008), *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579 (2009).
372. Flores v. Arizona, 516 F.3d 1140, 1179–80 (9th Cir. 2008), *rev'd sub nom.* Horne v. Flores, 129 S. Ct. 2579 (2009).
373. *Horne*, 129 S. Ct. at 2597–98.
374. *Id.* at 2593.
375. *Id*.
376. *Id*. at 2593–94.

federal order, federalism concerns are also increased: "Precisely because different state actors have taken contrary positions in this litigation, federalism concerns are elevated. And precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical."[377]

The district court and the Ninth Circuit, according to the Supreme Court, improperly confined their analyses to the scope of the original order, disallowing the school district from demonstrating compliance with the EEOA in any way except through increased state ELL funding.[378] As a result, the Court remanded the case for

> a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of [the No Child Left Behind Act], structural and management reforms in Nogales, and increased overall education funding.[379]

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. They argued that the lower courts thoroughly considered all of the changed circumstances that the majority mentioned and that were presented in the case; moreover, they objected to the "institutional reform litigation" label relied upon by the majority.[380] In particular, they argued that the majority's main criticism of the lower courts—that they focused too much on education funding—was misplaced because "the State's provision of adequate resources to its English-learning students . . . has always been the basic contested issue in this case."[381]

III. THE FEDERAL COURTS' ROLES VIS-À-VIS CONGRESS AND THE EXECUTIVE BRANCH: DEFERENCE AND INSTITUTIONAL COMPETENCE

Since the start of its 2005 Term, the Supreme Court has repeatedly wrestled with the overarching issue of the proper role of the federal courts in the United States' tripartite division of power at the federal level. Indeed, with respect to the Executive Branch and administrative agencies, the Supreme Court has demonstrated a high level of deference, although this deference becomes somewhat muddled when agencies contend with prior Supreme Court precedent.

This Part presents the recent decisions that give insight into the Roberts

377. *Id*. at 2596.

378. *See id*. at 2597–98 (noting that although the Ninth Circuit purported to engage in a "changed circumstances" analysis, in effect, it only asked whether the changed circumstances affected ELL funding, and finding similar errors by the district court).

379. *Id*. at 2600.

380. *Id*. at 2608 (Breyer, J., dissenting).

381. *Id*. at 2609.

Court's often-divided view of its own role in the federal government. These cases arise in three main contexts: the Supreme Court's interpretation of the Constitution itself, the Supreme Court's review of challenges to federal statutes, and the Supreme Court's review of federal agency actions. In the last category, moreover, three types of decisions have been important: arbitrary and capricious review of agency actions; cases involving *Chevron* deference and federal agency interpretations of federal statutes; and cases involving the intersection of federal agency actions and prior federal court—especially Supreme Court—precedent.

A. Constitutional Interpretation: The Roberts Court and the Second Amendment

As the Roberts Court's discussions of due process limitations on states suggest,[382] one area where the Supreme Court strongly maintains its role as the final decisionmaker is in direct interpretation and application of the U.S. Constitution. Another example of the Court's asserted dominance in this area came in what was arguably the most controversial decision of the Court's 2007–2008 Term, *District of Columbia v. Heller*.[383] In a 5–4 decision by Justice Scalia (Justices Stevens, Souter, Ginsburg, and Breyer dissented), the Court decided that the Second Amendment confers an individual right to keep and bear arms and, as a result, that statutes completely banning handgun possession are unconstitutional.[384] While the substance of the Second Amendment is generally outside the scope of administrative law practice, the majority's statements regarding the interpretation of the U.S. Constitution are nevertheless notable.

First, the Supreme Court emphasized that

> [i]n interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[385]

The majority thus incorporated both a strict plain meaning and an originalist approach to its interpretation of the Second Amendment—the latter evidenced in its exhaustive historical review of that amendment.[386]

382. *See supra* Part II.B.
383. 128 S. Ct. 2783 (2008).
384. *Id*. at 2816, 2821–22.
385. *Id*. at 2788 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931), and citing Gibbons v. Ogden, 9 Wheat. 1, 188 (1824)).
386. *See id*. at 2793–2801 (reviewing the meaning to the term *bear*, in relationship to *arms*, in view of those words' eighteenth-century historical and social context).

Second, the majority divided the Second Amendment into a prefatory clause—"[a] well-regulated Militia, being necessary to the security of a free State"—and an operative clause—"the right of the people to keep and bear Arms, shall not be infringed."[387] It then determined that, while the prefatory clause may "resolve an ambiguity in the operative clause, . . . [the] prefatory clause does not limit or expand the scope of the operative clause."[388] As such, the majority concluded that an equivalent phrasing of the Second Amendment could have been "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."[389] Accordingly, the majority focused its textual analysis on the operative clause, returning to the prefatory clause only "to ensure that our reading of the operative clause is *consistent* with the announced purpose."[390] Thus, the Amendment's purpose did not limit the scope of the right but instead provided one reason for ensuring that right.

In contrast, in his dissent, Justice Stevens argued that the purpose of the Second Amendment—"to protect the right of the people of each of the several States to maintain a well-regulated militia"[391]—also defined the scope of the right. He noted,

> Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.[392]

Justice Stevens thus would have pursued a more purpose-based approach to interpreting the Constitution.

Justice Breyer agreed "that the Second Amendment protects militia-related, not self-defense-related, interests."[393] In addition, he argued that governments still maintain the authority to regulate rights protected in the Constitution, so long as the regulations are reasonable.[394]

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387. *See id.* at 2789–91, 2799 (identifying and discussing the operative and prefatory clauses). For the relevant language, see U.S. CONST. amend. II.
388. *Heller*, 128 S. Ct. at 2789.
389. *Id*.
390. *Id*. at 2789–90 (emphasis added).
391. *Id*. at 2822 (Stevens, J., dissenting).
392. *Id*.
393. *Id*. at 2847 (Breyer, J., dissenting).
394. *See id*. (concluding that the "Amendment permits government to regulate the interests that it serves").

B. Separation of Powers in Favor of the Court: Habeas Corpus and the Court's Role in Protecting Detainees

In the same month that it decided *Heller*, the Supreme Court, in another 5–4 decision, asserted its role to protect the constitutional rights of detainees against congressional attempts to limit those rights. Prisoners held at Guantanamo Bay, Cuba were the subject of the Supreme Court's expositions on the constitutional role of judicial review in *Boumediene v. Bush*.[395] Justice Kennedy authored the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented.

Boumediene involved Congress's authority to suspend the writ of habeas corpus. After the Supreme Court determined in *Hamdan v. Rumsfeld*[396] that the Detainee Treatment Act (DTA) of 2005 did not apply to pending habeas proceedings, Congress enacted the Military Commissions Act of 2006 (MCA).[397] Section 7 of the MCA amends 28 U.S.C. § 2241 and purports to strip the federal courts of jurisdiction over pending as well as future habeas petitions by or on behalf of alien Guantanamo detainees determined to be enemy combatants or awaiting such determination.[398] The *Boumediene* Court determined that the procedures for reviewing detainees' status in the DTA "are not an adequate and effective substitute for habeas corpus" and hence that § 7 of the MCA "operates as an unconstitutional suspension of the writ."[399]

The Court's opinion in *Boumediene* incorporated both a historical review of the role of habeas corpus and technical interpretations of both the statutes and the Constitution.[400] From an administrative law perspective, however, the most interesting parts of the opinion are the discussions of separation-of-powers principles.

First, the Supreme Court noted that the writ of habeas corpus is an essential component in the constitutional protection of individual liberty, a part of the Constitution's overall separation-of-powers scheme. "The Framers' inherent distrust of governmental power was the driving force behind that constitutional plan that allocated powers among three independent branches . . . . [T]he Framers considered the writ a vital instrument for the protection of individual liberty . . . ."[401] As a result, the

395. 128 S. Ct. 2229 (2008).
396. *See supra* notes 92–98 and accompanying text.
397. Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 42 U.S.C.).
398. 28 U.S.C. § 2241(e) (2006).
399. *Boumediene*, 128 S. Ct. at 2240.
400. *Id*. at 2244–51.
401. *Id*. at 2246.

Constitution allowed Congress only limited grounds to suspend the writ, and the Court concluded that the Suspension Clause thus "ensures that, except during periods of formal suspension, the Judiciary will have the time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[402]

Second, the Supreme Court rejected the Government's formal interpretation of the extraterritorial application of the Constitution and hence the availability of the writ, in part on separation-of-powers grounds. Noting that "[t]he United States has maintained complete and uninterrupted control of [Guantanamo Bay] for over 100 years," the Court rejected the idea "that the Constitution had no effect there, at least to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term."[403] In effect, the Government's argument proved too much:

> The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.[404]

Such decisions, the Court determined, were not for the Executive Branch and Congress to make: "Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[405] Moreover, "The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain."[406] In particular, "Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."[407]

The majority, therefore, asserted the Court's duty to oversee and constrain the other branches of the federal government. The dissenters, in contrast, viewed the Court as over-enthusiastically striking down

> the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants . . . without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation.[408]

The dissenters would have been far more deferential to the political

402. *Id*. at 2247.
403. *Id*. at 2258.
404. *Id*. at 2258–59.
405. *Id*. at 2259.
406. *Id*.
407. *Id*. at 2269.
408. *Id*. at 2279 (Roberts, C.J., dissenting).

branches "amidst an ongoing military conflict," and perceived a different kind of separation-of-powers problem: "One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."[409]

C. Separation of Powers Against the Court: Supreme Court Precedent and Congress's Amendments of Federal Statutes

Over the course of the first four years of the Roberts Court, several opinions suggest that when statutory construction connects to a particular kind of constitutional issue, the Court's treatment of the statute will skew toward that issue—toward protection of individuals when constitutional civil rights are at stake, toward recognition of state sovereignty when federalism concerns are raised, and toward congressional authority in the context of the Voting Rights Act's implementation of the Fifteenth Amendment. When specific constitutional connections did not immediately present themselves, however, the Roberts Court was overtly deferential to Congress regarding federal statutes and statutory amendments, even in the face of seemingly relevant Supreme Court precedents.

For example, the Age Discrimination in Employment Act of 1967 (ADEA)[410] was the subject of the Court's 5–4, June 2009 decision in *Gross v. FBL Financial Services, Inc.*[411] This case raised the issue of whether and how courts should engage in parallel interpretations of the ADEA and Title VII, addressing specifically whether a plaintiff in an ADEA case "must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction."[412] In an opinion by Justice Thomas, the majority concluded that, unlike in the case of Title VII, such an instruction is *never* appropriate under the ADEA.[413] Specifically, the Court concluded that "[b]ecause Title VII is materially different with respect to the relevant burden of persuasion, [the Court's Title VII] decisions do not control our construction of the ADEA."[414]

From a separation-of-powers perspective, *Gross* raised the issue of what happens when Congress "ratifies" a Supreme Court interpretation through amendments to one statute but does not similarly amend a related statute—here, respectively, Title VII and the ADEA. In the majority's view,

409. *Id*.
410. 29 U.S.C. §§ 621–634 (2006).
411. 129 S. Ct. 2343 (2009).
412. *Id*. at 2346.
413. *Id*.
414. *Id*. at 2348.

Congress's failure to amend both statutes eliminates the applicability of the Court's prior interpretation to the unamended statute.[415] As background, in *Price Waterhouse v. Hopkins*,[416] a splintered Supreme Court determined that in a Title VII case, the burden of persuasion shifts to the employer after a plaintiff shows that discrimination was a "motivating" or "substantial" factor in the employer's decision.[417]

The *Gross* Court noted that "Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision,"[418] but Congress did not similarly amend the ADEA. As a result, the majority refused to "import" its Title VII jurisprudence into the ADEA, because "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII . . . even though it contemporaneously amended the ADEA in several ways . . . ."[419] It emphasized that "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[420] As a result, the Court's Title VII jurisprudence is not relevant to the ADEA,[421] and the Court held that an ADEA plaintiff "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer . . . ."[422]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They noted that the ADEA "makes it unlawful for an employer to discriminate against any employee 'because of' that individual's age" and that "[t]he most natural reading of this statutory text prohibits adverse employment actions motivated in whole or in part by the age of the employee."[423] Noting that the Supreme Court had rejected the majority's "but for" causation test for Title VII in 1991, the dissenters also emphasized that the fact that

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415. *Id*. at 2349.
416. 490 U.S. 228 (1989).
417. *Id*. at 249, 258.
418. 129 S. Ct. at 2349 (quoting 42 U.S.C. § 2000e-2(m) (2006)).
419. *Id.* (quoting Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1153 (2008), and citing Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 115, 302, 105 Stat. 1079, 1088 (1991)).
420. *Id*. (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).
421. *Id*.
422. *Id*. at 2352.
423. *Id*. at 2353 (Stevens, J., dissenting).

> the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'"[424]

The 1991 amendments to Title VII had no bearing on these pre-amendment interpretations: "*Price Waterhouse*'s construction of 'because of' remains the governing law for ADEA claims."[425] Indeed, "the fact that Congress endorsed this Court's interpretation of the 'because of' language in *Price Waterhouse* (even as it rejected the employer's affirmative defense to liability) provides all the more reason to adhere to that decision's motivating-factor test."[426]

Nevertheless, the Supreme Court's deference to Congress's amendments is not universal. For example, in *Forest Grove School District v. T.A.*,[427] in an opinion by Justice Stevens, the Court held 6–3 that the Individuals with Disabilities Education Act (IDEA)[428] continues to allow for reimbursement of private-school education costs even if the child did not previously receive special education services from the school district. The majority reached this decision despite the fact that Congress amended IDEA in 1997 to add "clause (ii)," which states that a "court or hearing officer may require [a public agency] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] public agency."[429] The Court instead maintained the continuing vitality of its own decision in *School Committee v. Department of Education*, which allowed courts to require reimbursement of private education.[430]

In *Forest Grove*, the Forest Grove School District failed to acknowledge the severity of plaintiff–student's attention deficit hyperactivity disorder (ADHD), concluding instead that he did not qualify for special education services, and hence it did not provide him with any individualized education program (IEP) or other services, as IDEA requires. The student's parents enrolled him in private school for his senior year. In the resulting administrative hearing, the hearing officer found that the student's

424. *Id*. at 2354 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978))).
425. *Id*. at 2356 (Stevens, J., dissenting).
426. *Id*.
427. 129 S. Ct. 2484 (2009).
428. 20 U.S.C. §§ 1400–1482 (2006).
429. 20 U.S.C. § 1412(a)(10)(C)(ii) (2006).
430. 471 U.S. 359, 370 (1985).

ADHD adversely affected his educational performance, that the school district violated IDEA in not providing special education services, and that the district had to reimburse the parents for the costs of private school. On appeal, the district court set aside the award, finding that the 1997 amendments to IDEA categorically bar reimbursement awards if the student did not previously receive special education services. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded, finding that no categorical bar on reimbursement existed but requiring a reexamination of the equities.[431]

The Supreme Court affirmed the Ninth Circuit. It first noted that, in its own cases interpreting IDEA, the Court had determined that reimbursement of private-school costs could be an appropriate remedy for IDEA violations.[432] The specific factual situation of the student was largely irrelevant in those cases

> because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, . . . a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP.[433]

Thus, unless in the 1997 amendments Congress expressed a clear intent to eliminate reimbursement as a remedy, the background case law allowed it.[434]

The majority found no such clear intent. It emphasized that in the 1997 amendment, Congress intended to do more "to guarantee children with disabilities adequate access to appropriate services."[435] The Court concluded that because clause (ii) "is phrased permissively, stating only that courts 'may require' reimbursement in those circumstances, it does not foreclose reimbursement awards in other circumstances."[436] In the general context of IDEA, moreover,

> clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a [free appropriate public education] by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate.[437]

This reading is also "necessary to avoid the conclusion that Congress

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431. *See Forest Grove*, 129 S. Ct. at 2489–90 (discussing the lower courts' decisions).
432. *Id.* at 2490–92 (emphasizing Sch. Comm. v. Dep't of Educ., 471 U.S. 359 (1985) and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993)).
433. *Id*. at 2491.
434. *Id*. at 2492.
435. *Id*. at 2491.
436. *Id*. at 2493.
437. *Id*.

abrogated *sub silentio*" prior Supreme Court decisions on the same issue, like *Burlington*.[438] Finally, "A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services."[439]

The majority thus required Congress to be clear if it intended to abrogate prior Supreme Court decisions, an approach to interactions between Congress and the Supreme Court over statutes arguably at odds with the Court's construction of the ADEA in *Gross*. Justice Souter, joined by Justices Scalia and Thomas in dissent, made this point. Specifically, they argued that Congress superseded *Burlington* in the 1997 amendments to IDEA, that "the assessment of congressional policy aims falls short of trumping" the plain meaning of clause (ii), and that the majority improperly imposed "a heightened standard before Congress can alter a prior judicial interpretation of a statute."[440] According to the dissenters, the majority's "clear statement rule" misstated the law. "If Congress does not suggest otherwise, reenacted statutory language retains its old meaning; but when a new enactment includes language undermining the prior reading, there is no presumption favoring the old, and the only course open is simply to read the revised statute as a whole."[441]

D. The Supreme Court and Federal Agencies: The Basics of the Federal Administrative Procedure Act

A key aspect of the Supreme Court's role in administrative law is its interpretation of the APA[442] and its use of the APA as a gap filler for other administrative law purposes. The Roberts Court has already engaged in several such interpretations, most in the context of "arbitrary and capricious" review of federal agency actions.

1. The IDEA's Burden of Proof

Section 556(d) of the APA puts the burden of proof in formal adjudications on "the proponent of a rule or order," regardless of whether that proponent is the plaintiff or the defendant.[443] As a result, it is usually the agency that bears the burden of proof in such adjudications.

438. *Id*. at 2493–94.
439. *Id*. at 2495.
440. *Id*. at 2498 (Souter, J., dissenting).
441. *Id*. at 2501.
442. 5 U.S.C. §§ 551–559, 701–706 (2006).
443. *Id.* § 556(d).

Nevertheless, in its November 2005 decision in *Schaffer v. Weast*,[444] the Supreme Court determined 6–2 (new Chief Justice Roberts took no part in the decision) that, in administrative "due process" hearings pursuant to IDEA,[445] the parent of a child with disabilities has the burden of persuasion when challenging a school district's IEP for that child.[446] This decision fills a gap in IDEA's otherwise fairly specific requirements for such "due process" hearings.[447] The majority's opinion by Justice O'Connor affirmed the divided U.S. Court of Appeals for the Fourth Circuit's assignation of the burden of persuasion to parents, despite the district court's conclusion that the burden of proof more properly belonged with the school district.[448]

Because "[t]he plain text of IDEA is silent on the allocation of the burden of persuasion," the Supreme Court majority "beg[a]n with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."[449] Interestingly, the majority cited § 556(d) as evidence of Congress's broad adoption of this ordinary default rule,[450] although more faithful application of the APA in this IDEA case would place the burden of proof on the proponent of the challenged IED, i.e., on the school district.

Nevertheless, the Court concluded, "Absent some reason to believe that Congress intended otherwise . . . the burden of persuasion lies where it usually falls, upon the party seeking relief."[451] It rejected plaintiffs' argument that placing the burden of proof on the school district would provide a procedural safeguard that would help to ensure that school districts effectuated IDEA's purpose of providing appropriate education to all disabled students. Instead, characterizing the plaintiffs' argument as "in effect ask[ing] this Court to assume that every IEP is invalid until the school district demonstrates that it is not," the Court cited to financial considerations and IDEA's "stay-put" provision, under which students remain in their current placements during the IEP "due process" hearing, as evidence that the normal default rule was the better approach.[452] In addition, the Court explained, "Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances."[453]

The Court was less dismissive of the plaintiffs' argument that school

444. 546 U.S. 49 (2005).
445. 20 U.S.C. §§ 1400–1482 (2006).
446. *Schaffer*, 546 U.S. at 51.
447. *See id*. at 53–54 (discussing the procedural requirements in 20 U.S.C. § 1415).
448. *See id*. at 55 (recounting the procedural history of the case).
449. *Id*. at 56.
450. *Id*. at 57.
451. *Id*. at 57–58.
452. *Id*. at 59.
453. *Id*. at 60.

districts should bear the burden of proof based on the school districts' greater access to the relevant information.[454] However, although it acknowledged that "[s]chool districts have a 'natural advantage' in information and expertise," the majority again concluded that Congress's procedural safeguards in IDEA were sufficient to resolve the disparity.[455] Specifically, the Court noted that "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence," and the statute guarantees parents access to the school district's information.[456] Thus, the Court found that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief."[457]

In deciding *Schaffer*, the Supreme Court majority relied on *federal* law to reach its decision, assuming without explanation that federal law dictates the procedures used to adjudicate rights created by federal statute, despite the fact that *state* and *local* officials conduct the IDEA IEP "due process" hearings, and despite the majority's acknowledgement that IDEA is based on cooperative federalism.[458] Justice Breyer dissented specifically to argue that because Congress "did not decide the 'burden of persuasion' question," it instead "left the matter to the States for decision."[459] Because Maryland had state rules of administrative procedure in place at the time of the IEP hearing, Justice Breyer would have remanded to the state ALJ for a determination of how *state* law would have resolved the burden of persuasion issue.[460] The *Schaffer* decision thus raises a converse-*Erie* issue that increasingly arises in federal administrative schemes that are based on federal delegations of programs to state governments: to what extent must federal procedural requirements accompany state implementation of federal programs?[461]

2. Arbitrary and Capricious Review

The APA allows the federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,

454. *Id*. at 60–61.
455. *Id*.
456. *Id*. at 61.
457. *Id.* at 62.
458. *Id*. at 52, 61–62.
459. *Id*. at 69 (Breyer, J., dissenting).
460. *See id*. at 71 (arguing such respect for the state's right to decide this procedural matter is consistent with the cooperative federalism approach).
461. *See, e.g.*, Legal Envtl. Assistance Found., Inc. v. EPA, 400 F.3d 1278, 1280–81 (11th Cir. 2005) (challenging the EPA's delegation of Clean Air Act permitting programs to Florida and Alabama on the grounds that the state requirements for standing would not match the federal requirements).

capricious, an abuse of discretion, or otherwise not in accordance with law."[462] Arbitrary and capricious review is by nature deferential to federal agencies. As the Supreme Court explained in its classic formulation of this standard of review:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[463]

In its decisions employing arbitrary and capricious review since the 2005–2006 Term began, the Supreme Court was deferential to the federal agency in two cases but reversed the federal agency in one. The reversal came in the first of the three cases, the Supreme Court's April 2007 decision in *Massachusetts v. EPA*.[464] Two of the most interesting aspects of the Court's interpretation of the federal Clean Air Act[465] in this case were the explicit debate over when and whether statutory terms are ambiguous and the implied debate over the relative roles of *Chevron* deference and arbitrary and capricious review.

In *Massachusetts v. EPA*,[466] the EPA denied a rulemaking petition to regulate greenhouse gas emissions from motor vehicles pursuant to § 202 of the Clean Air Act, which requires the EPA Administrator to "prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[467] The EPA denied the petition on primarily two grounds. First, relying on *FDA v. Brown & Williamson Tobacco Corp.*,[468] the EPA concluded that, given Congress's many other statutes addressing climate change and its awareness of the issue during amendments of the Clean Air Act,

462. 5 U.S.C. § 706(2)(A) (2006).

463. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

464. 549 U.S. 497 (2007); *see also* discussion *supra* notes 20–41 and accompanying text (discussing the standing issue in this case).

465. 42 U.S.C. §§ 7401–7671q (2006).

466. 549 U.S. 497.

467. 42 U.S.C. § 7521(a)(1).

468. 529 U.S. 120 (2000).

Congress's decision not to explicitly address climate change in the Clean Air Act meant that greenhouse gases were not "air pollutants" within the EPA's authority to regulate.[469] Second, the EPA concluded that, for policy reasons and in deference to the Bush Administration's other programs for addressing climate change, it would refuse to regulate greenhouse gases under the Clean Air Act even if it did have the authority to do so.[470]

Writing for the five-Justice majority, Justice Stevens rejected both rationales. First, the majority concluded that the Clean Air Act's arbitrary and capricious standard of review[471] applied in this case, although it also noted the potential role of *Chevron* deference.[472] Second, the majority used the plain meaning of the Act's definition of *air pollutant*—"*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air"[473]—to conclude that "[t]he statute is unambiguous" and "embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'"[474] As a result, the Clean Air Act's definition of *air pollutant* includes greenhouse gases. Third, the majority concluded that regulation of greenhouse gases through the Clean Air Act differed in two significant respects from the attempted regulation of tobacco pursuant to the Food, Drug, and Cosmetic Act (FDCA) that was at issue in *Brown & Williamson*: first, the FDA would have had to ban tobacco under the FDCA, which clashed with common sense, while the EPA would only have to regulate greenhouse gases under the Clean Air Act; and second, no congressional action regarding climate change actually conflicted with the EPA's regulation of greenhouse gases.[475] As a result, the Court concluded that the EPA had proper regulatory authority.

Finally, the majority used a standard arbitrary and capricious analysis to conclude that the EPA's refusal to regulate was invalid. According to the majority,

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it

469. *See* Massachusetts v. EPA, 549 U.S. at 511–13 (noting that the EPA concluded that if it were to regulate emissions through increased fuel economy, its regulatory authority would be superfluous to the Department of Transportation's existing authority to regulate emissions).

470. *Id*. at 513.

471. 42 U.S.C. § 7607(d)(9)(A) (2006).

472. Massachusetts v. EPA, 549 U.S. at 527–28.

473. 42 U.S.C. § 7602(g).

474. Massachusetts v. EPA, 549 U.S. at 529.

475. *See id*. at 530–31 (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

cannot or will not exercise its discretion to determine whether they do.[476]

Because the EPA's explanation addressed policy issues rather than these statutory factors, that explanation was arbitrary and capricious and the EPA's decision had to be reversed.[477] However, the majority declined to conclude that the EPA was bound to make an endangerment finding on remand.

In an opinion by Justice Scalia, the four dissenting Justices would have accorded the EPA far more discretion and decided the case entirely on the basis of *Chevron* deference. Specifically, the dissenters would have deferred to the EPA's interpretation of the "in his judgment" language in § 202 and allowed the EPA to assess the decision to regulate in terms of policy as well as potential endangerment;[478] would have considered the term *air pollutant* to be ambiguous;[479] and would have focused more on the term *air pollution*, which is not defined in the Clean Air Act, to accord *Chevron* deference to the EPA's conclusion that climate change is not air pollution for purposes of the Clean Air Act.[480]

The majority's opinion in *Massachusetts v. EPA* suggests that the Supreme Court regards basic issues regarding the scope of a federal agency's regulatory authority to be a proper matter for judicial resolution, with less deference to the agency's own views. After all, Congress does not—and probably cannot, under the nondelegation doctrine[481]—delegate to the agency the authority to definitively interpret the scope of its own regulatory authority. In contrast, when a federal agency actually implements statutory authority given to it by Congress the Court tends to be more deferential.

Thus, for example, the Supreme Court's June 2007 decision in *National Ass'n of Home Builders v. Defenders of Wildlife*[482] upheld the EPA's approval of Arizona's state permitting program under the federal Clean Water Act.[483] In approving Arizona's permit program under that statute, the EPA had to decide whether it was bound to comply with the federal Endangered Species Act's (ESA's) federal agency consultation

476. *Id*. at 533.

477. *See id.* at 533–34 (noting that although the Court has "neither the expertise nor the authority to evaluate [EPA's] policy judgments" against regulating greenhouse gases, "it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change").

478. *Id*. at 552–53 (Scalia, J., dissenting).

479. *Id*. at 555–58.

480. *Id*. at 558–60.

481. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (noting that the doctrine is rooted in the principle of separation of powers and "mandate[s] that Congress generally cannot delegate its legislative power to another Branch").

482. 551 U.S. 644 (2007).

483. 33 U.S.C. §§ 1251–1387 (2006).

requirements[484] as well as to assess the criteria for state delegations in the Clean Water Act.[485] In a 5–4 decision authored by Justice Alito, the Supreme Court held that the EPA correctly approved the delegation to Arizona under only the Clean Water Act criteria.[486]

The Court first determined whether the EPA's decision to approve the delegation to Arizona was arbitrary and capricious, on grounds that the EPA and the U.S. Fish and Wildlife Service "'relied . . . on legally contradictory positions regarding [their ESA] obligations,'" rendering the decision "internally inconsistent."[487] The Court noted that the proper response to an arbitrary and capricious finding was to remand the matter to the agency.[488] It then emphasized the deferential nature of the arbitrary and capricious standard of review,[489] concluding that the agencies, and especially the EPA, did *not* act arbitrarily or capriciously because (1) the inconsistencies arose in the early stages of consideration, not in the EPA's final decision; (2) although the EPA's final *Federal Register* statement indicating that it completed the ESA consultation process appeared to conflict with its overall legal position that the ESA consultation requirement was not triggered, "the question whether that consultation had been *required*, as opposed to voluntarily undertaken by the Agency, was simply not germane to the final agency transfer decision"; and (3) the EPA gave the challengers sufficient opportunity to participate in the process during the comment period.[490]

Next, the Supreme Court addressed how to reconcile the two statutory commands: the Clean Water Act's command that the EPA "shall approve" a permit program delegation to a state when the state meets several enumerated criteria, none of which involve the ESA; and the ESA's command that federal agencies shall consult with the U.S. Fish and Wildlife Service when their actions could affect listed species. Although Congress enacted the ESA after the Clean Water Act, the Court stressed that "'repeals by implication are not favored.'"[491] Characterizing the application of the ESA's consultation requirement to the Clean Water Act's

484. *See* 16 U.S.C. § 1536(a)(2) (2006) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by the such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . .").

485. *See* 33 U.S.C. § 1342(b) (providing that states may establish their own regulatory scheme for discharges into navigable waters).

486. *Nat'l Ass'n of Home Builders*, 551 U.S. at 649–50.

487. *Id.* at 657–58 (quoting Defenders of Wildlife v. EPA, 420 F.3d 946, 959 (9th Cir. 2005)).

488. *Id*. at 657.

489. *Id*. at 658.

490. *Id*. at 658–60.

491. *Id*. at 662 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)).

delegation process as an "implicit repeal" of the Clean Water Act,[492] the Court instead deferred to the U.S. Fish and Wildlife Service and National Marine Fisheries Service's regulatory interpretation of the consultation requirement. According to the majority, this interpretation—which, the Court stressed, the agencies issued "following notice-and-comment rulemaking procedures"—indicates that the ESA consultation requirement applies only to discretionary agency actions.[493] Moreover, the Court upheld the agencies' interpretation under a *Chevron* analysis because it harmonized the two statutes and resolved "a fundamental ambiguity" regarding how to read the ESA's requirements against the backdrop of other statutory commands in a reasonable way.[494]

Finally, having accepted that the ESA's consultation requirement applied only to discretionary agency actions, the Supreme Court concluded that the EPA had no discretion to deny Arizona's request for delegation of the Clean Water Act permit program. Specifically, the Court noted, "Nothing in the text of [the Clean Water Act] authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application."[495]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. The dissenters stressed that the Supreme Court's primary duty in cases with competing statutory mandates is "to give full effect to both if at all possible."[496] The dissenters then argued that

> [t]he Court fails at this task. Its opinion unsuccessfully tries to reconcile the [Clean Water Act] and the ESA by relying on a federal regulation, which it reads as limiting the reach of [the ESA consultation requirement] to *only* discretionary federal actions. Not only is this reading inconsistent with the text and history of [the regulation], but it is fundamentally inconsistent with the ESA itself.[497]

The dissenters argued "that EPA's decision was arbitrary and capricious under the Administrative Procedure Act and would remand to the Agency for further proceedings consistent with this opinion."[498]

The Supreme Court's third arbitrary and capricious review case came in 2009 and involved indecency in broadcasting. Federal statutes prohibit the

492. *Id*. at 664.
493. *Id*. at 664–65 (quoting 50 C.F.R. § 402.03 (2006)).
494. *See id*. at 665–69 (noting that when read against the backdrop of other statutory mandates the ESA would "implicitly abrogate or repeal," the ESA leaves a "fundamental ambiguity that is not resolved by the statutory text").
495. *Id*. at 671.
496. *Id*. at 673 (Stevens, J., dissenting) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).
497. *Id*. at 674 (citations omitted).
498. *Id*. at 695 (citation omitted).

broadcasting of "any . . . indecent . . . language,"[499] which the Supreme Court previously had concluded includes expletives of a sexual or excretory nature.[500] The Federal Communications Commission (FCC) enforces this prohibition in connection with its licensing authority under the Communications Act of 1934 and the Public Telecommunications Act of 1992.[501]

Until 2006, the FCC had a policy of not taking enforcement actions against broadcasters who broadcast a single "fleeting expletive"—generally, an unscripted exclamation during live broadcasts. In March 2006, however, the FCC issued an enforcement order against Fox Television Stations and its affiliates in response to its broadcasts of two fleeting expletives—one by the singer Cher during the 2002 Billboard Music Awards, and the other by the celebrity Nicole Richie during the 2003 Billboard Music Awards. After challenges and a remand to more fully hear the parties' objections, the FCC upheld its indecency findings.[502] On appeal, the U.S. Court of Appeals for the Second Circuit reversed the order, finding the FCC's reasoning arbitrary and capricious under the APA, in part because the Second Circuit concluded that the FCC had not adequately explained its change in enforcement policies and in part because it feared that the FCC's enforcement policy would violate that First Amendment, although the Second Circuit did not reach the constitutional issue.[503]

In its 5–4 decision in *FCC v. Fox Television Stations, Inc.*[504] by Justice Scalia, the Supreme Court reversed, concluding that the FCC was not arbitrary and capricious in its enforcement order.[505] The majority began by noting that the arbitrary and capricious standard is a "'narrow' standard of review" that requires an agency to "'examine the relevant data and articulate a satisfactory explanation for its action.'"[506] Moreover, "'a court is not to substitute its judgment for that of the agency,' and should 'uphold

499. 18 U.S.C. § 1464 (2006).

500. *See* FCC v. Pacifica Found., 438 U.S. 726, 739–40 (1978) (holding that the plain language of the statute did not support Pacifica's argument that sexual or excretory references were not indecent within the meaning of the statute).

501. *See* 47 U.S.C. § 303 (2006) (listing powers and duties of the Commission); 47 U.S.C. § 309(k) (2006) (setting out broadcast station renewal procedures); 47 U.S.C. § 312(a)(6) (2006) (establishing administrative sanctions); 47 U.S.C. § 503(b)(1) (2006) (noting activities constituting violations authorizing forfeiture penalties).

502. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808–09 (2009) (giving the background of the case).

503. *See id.* at 1809–10 (explaining the lower court's decision).

504. 129 S. Ct. 1800.

505. *See id.* at 1814 (holding specifically that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious" its enforcement order).

506. *Id.* at 1810 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"[507]

Most significantly, the majority announced that there is no heightened APA review for decisions involving a change in agency position.[508] The Court noted that it found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard."[509] Further, the Court's earlier opinions "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance";[510] indeed, "The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[511]

The Court did provide some caveats, however. First, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position."[512] Second, agencies cannot ignore valid regulations still in effect.[513] Finally,

> the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[514]

The Court also determined that constitutional avoidance does not demand heightened review in cases where constitutional rights are implicated. As the Court explained, "The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action."[515] Instead, if the agency's authorized action is unconstitutional, the court can set it aside under the APA as "unlawful."[516]

Under these rules, the FCC's enforcement actions were not arbitrary and capricious. First, the FCC openly acknowledged that its decision that the

507. *Id*. (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)) (citation omitted).
508. *Id*. at 1810–11.
509. *Id*. at 1810.
510. *Id*.
511. *Id*. at 1811.
512. *Id*.
513. *Id*.
514. *Id*. (emphases in original).
515. *Id*. at 1811–12 (citation omitted).
516. *Id*. at 1812.

fleeting expletives at issue warranted enforcement broke new ground—in fact, it declined to assess penalties in recognition of that fact.[517] Second, "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," given that it carefully explained how both literal and nonliteral uses of sexual and scatological expletives could be offensive and indecent, it declined to create safe harbors in the past, and new technologies made it much "easier for broadcasters to bleep out offending words."[518] Empirical evidence regarding the impact of fleeting expletives was not required,[519] and the FCC's retention of discretion to regard fleeting expletives as indecent in some contexts—music award shows likely to draw many children viewers—while not in others—*Saving Private Ryan*—did not render the enforcement policy arbitrary and capricious.[520] Finally, the majority found entirely logical the FCC's conclusion that a per se exemption for fleeting expletives would likely increase the number of fleeting expletives broadcast during prime-time television.[521]

Justice Kennedy concurred to suggest that agencies might in fact have to provide more-detailed explanations of changes in policies in some circumstances. He noted, "The question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases."[522] Instead, he explained,

> The question in each case is whether the agency's reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency's proper understanding of its authority.[523]

Justice Breyer, in a dissent joined by Justices Stevens, Souter, and Ginsburg, argued that the FCC failed to adequately explain why it changed its enforcement policy with respect to fleeting expletives.[524] Regarding the arbitrary and capricious standard itself, the dissenters emphasized that the "law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon

517. *Id*. at 1812.
518. *Id*. at 1812–13.
519. *See id*. at 1813 (noting the moral difficulty of conducting such a study).
520. *Id*. at 1814.
521. *See id*. (arguing that although the court of appeals found such an argument unconvincing, the lack of evidence or date renders the agency's expert predictive judgment persuasive).
522. *Id*. at 1822–23 (Kennedy, J., concurring).
523. *Id*. at 1823.
524. *Id*. at 1829 (Breyer, J., dissenting).

unexplained policy preferences."[525] The arbitrary and capricious standard, in turn, "helps assure agency decisionmaking based upon more than the personal preferences of the decisionmakers" and makes it clear that agency discretion is not unlimited.[526] The standard requires that agencies engage in "a process of learning through reasoned argument," "follow a 'logical and rational' decisionmaking 'process,'" "act consistently," and "follow its own rules."[527] In addition, "when an agency seeks to change those rules, it must focus on the fact of change and explain the basis for that change," which "requires the agency to answer the question, 'Why did you change?'" with "a more complete explanation than would prove satisfactory were change itself not at issue."[528]

Substantively, the dissenters argued that the FCC failed to discuss two important factors. "First, the FCC said next to nothing about the relation between the change it made in its prior 'fleeting expletive' policy and the First-Amendment-related need to avoid 'censorship,' a matter as closely related to broadcasting regulation as is health to that of the environment."[529] "Second, the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage."[530] As a result, the dissenters concluded that the FCC was arbitrary and capricious in its enforcement order.[531]

E. The Supreme Court and Federal Agencies: Statutory Interpretation and Chevron *Deference in the Absence of Federal Court Precedent*

The Roberts Court acknowledged that, in the absence of agency interpretation, the Supreme Court remains the final arbiter of statutory meaning. This Supreme Court role is most common in federal criminal law. As one example, in its April 2008 decision in *Burgess v. United States*,[532] a unanimous Supreme Court, in an opinion by Justice Ginsburg, construed the meaning of *felony drug offense* in the Controlled Substances Act[533] for purposes of determining whether a criminal defendant's sentence should be doubled. Specifically, the Court addressed the interpretive issue of whether the Act's definition of *felony* in § 802(13)—an "offense

525. *Id.*
526. *Id*. at 1830.
527. *Id*.
528. *Id*.
529. *Id*. at 1833.
530. *Id.* at 1835.
531. *See id*. at 1840–41 (concluding that the FCC's change in policy leaves critical matters unaddressed).
532. 128 S. Ct. 1572 (2008).
533. *See* 21 U.S.C. § 841(b)(1)(A) (2006) (prescribing penalties for controlled-substances offenses).

classified by applicable Federal or State law as a felony"—limited the Act's definition of *felony drug offense* in § 802(44), which otherwise defines such offenses as certain drug crimes that are "punishable by imprisonment for more than one year."[534] The Court held that the term "'felony drug offense' . . . is defined exclusively by § 802(44) and does not incorporate § 802(13)'s definition of 'felony.' A state drug offense punishable by more than one year therefore qualifies as a 'felony drug offense,' even if state law classifies the offense as a misdemeanor."[535]

Similarly, in *United States v. Santos*,[536] the Court addressed the issue of whether *proceeds* in the federal money-laundering statute[537] means "receipts" or "profits." An unusual alignment of five Justices—Justices Scalia, Souter, Ginsburg, Thomas, and Stevens—agreed that the defendant was entitled to postconviction relief. Justice Scalia's plurality concluded that because "[t]he federal money-laundering statute does not define 'proceeds' . . . we give it its ordinary meaning."[538] However, after consulting the *Oxford English Dictionary*, *Random House Dictionary of the English Language*, and *Webster's New International Dictionary*, the plurality concluded, "'Proceeds' can mean either 'receipts' or 'profits.' Both meanings are accepted, and have long been accepted, in ordinary usage."[539] Moreover, the plurality concluded that the term *proceeds* "has not acquired a common meaning in the provisions of the Federal Criminal Code."[540] As a result, the rule of lenity applied, entitling the defendant to relief.[541] However, the rule of lenity also carries interpretive force with it: "Because the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted."[542]

More importantly for this discussion, in his concurrence, Justice Stevens emphasized, "When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute."[543] However, he also recognized "that the same word can have different meanings in the same statute" and hence disagreed with Justice Alito that the Court must pick one meaning for the term

534. *Burgess*, 128 S. Ct. at 1577.
535. *Id.* at 1575.
536. 128 S. Ct. 2020 (2008).
537. *See* 18 U.S.C. § 1956(a)(1) (2006) (defining the offense of "laundering of monetary instruments").
538. *Santos*, 128 S. Ct. at 2024.
539. *Id*.
540. *Id*.
541. *See id.* at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").
542. *Id*.
543. *Id*. at 2031 (Stevens, J., concurring).

proceeds.[544] In addition, Justice Stevens disagreed with Justice Alito's conclusion that the statute's legislative history required *proceeds* to mean "gross receipts."[545] As a result, "the rule of lenity may weigh in the determination," and he concurred in the judgment.[546]

Outside of criminal law, the Supreme Court often confronts statutory interpretation with an intervening interpretation by an administrative agency. In contrast to the Court's assertion of its role in constitutional interpretation in *Heller*, its willingness to stand up to Congress in *Boumediene*, and its acceptance of its role as primary statutory interpreter in federal criminal law, the Court displays a consistent tendency to set aside its own role in statutory interpretation in favor of executive agencies. The most common vehicle for this view of relative institutional competence is the doctrine of *Chevron* deference.

1. Overview of Chevron *Deference*

The Supreme Court created the two-step review of agency interpretations of the statutes they administer in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[547] which involved a rather technical interpretation of the Clean Air Act. In applying *Chevron*, federal courts first ask whether the statutory provision at issue is clear and covers the facts at hand, or, in contrast, whether Congress left an ambiguity or gap in the statutory regime for the agency to resolve.[548] If the statute is clear, that ends the matter, and the court follows the express will of Congress.[549] However, if there is an ambiguity or gap, the federal court proceeds to the second step in the analysis, asking whether the agency's interpretation is reasonable.[550]

Federal agencies rarely fail this second step, so the Court's statutory interpretation methodology in step one of the *Chevron* analysis is critical. Thus, one aspect of the evolution of *Chevron* deference—and the Court's approach to statutory interpretation in general—has been the continuing debate among the Justices regarding the proper methodology for statutory interpretation. This debate is most evident around the role of legislative and statutory history in statutory interpretation, with Justice Stevens generally leading those Justices who will look at the full history of a

544. *Id*. at 2032.
545. *Id*.
546. *Id*. at 2033–34.
547. 467 U.S. 837 (1984).
548. *Id*. at 842–43.
549. *Id*.
550. *See id*. at 843–44 (noting additionally that such gaps represent implicit delegations of authority by Congress for the agency to elucidate upon).

statute, including congressional reports and debates, in order to effectuate Congress's purpose. In contrast, Justice Scalia usually argues for a strict "plain meaning" approach to statutory interpretation that resists looking beyond the dictionary meaning of the specific words Congress chose to use in the legislation.[551]

In addition, and of more import to the Roberts Court, *Chevron* deference raises the issue of the "proper" relationships between Congress, federal agencies, and the federal courts. In the first five years of the twenty-first century, before Congress confirmed Chief Justice Roberts and Justice Alito, the Supreme Court progressively limited the situations in which federal agencies would receive full *Chevron* deference for their interpretations of federal statutes. For example, in the 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*,[552] the Supreme Court held that the FDA was not entitled to *Chevron* deference for its interpretation of the FDCA[553] because the history of that Act indicated that Congress had not authorized the FDA to regulate tobacco.[554] Later that year, the Court held in *Christensen v. Harris County*[555] that an agency opinion letter issued under the Fair Labor Standards Act[556] was not entitled to *Chevron* deference because it did not carry the force of law; however, the agency's interpretation was entitled to some deference pursuant to *Skidmore v. Swift & Co.*[557] to the extent that it had the "power to persuade."[558]

Building on these themes, the Supreme Court held in 2001 in *United States v. Mead Corp.*[559] that tariff rulings were not entitled to *Chevron* deference, which applies only when Congress has delegated authority to the relevant agency to write rules that have the force of law and the agency actually uses that authority in issuing its interpretation.[560] Also in 2001, the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that the Army Corps of Engineers and the EPA were not entitled to *Chevron* deference when their interpretation of the Clean Water Act "invokes the outer limits of Congress' power," raising

551. *See generally* Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955 (2005) (concluding that the strict plain meaning approach leads to overemphasis on statutory imprecision at the expense of statutory purpose).

552. 529 U.S. 120 (2000).

553. 21 U.S.C. §§ 301–395 (1994).

554. *Brown & Williamson*, 529 U.S. at 126.

555. 529 U.S. 576 (2000).

556. 29 U.S.C. §§ 201–219 (1994).

557. 323 U.S. 134 (1944).

558. *Christensen*, 529 U.S. at 587–88 (citing *Skidmore*, 323 U.S. at 140).

559. 533 U.S. 218 (2001).

560. *Id.* at 221, 226–27.

constitutional issues, because "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[561]

Given these restrictions on *Chevron* deference, the Equal Employment Opportunity Commission's interpretive guidelines, according to the Supreme Court in 2002, were not entitled to *Chevron* deference because they lacked the requisite formal exercise of legal authority with the force of law.[562] Moreover, the relationship between statutory interpretation and *Chevron* deference became clear in 2004, when the Supreme Court denied *Chevron* deference to an agency interpretation of the Age Discrimination in Employment Act (ADEA).[563] In a fairly clear assertion of the Supreme Court's primacy in statutory interpretation, the Rehnquist Court declared, "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[564] The agency's interpretation received no deference in that case because "regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA."[565]

As a result, as the Rehnquist Court concluded, agencies were likely to receive *Chevron* deference only when they were engaged explicitly in statutory gap filling clearly authorized by Congress through fairly formal processes of interpreting statutes that were obviously ambiguous or highly technical.[566] One of the more subtle but important changes in the Roberts Court's administrative law jurisprudence is an increased willingness to subordinate the federal courts' role in statutory interpretation to federal agencies, particularly when neither constitutional issues nor questions of the agency's own authority are involved.

2. Applications of Chevron *in Cases Involving the Agency's Jurisdiction, Authority, or Both*

a. Gonzales v. Oregon

As noted above, the Supreme Court's January 2006 decision in *Gonzales v. Oregon*[567] involved the U.S. Attorney General's claim of authority to

561. 531 U.S. 159, 172–73 (2001).
562. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (explaining that the interpretative guidelines were instead entitled to *Skidmore* deference).
563. 29 U.S.C. §§ 621–634 (2000).
564. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004).
565. *Id.*
566. *See, e.g.*, Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 523 (2002) (according *Chevron* deference to the FCC's local competition rules under the Communications Act).
567. 546 U.S. 243 (2006).

regulate the medical profession pursuant to the federal Controlled Substances Act (CSA)[568] in the specific context of Oregon's legalization of physician-assisted suicide. In a November 9, 2001 interpretive rule, the Attorney General determined that "using controlled substances to assist suicide is not a legitimate medical practice" under the CSA.[569] Dissenting Justices Scalia, Roberts, and Thomas would have accorded the Attorney General's interpretation *Chevron* deference, but the majority, in an opinion by Justice Kennedy, disagreed.

The majority began by noting, "An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation,"[570] a type of deference known as *Auer* deference. However, the regulation that the 2001 interpretive rule purportedly interpreted "does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference."[571]

Chevron deference also accords "substantial deference" to the agency, but it "is warranted only '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.'"[572] The interpretive rule was not entitled to *Chevron* deference, even though *legitimate medical purpose* was an ambiguous term, because Congress had not delegated the requisite authority to the Attorney General.[573] Moreover, the majority explained, "The CSA gives the Attorney General limited powers, to be exercised in specific ways,"[574] which include deregistration of physicians but *not* the general authority to regulate medicine by determining, on a national scale, what constitutes a "legitimate medical practice."[575] As a result, "the CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law."[576]

As a result, the Attorney General's interpretation was entitled only to *Skidmore* deference.[577] Moreover, the Attorney General failed to persuade the majority of the interpretation's reasonableness, largely for the same

568. 21 U.S.C. §§ 801–971 (2000).
569. Gonzales v. Oregon, 546 U.S. at 249.
570. *Id*. at 255 (citing Auer v. Robbins, 519 U.S. 452, 461–63 (1997)).
571. *Id*. at 257 (discussing 21 C.F.R. § 1306.04 (2005)).
572. *Id*. at 255–56 (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)).
573. *Id*. at 258.
574. *Id*. at 259.
575. *Id*. at 259–68.
576. *Id*. at 268.
577. *Id*.

reasons that the Court concluded that the Attorney General lacked authority to regulate physicians' conduct.[578] In particular, the majority emphasized that the states have traditionally regulated physicians through their police powers,[579] and hence that the Attorney General was violating principles of federalism by intruding into traditional state concerns. In addition, "The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."[580]

Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. The dissenters would have either accorded *Auer* deference to the interpretive rule, upheld the interpretive rule as "by far the most natural interpretation of the Regulation," or accorded the interpretive rule *Chevron* deference and upheld its interpretations of the statutory terms *public interest* and *public health and safety*.[581]

b. Rapanos v. United States

Some of the Supreme Court's most contested applications of *Chevron* deference arise in the context of environmental law. In June 2006, for example, the Court decided *Rapanos v. United States*,[582] issuing a fractured non-decision regarding the scope of "waters of the United States" under the federal Clean Water Act.[583]

Rapanos consolidated two cases, *Rapanos* and *Carabell v. U.S. Army Corps of Engineers*,[584] both of which involved the issue of the Army Corps' jurisdiction pursuant to § 404 of the Clean Water Act[585] over the dredging and filling of wetlands that are adjacent to tributaries of the traditional navigable waters (that is, waters navigable by ships for commerce). The Justices issued five opinions, splitting 4–1–4 with a very narrow majority decision to remand the cases back to the lower courts.

The plurality clearly considered federalism issues relevant to the scope of *Chevron* deference, a perspective consistent with the Supreme Court's assertion of dominance in the field of constitutional law, and accorded little to no deference to the Army Corps and the EPA. Writing for Chief Justice Roberts, Justice Thomas, and Justice Alito, Justice Scalia emphasized in

578. *Id*. at 268–74.
579. *Id*. at 270.
580. *Id*. at 269.
581. *Id*. at 275–76 (Scalia, J., dissenting) (referencing 21 U.S.C. §§ 823(f), 824(a) (2000)).
582. 547 U.S. 715 (2006).
583. *See* 33 U.S.C. § 1362(7) (2006) (defining jurisdictional "navigable waters" to be "waters of the United States, including the territorial seas").
584. 391 F.3d 704 (6th Cir. 2004).
585. 33 U.S.C. § 1344 (2000).

the plurality opinion what he considered to be the Army Corps' vast violation of federalism principles in applying § 404. Justice Scalia began by announcing, "The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."[586] Moreover, "rather than 'preserv[ing] the primary rights and responsibilities of the States,'" Justice Scalia asserted that the theory advanced by the Corps "would have brought virtually all 'plan[ning of] the development and use . . . of land and water resources' by the States under federal control."[587] Thus, the plurality found it was "an unlikely reading of the phrase 'the waters of the United States."[588]

Nevertheless, the plurality dismissed Rapanos's argument that Clean Water Act jurisdiction was limited to the traditional "navigable waters."[589] Instead, it focused on the meaning of *waters*, relying on *Webster's New International Dictionary* to "confirm that 'the waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it."[590] The Justices concluded that "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water"—that is, "continuously present, fixed bodies of water, as opposed to ordinary dry channels through which water occasionally or intermittently flows."[591] Given this definition of *waters*, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water] Act."[592]

The plurality also indicated that its interpretation of the Act would foreclose *Chevron* deference for any future Army Corps and EPA regulations. Specifically, it concluded that only its definition of *waters of the United States* was consistent with principles of federalism and the Act's policy of respecting the rights of States.[593] Thus, the plurality indicated that it was controlling all future agency interpretations of the term *waters of the United States*.

Justice Kennedy wrote separately to concur in the plurality's decision to

586. *Rapanos*, 547 U.S. at 722.
587. *Id*. at 737 (alterations in original).
588. *Id*.
589. *See id.* at 730–31 (discussing the petitioners' argument that this traditional definition pertains only to waters "navigable in fact, or susceptible of being rendered so").
590. *Id*. at 731–32.
591. *Id*. at 732–33.
592. *Id*. at 742.
593. *Id*. at 737.

remand but otherwise offered his own analysis of *waters of the United States*. According to Justice Kennedy, the scope of "navigable waters" should be resolved through a "significant nexus" test that the Court had announced in 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[594] Thus, Justice Kennedy in effect argued that the Supreme Court had *already* limited the agencies' discretion to define *waters of the United States* and hence had limited the deference available for their existing regulations. He reasoned that

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC*?[595]

Justice Kennedy emphasized that his interpretation "[did] not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption," because "in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty."[596] Moreover, he noted "[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure."[597]

Justice Stevens authored a dissenting opinion for himself and Justices Breyer, Souter, and Ginsburg. The dissenters, essentially arguing for the status quo ante, would have given full *Chevron* deference to the agencies' broad interpretations of *waters of the United States*,[598] emphasizing Congress's broad purposes in enacting the Clean Water Act.[599] Notably, the dissenters accused the plurality of undoing "more than 30 years of practice by the Army Corps" and "disregard[ing] the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake."[600] Justice Kennedy's approach was better but still failed "to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act."[601]

As a result, the dissenters would have affirmed both *Rapanos* and

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594. *Id.* at 759 (Kennedy, J., concurring) (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162, 172 (2001)).
595. *Id*. at 767.
596. *Id*. at 782.
597. *Id*. at 783 (citing Gonzales v. Raich, 545 U.S. 1, 17 (2005)).
598. *Id*. at 788 (Stevens, J., dissenting).
599. *See id*. at 787–88 (recounting the history of the Clean Water Act).
600. *Id*. at 788.
601. *Id.* at 810.

Carabell. However, recognizing that the split between Justices Scalia and Kennedy left the lower courts with no clear test, the dissenters instructed that "on remand each of the judgments should be reinstated if *either* of those tests is met."[602]

c. Carcieri v. Salazar

The Supreme Court's February 2009 decision in *Carcieri v. Salazar*[603] involved the application of the Indian Reorganization Act (IRA)[604] to the Narragansett Indian tribe in Rhode Island and the Secretary of the Interior's authority to take land in trust for the tribe. As in *Rapanos* and *Gonzales v. Oregon*, the Supreme Court did not defer to the agency's interpretation of its own authority.

Under § 465 of the IRA, the Secretary of the Interior may acquire land and hold it in trust "for the purpose of providing land for Indians."[605] However, the Act defines *Indian* to "include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*."[606] In 1998, relying on its IRA authority, the Secretary of the Interior took a thirty-one-acre parcel of land in the town of Charlestown, Rhode Island, into trust for the tribe, over the protests of the state, the Governor, and the town.[607]

However, the federal government did not formally recognize the Narragansett as a tribe until 1983, almost fifty years after Congress enacted the IRA. As a result, the Court had to determine what the phrase *now under Federal jurisdiction* in the IRA means. The town and the state sued the Secretary pursuant to the federal APA, claiming that the Secretary's action was illegal because the tribe was not "now" under federal jurisdiction in 1934, when Congress enacted the IRA. The Secretary, in turn, argued that *now* applied to the moment of land acquisition, and hence that the land transfer was legal because the Narragansett was a recognized tribe in 1998 when the Secretary acted.[608]

In a 6–3 decision by Justice Thomas (Justices Souter and Ginsburg concurred in part and dissented in part, while Justice Stevens dissented), the Supreme Court concluded that Rhode Island and the Town of Charlestown were correct: the Secretary of the Interior could not take land

602. *Id*.
603. 129 S. Ct. 1058 (2009).
604. 25 U.S.C. §§ 465, 479 (2006).
605. § 465.
606. § 479 (emphasis added).
607. *See Carcieri*, 129 S. Ct. at 1062 (providing the factual background to the case).
608. *See id.* at 1065 (describing the Secretary's "current interpretation" of *now*).

into trust for tribes not formally recognized in 1934.[609] According to the majority, the statute was unambiguous in its meaning on this point. In 1934, "the primary definition of 'now' was '[a]t the present time; at this moment; at the time of speaking.'"[610] As a result, *Chevron* deference was not appropriate.[611]

The Court was content with the contemporaneous dictionary definition for several reasons. First, it was "consistent with interpretations given to the word 'now' by this Court, both before and after passage of the IRA, with respect to its use in other statutes."[612] Second, this meaning aligned "with the natural reading of the word within the context of the IRA."[613] In particular, the majority emphasized that in other sections of the IRA, Congress explicitly referred to both contemporaneous and future events through the phrase *now or hereafter*.[614] In contrast, the definition of *Indian* referred only to *now*.[615] Third, "the Secretary's current interpretation is at odds with the Executive Branch's construction of [§§ 465 and 479] at the time of enactment," which interpreted *now* to mean "recognized in 1934."[616] While the Court made it clear that it was not deferring to this earlier interpretation, it did agree with it.[617]

Fourth, and perhaps most importantly, the majority rejected the Secretary's arguments that the term *now* was ambiguous. Although acknowledging that, in general, *now* was susceptible of more than one meaning, the Court nevertheless underscored the importance of statutory context in statutory construction, concluding that "the susceptibility of the word 'now' to alternative meanings 'does not render the word . . . whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'"[618]

Fifth, the Court rejected the Secretary's argument that the definition of *tribe* was controlling rather than the definition of *Indian* because the

609. *See id.* at 1068 (emphasizing that the language of § 479 "unambiguously" referred to tribes under federal jurisdiction at the time of the enactment of the Indian Reorganization Act).

610. *Id*. at 1064 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1671 (2d ed. 1934)).

611. *Id*. at 1063–65.

612. *Id*. at 1064.

613. *Id*.

614. *Id.* at 1065.

615. *Id*. at 1064–65.

616. *Id*. at 1065.

617. *See id.* (suggesting that deference would be inappropriate as the statute itself is unambiguous).

618. *Id*. at 1066 (quoting Deal v. United States, 508 U.S. 129, 131–32 (1993)); *see also* Abuelhawa v. United States, 129 S. Ct. 2102, 2103 (2009) (emphasizing that "statutes are not read as a collection of isolated phrases" and that "'[a] word in a statute may or may not extend to the outer limits of its definitional possibilities'" (quoting Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006))).

Secretary's authority to take lands in trust was for "Indian tribes," and the definition of *tribe* also incorporated the definition of *Indian*.[619] Thus, there simply was "no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479."[620] Nor did the later-enacted Indian Land Consolidation Act[621] remove the problem because it neither expanded the Secretary's authority to take lands into trust nor altered the definition of the word *Indian*.[622] As a result, the Secretary had no authority to take the thirty-one-acre parcel into trust for the Narragansett tribe.[623]

Justices Souter and Ginsburg concurred in part and dissented in part to point out that § 479 refers to "any recognized Indian tribe now under Federal jurisdiction," which allows for the possibility that tribal recognition and being "under Federal jurisdiction" might be separate statuses, triggered by different events.[624] If so, then the Narragansett need only have been "under Federal jurisdiction" in 1934—not necessarily formally recognized.[625] These two Justices would have remanded the case to the Secretary for clarification of these two points.[626] Justice Stevens dissented, arguing primarily that, in the IRA's overall structure, the distinction between individual Indians and tribes was critical, with the result that "'now,' the temporal limitation in the definition of 'Indian,' only affects an individual's ability to qualify for benefits under the IRA," not a tribe's eligibility for land.[627]

d. Wyeth v. Levine

In March 2009, the Court's decision in *Wyeth v. Levine*[628] restricted an agency's authority to preempt state tort law. In this products-liability action, the plaintiff claimed that Wyeth failed to provide sufficient warnings regarding the use of Phenergan, an anti-nausea drug that can cause severe problems, often leading to gangrene and amputation, when

619. *Id.* at 1068.
620. *Id.* at 1067.
621. *See* 25 U.S.C. § 2202 (2006) (providing that nothing in the Indian Land Consolidation Act is intended to supersede any other federal law authorizing the acquisition of lands for Indians).
622. *Carcieri*, 129 S. Ct. at 1067–68.
623. *See id.* at 1068 (establishing that the Narragansett Tribe was "neither federally recognized nor under the jurisdiction of the federal government" at the time Congress enacted the IRA).
624. *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).
625. *Id.*
626. *Id.*
627. *Id.* at 1073–78 (Stevens, J., dissenting).
628. 129 S. Ct. 1187 (2009).

injected directly into a vein.[629] Wyeth defended the action on the ground that the FDA approved Phenergan's labeling pursuant to the FDCA and hence that the FDCA preempted the tort lawsuit.[630]

In a 6–3 decision by Justice Stevens, the Court first concluded that Wyeth failed to demonstrate that it was impossible to comply with both state tort law and the FDCA's labeling requirements.[631] Wyeth then argued that the FDA determined that the agency's labeling decisions preempted state tort claims based on failure to warn because the approved labels constitute both a floor and a ceiling for labeling requirements.[632]

The Court noted that "an agency regulation with the force of law can pre-empt conflicting state requirements."[633] However, no such regulation existed, leaving the Court to determine what level of deference to give the FDA's view of the preemptive effect of its approvals of drug labels.[634] The Court concluded that it would give no weight to the "agency's *conclusion* that state law is pre-empted. Rather, [it would have] attended to an agency's explanation of how state law affects the regulatory scheme."[635] Even then, however, the FDA was entitled only to *Skidmore* deference,[636] and the Court was not persuaded by the agency's assertion of preemption:

> Under this standard, the FDA's 2006 preamble does not merit deference. When the FDA issued its notice of proposed rulemaking in December 2000, it explained that the rule would "not contain policies that have federalism implications or that preempt State law." In 2006, the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA's pre-emptive effect in the regulatory preamble. The agency's views on state law are inherently suspect in light of this procedural failure.[637]

The Court also emphasized that the FDA's view contradicted Congress's apparent intent in the FDCA and represented a reversal of the FDA's own long-standing view of the FDCA, both of which further undercut the agency's position.[638]

Thus, as in other contexts in which an agency interpreted the scope of its

629. *Id.* at 1191.
630. *Id.* at 1192.
631. *Id.* at 1198–99.
632. *Id.* at 1200.
633. *Id.*
634. *Id.* at 1201.
635. *Id.*
636. *Id.*
637. *Id.* (citations omitted).
638. *Id.* at 1201–02; *see also id.* at 1204 ("Congress has repeatedly declined to pre-empt state law, and the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.").

own authority, the Roberts Court accorded little deference to the FDA's attempt to preempt state law, an issue with direct federalism implications. As such, the *Wyeth* decision is consistent with *Gonzales* and *Rapanos* in demonstrating the Roberts Court's reluctance to defer to agencies when those agencies intrude into areas of law traditionally left to the states.

e. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

Justice Kennedy authored the majority opinion for the Supreme Court's 6–3 decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[639] which involved the issue of which permit program under the federal Clean Water Act[640] applied to Coeur Alaska's discharge of a slurry of gold mining wastes ("tailings") into Lower Slate Lake in Alaska. The U.S. Army Corps of Engineers issued the relevant permit pursuant to its authority under § 404 of the Clean Water Act to permit discharges of "dredged" or "fill" material.[641] The environmental challengers argued that the slurry was subject to the EPA's permitting authority under § 402 under the phrase all other "discharges of a pollutant."[642] If they were right, the discharge would be illegal under an EPA regulation, known as a new source performance standard, which prohibits all discharges of process wastewater from new froth flotation gold mines like Coeur Alaska's.[643] Alternatively, the challengers argued that EPA's new source performance standard applied to § 404 permits as well, rendering the Army Corps permit illegal in violation of the APA. All parties agreed that if Coeur Alaska was allowed to discharge its slurry into the lake, those discharges over time would fill the lake, killing almost all life within it—although Coeur Alaska would have to restore the lake when it was done mining.[644]

The Supreme Court began by establishing that the Act's two permit programs are mutually exclusive because the EPA may issue permits only "as provided" in § 404.[645] With respect to § 404 permits, moreover, the EPA has only two functions—to write guidelines for the Army Corps and to veto any § 404 permit issued by the Army Corps that causes too much environmental damage.[646]

The Court then turned to the agencies' joint regulation defining *fill*

639. 129 S. Ct. 2458 (2009).
640. 33 U.S.C. §§ 1251–1387 (2006).
641. *See id.* § 1344 (providing the Secretary the authority to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites").
642. *Id.* § 1342.
643. 40 C.F.R. § 440.104(b)(1) (2007).
644. *Coeur Alaska*, 129 S. Ct. at 2480 (Ginsburg, J., dissenting).
645. *Id.* at 2467 (majority opinion) (citing 33 U.S.C. § 1342(a)(1)).
646. *Id*. (citing 33 U.S.C. § 1344 (2006)).

material to be "any material [that] has the effect of . . . [c]hanging the bottom elevation" of a body of water.[647] "As all parties concede[d], the slurry [met] the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002."[648] Thus, the discharge of the slurry was a discharge of fill material subject to Army Corps permitting under § 404.

That left the issue of whether the Army Corps' permits were subject to the EPA's new source performance standards, which in turn created a muddled issue of *Chevron*, *Mead*, or *Skidmore* deference. The majority first concluded that "[b]ecause Congress has not 'directly spoken' to the 'precise question' of whether an EPA performance standard applies to discharges of fill material, the statute alone does not resolve the case."[649] Under § 306(e) of the Clean Water Act, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source,"[650] suggesting that *all* dischargers have to comply with new source performance standards, regardless what permit program governs their discharge.[651] On the other hand, § 402 explicitly requires EPA permits to comply with the new source performance standards and protects permit holders from enforcement actions involving new source performance standards, while § 404 does neither, suggesting that new source performance standards are not relevant to § 404 permits.[652] As a result, "The [Clean Water Act] is ambiguous on the question whether § 306 applies to discharges of fill material regulated under § 404."[653]

The ambiguity provoked the Court, in its application of *Chevron*, to turn to the agencies' regulations.[654] However, "The regulations, like the statutes, [did] not address the question whether § 306, and the EPA new source performance standards promulgated under it, apply to § 404 permits . . . ."[655]

Nevertheless, while "[t]he regulations do not give a definitive answer to the question . . . [the Court did] find that agency interpretation and agency

647. *Id.* at 2468 (citing 40 C.F.R. § 232.2 (2008)).
648. *Id*.
649. *Id*. at 2469 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).
650. 33 U.S.C. § 1316(e) (2006).
651. *Coeur Alaska*, 129 S. Ct. at 2470–71.
652. *See id*. at 2471 (citing 33 U.S.C. §§ 1342(a), 1342(k), 1344(a), 1344(p) (2006)) (opining that Congress probably did not intend § 306(e) to apply to the Corps' § 404 permits or to discharges of fill material).
653. *Id*.
654. *See id*. at 2469, 2472 (turning to the agencies' regulations because the statute did not directly address the question at hand, and thus did not itself resolve the issue).
655. *Id*. at 2472.

application of the regulations are instructive and to the point."[656] Specifically, the Court discussed a May 2004 memorandum sent from the Director of the EPA's Office of Wetlands, Oceans, and Watersheds to the Director of the EPA regional office with jurisdiction over Coeur Alaska's mine (the "Regas Memorandum"), which explained that the new source performance standards do not apply to discharges permitted under § 404.[657]

Citing *Auer v. Robbins*,[658] the Court deferred to the memorandum's interpretation for five reasons.[659] "First, the Memorandum preserves a role for the EPA's performance standard" because "[i]t confines the Memorandum's scope to closed bodies of water, like the lake here."[660] "Second, the Memorandum acknowledges that this is not an instance in which the discharger attempts to evade the requirements of the EPA's performance standard."[661] "Third, the Memorandum's interpretation preserves the Corps' authority to determine whether a discharge is in the public interest."[662] "Fourth, the Regas Memorandum's interpretation does not allow toxic pollutants . . . to enter the navigable waters."[663] Finally, the Court found the interpretation "a sensible and rational construction that reconciles §§ 306, 402, and 404, and the regulations implementing them, which the alternatives put forward by the parties do not."[664]

Justice Scalia concurred specifically to address the *Chevron* issue. He joined the majority except for its unwillingness to accord the memorandum *Chevron* deference.[665] Justice Scalia argued that *Auer* deference was inapplicable because the Memorandum interpreted the statutory scheme and *Auer* deference applies only "to an agency's interpretation *of its own ambiguous regulation*."[666] As a result, Justice Scalia accused the Court of making *Chevron* deference even more complicated than *Mead* had already managed.[667] Justice Scalia also noted the appearance in lower courts of "the phenomenon of *Chevron* avoidance—the practice of declining to opine

656. *Id*. at 2472–73 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

657. *See id*. at 2473 (explaining that while the memorandum was not entitled to *Chevron* deference because of its informality, it was entitled to a measure of deference because it interpreted the agencies' own regulatory scheme).

658. 519 U.S. 452, 461 (1997).

659. *Coeur Alaska*, 129 at 2473–74 (deferring to the agency's interpretation in the memorandum because it was not "'plainly erroneous or inconsistent with the regulations'").

660. *Id*. at 2473.

661. *Id*.

662. *Id*.

663. *Id*. at 2474.

664. *Id*.

665. *See id*. at 2479 (Scalia, J., concurring) (asserting that the memorandum's opinion is reasonable and noting that it was consistently followed by both EPA and the Corps of Engineers).

666. *Id*.

667. *Id*. at 2479–80 (referring to United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting)).

whether *Chevron* applies or not"—and advocated the overruling of *Mead*.[668]

Justice Ginsburg dissented, joined by Justices Stevens and Souter. Instead of starting, as the majority did, with the question of which permit program applies to Coeur Alaska's discharge, the dissenters started with the Clean Water Act's basic prohibition: "[T]he discharge of any pollutant by any person shall be unlawful," except as in compliance with the Act.[669] To that they added the fact that "Coeur Alaska's proposal is prohibited by the [EPA] performance standard forbidding any discharge of process wastewater from new 'froth-flotation' mills into the waters of the United States."[670] At that point, the issue became whether "a pollutant discharge prohibited under § 306 of the Act [is] eligible for a § 404 permit as a discharge of fill material," which the dissenters concluded should be answered in the negative.[671] "No part of the statutory scheme . . . calls into question the governance of EPA's performance standard," and § 306(e) clearly requires all discharges to comply with that standard.[672] As a result,

> The Court's reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards.[673]

Because the dissenters viewed the statutory provisions as clearly resolving the issue, *Chevron* deference played no role in their analysis.

3. Nonjurisdictional Agency Constructions of Statutes and Chevron *Deference*

The Roberts Court is far more likely to defer to agency constructions of statutes outside jurisdictional and federalism contexts. Several decisions over the last four Terms make this point clear. However, they also often reveal recurring splits among the Justices regarding the Court's role and principles of statutory interpretation.

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668. *Id*.
669. *Id*. at 2481 (Ginsburg, J., dissenting).
670. *Id*. at 2480.
671. *See id*. (citing the statute's text, structure, and purpose as mandating adherence to EPA's pollution-control requirements).
672. *See id*. at 2482 (quoting the statute, which proscribes "any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source").
673. *Id*. at 2483.

a. Environmental Defense v. Duke Energy Corp.

In April 2007, the Supreme Court decided *Environmental Defense v. Duke Energy Corp.*,[674] a case that involved an interpretation of the Clean Air Act (CAA).[675] This decision produced a fairly unified Supreme Court willing to stress both deference to the EPA and contextual understandings of statutory terms. *Duke Energy* involved the Act's new source review (NSR) requirements—specifically, the requirement that existing sources that "modify" their facilities install "the best technology for limiting pollution."[676] There are two NSR requirements in the Act, one in the provisions governing new source performance standards (NSPS)[677] and one in the provisions creating the Prevention of Significant Deterioration (PSD) program.[678] The issue for the case, while fairly technical, was essentially whether the EPA could define *modification* differently for the two NSR requirements.[679]

Writing for eight Justices (Justice Thomas concurred on this point), Justice Souter concluded that "principles of statutory construction are not so rigid" as to require the EPA to interpret *modification* exactly the same way in all sections of the Clean Air Act.[680] The presumption in favor of identical meanings is rebuttable because "[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."[681] All nine Justices agreed that the D.C. Circuit erred in trying to force the PSD modification regulations to track the NSPS modification regulations.[682]

Duke Energy illustrates that even when agency constructions of statutes are at issue, *Chevron* deference is not always relevant. In the particular procedural posture of this case, the U.S. Court of Appeals for the Fourth Circuit concluded that the Supreme Court created an "effectively irrebutable" presumption that a statutory term must be interpreted the same way throughout a statute.[683] As a result, the Fourth Circuit attempted to

674. 549 U.S. 561 (2007).
675. 42 U.S.C. §§ 7401–7671q (2006).
676. *Duke Energy*, 549 U.S. at 565–67.
677. *See* 42 U.S.C. § 7411(a)(4) (2006) (defining *modification*).
678. *See* 42 U.S.C. § 7479(2)(C) (defining the term *construction* for purposes of the Clean Air Act to include any modification).
679. *See Duke Energy*, 549 U.S. at 569–70 (describing the discrepancy in the use of the statutory term *modification* between the two requirements).
680. *Id*. at 574.
681. *Id*.
682. *Id*. at 577–81.
683. *See* United States v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005) (citing Rowan Cos. v. United States, 452 U.S. 247, 250 (1981)) (noting the absolute strength of the presumption that a statutory term must be interpreted consistently throughout a particular statute such that even the different purposes of the New Source Performance Standards

harmonize the PSD regulations with the NSPS regulations' definition of *modification*.[684] It was the Fourth Circuit's reinterpretation that the Supreme Court invalidated,[685] leaving no proper role for *Chevron* analysis. The Fourth Circuit did not properly address the challenge to the EPA's own interpretation of *modification* in the PSD regulations, and so the Court remanded that issue.[686]

b. Zuni Public School District No. 89 v. Department of Education

It was a fairly obscure provision of the Federal Impact Aid Act[687] that served as a flashpoint, in April 2007, for the Supreme Court's ongoing debates regarding the methodology of statutory interpretation. In *Zuni Public School District No. 89 v. Department of Education*,[688] the Court addressed the issue of how the Secretary of Education should assess whether a state's public school funding program "equalizes expenditures" throughout the state, as the Act requires.[689] Specifically, the issue for the Court was whether the Secretary should look at the number of pupils as well as the size of the expenditures when deciding which school districts to disregard because they had "'per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.'"[690]

In a 5–4 decision authored by Justice Breyer (and including Justice Alito), the Supreme Court concluded that the number of pupils *was* properly included within the statutory language.[691] The Court considered *Chevron* deference to be the appropriate framework for assessing the Secretary's regulations interpreting the relevant statutory provision.[692] However, it reversed the normal procedure for assessing whether the

(NSPS) and Prevention of Serious Deterioration (PSD) programs could not override that presumption).

684. *Id.* at 573.

685. *See* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 577–81 (2007) (concluding that the court of appeals' attempt to conform the PSD regulations to their NSPS counterparts resulted in "too far a stretch for the language used" in the PSD regulations).

686. *Id*. at 581–82.

687. 20 U.S.C. §§ 7701–7714 (2006).

688. 550 U.S. 81 (2007).

689. *See* 20 U.S.C. § 7709(b)(2) (2006) (establishing that in making determinations for Impact Aid Act purposes, "the Secretary shall disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures").

690. *Zuni Public School District*, 550 U.S. at 84 (quoting 20 U.S.C. § 7709(b)(2)(B)(i)) (emphasis omitted).

691. *See id*. at 100 (concluding that the Secretary's reading was a reasonable reading and the method of calculation was lawful).

692. *See id.* at 89 (noting that even the challenger conceded that the Court must defer to the Secretary's reasonable interpretations of the statute if Congress left a gap for the agency to fill).

language was ambiguous, addressing the plain meaning of the statute only *after* it reviewed the background, history, and basic purposes of the Act and concluded, "Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one."[693]

In contrast, the majority's examination of the literal language of the statute was forced and hypertechnical,[694] a contorted act of interpretation designed to allow it to conclude "that the language of the statute is broad enough to permit the Secretary's reading."[695] Specifically, the majority emphasized Congress's silence on the subject of the relevant "population" for the statistical analysis and on how to construct the distribution.[696] Moreover,

> No dictionary definition we have found suggests that there is any *single* logical, mathematical, or statistical link between, on the one hand, the characterizing data (used for ranking purposes) and, on the other hand, the nature of the relevant population or how that population might be weighted for purposes of determining a percentile cutoff.[697]

While *Zuni* was explicitly a *Chevron* decision, the concurring and dissenting opinions made clear that the Court's own interpretive authority was also at issue. Justice Stevens concurred specifically to emphasize the legitimacy of using legislative history to interpret statutory language as part of the first step of the *Chevron* analysis.[698] Justices Scalia, Roberts, Thomas, and Souter dissented (Justice Souter joining only Part I of the dissent), arguing that the majority's opinion "is nothing other than the elevation of judge-supposed legislative intent over clear statutory text" and that statutory construction based on the "spirit" of the law is "a judge-empowering proposition if there ever was one, and . . . the Court has wisely retreated from it."[699] They concluded that the majority's plain meaning reading was "sheer applesauce."[700]

c. Long Island Care at Home, Ltd. v. Coke

In *Long Island Care at Home, Ltd. v. Coke*,[701] in an opinion by Justice Breyer, a unanimous Supreme Court applied the *Chevron* doctrine and

693. *Id*. at 90.
694. *See id*. at 93–94.
695. *See id*. at 93–100 (engaging in a literal analysis of the statute's text).
696. *Id*. at 95–96.
697. *Id*. at 96.
698. *Id*. at 105–06 (Stevens, J., concurring).
699. *Id*. at 108 (Scalia, J., dissenting).
700. *Id*. at 113.
701. 551 U.S. 158 (2007).

upheld[702] the Department of Labor's regulatory interpretation of the Fair Labor Standards Act (FLSA).[703] In 1974, Congress amended the FLSA to bring many domestic service employees within the Act's minimum-wage and maximum-hour protections.[704] However, Congress simultaneously excluded some domestic service employees, such as casual babysitters.[705] The Act also excluded "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."[706] The Department of Labor's regulation interpreted this exemption to include companionship workers employed by someone other than the family or household using the companion services.[707]

After reviewing the *Chevron* doctrine, the Supreme Court determined that "the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services'" and that the statute "provides the Department [of Labor] with the power to fill these gaps through rules and regulations."[708] All of the other considerations relevant to a *Chevron* analysis were also present: "The subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out."[709] Furthermore, "The Department focused fully upon the matter in question," and the Department used notice-and-comment rulemaking procedures.[710]

The Supreme Court upheld the regulation at issue, even though it appeared to conflict with the Department's general regulations, which define *domestic service employment*."[711] First, the Court concluded that if it decided that the general regulations controlled, "our interpretation would create serious problems."[712] "Second, normally the specific governs the

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702. *See id.* at 162 (citing *Chevron* for the proposition that the inquiry before the Court is "whether, in light of the statute's text and history, and a different (apparently conflicting) regulation, the [agency's] regulation is valid and binding").

703. 29 U.S.C. §§ 201–219 (2006).

704. *See id.* § 206(f) (providing that any employee "employed in domestic service in a household," or that is employed in one or more households in an aggregate of eight hours or more, shall be paid at the rate specified by minimum wage requirements).

705. *Id.* § 213(a)(15).

706. *Id*.

707. 29 C.F.R. § 552.109(a) (1977).

708. Long Island Care at Home v. Coke, 551 U.S. 158, 165 (2007).

709. *Id.*

710. *Id*.

711. *See* 29 C.F.R. § 552.3 (1977) (defining *domestic service employment* as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed").

712. *Long Island Care*, 551 U.S. at 169.

general."[713] Third, although the Department may have interpreted its regulations differently at different times, "as long as interpretive changes create no unfair surprise—and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."[714] Finally, although the Department apparently formulated its interpretation of its regulation during the course of litigation, "[w]here, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views—the Department has clearly struggled with the third-party-employment question since at least 1993—we have accepted that interpretation as the agency's own."[715]

The Court also addressed whether this interpretive regulation should be considered legally binding. It concluded "that the Department intended the third-party regulation as a binding application of its rulemaking authority."[716] First, "The regulation directly governs the conduct of members of the public, affecting individual rights and obligations."[717] Second, the Department used notice-and-comment rulemaking, which the federal APA does not require for "interpretive" rules.[718] Finally, "for the past 30 years, . . . the Department has treated the third-party regulation like the others, *i.e.*, as a legally binding exercise of its rulemaking authority."[719]

Nevertheless, "the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority."[720] Given all the other factors and the fact that "the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination."[721]

d. Federal Express Corp. v. Holowecki

The Supreme Court's complex jurisprudence with respect to the deference given to agency interpretations of statutes played out fully in February 2008 in *Federal Express Corp. v. Holowecki*.[722] In this 7–2

713. *Id*. at 170.
714. *Id*. at 170–71 (citation omitted).
715. *Id*. at 171 (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)).
716. *Id*. at 172.
717. *Id*. at 172–73 (internal quotation marks omitted).
718. *Id*. at 173.
719. *Id*.
720. *Id*.
721. *Id*. at 173–74.
722. 128 S. Ct. 1147 (2008).

decision by Justice Kennedy (Justices Thomas and Scalia dissented), the Court progressively applied *Chevron*, *Auer*, and *Skidmore* deference to determine what qualifies as a "charge" under the ADEA.[723]

The ADEA, like most employment discrimination statutes, establishes primary enforcement authority in the Equal Employment Opportunity Commission (EEOC).[724] When an employee files a "charge alleging unlawful discrimination" with the EEOC, that "charge" sets the Act's enforcement mechanisms in motion.[725] Specifically, if the EEOC does not act within sixty days of the "charge," the employee herself can file a lawsuit against the allegedly discriminating employer.[726]

In *Holowecki*, the employee submitted EEOC Form 283, an "Intake Questionnaire," together with an affidavit alleging that her employer, Federal Express, was discriminating on the basis of age.[727] More than sixty days after submitting this form, the employee filed an ADEA lawsuit in federal court.[728] Federal Express defended on the basis that the submission of the intake questionnaire was not a "charge" and hence that the courts did not have jurisdiction over the lawsuit.

The ADEA does not define the term *charge*. However, the EEOC issued regulations for the ADEA, three of which bear on the issue of what counts as a *charge*. First, the EEOC's regulations state that "*charge* shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act."[729] A subsequent regulation specifies five pieces of information that should be included in the charge but also states that the charge is sufficient if it meets the requirements of § 1626.6.[730] Section 1626.6, in turn, states that a "charge" is sufficient if it is in writing, provides the name of the respondent, and generally alleges discriminatory acts.[731]

From these regulations, three arguments arose regarding the intake questionnaire at issue. Federal Express argued that the intake questionnaire could *never* serve as a "charge." The plaintiff employee argued that an intake questionnaire *always* qualified as a "charge." The EEOC, participating through the United States' amicus brief, argued that an intake questionnaire can serve as a "charge" if it expresses the filer's intent to

723. 29 U.S.C. §§ 621–634 (2006).
724. *Holowecki*, 128 S. Ct. at 1152–53.
725. 29 U.S.C. § 626(d).
726. *Id*.
727. *Holowecki*, 128 S. Ct. at 1153.
728. *Id*.
729. 29 C.F.R. § 1626.3 (2009).
730. *Id.* § 1626.8(a)–(b).
731. *Id.* § 1626.6.

activate the EEOC enforcement mechanisms.[732]

The Supreme Court began its process of deciding what *charge* means by according *Chevron* deference to the EEOC's legislative rules, so far as they went:

> The Act does not define charge. While EEOC regulations give some content to the term, they fall short of a comprehensive definition. The agency has statutory authority to issues regulations, *see* § 628; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations. The regulations the agency has adopted—so far as they go—are reasonable constructions of the term charge. There is little dispute about this.[733]

However, the regulations were clearly ambiguous regarding whether *every* intake questionnaire that met the minimal requirements of § 1626.6 should qualify as a "charge."[734]

Given the ambiguity of the regulation, the EEOC claimed *Auer* deference for its interpretation of the regulation.[735] Moreover, as for the basic issue of whether everything that meets § 1626.6 qualifies as a charge, the Supreme Court granted *Auer* deference, meaning that it would reject the EEOC's interpretation only if it were "plainly erroneous or inconsistent with the regulation."[736] However, the EEOC wanted more:

> The EEOC submits that the proper test for determining whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights. The EEOC has adopted this position in the Government's *amicus* brief and in various internal directives it has issued to its field offices over the years. The Government asserts that this request-to-act requirement is a reasonable extrapolation of the agency's regulations and that, as a result, the agency's position is dispositive under *Auer*.[737]

However, as in *Gonzales v. Oregon*,[738] the Court concluded that *Skidmore* deference was the appropriate level of deference because the EEOC was interpreting regulatory language that parroted the statutory language and its interpretations occurred in vehicles that were not entitled to *Chevron* deference.[739]

Applying *Skidmore* deference, the Court emphasized "whether the agency has applied its position with consistency."[740] In this case, the Court

732. *Holowecki*, 128 S. Ct. at 1154.
733. *Id*. (citation omitted).
734. *Id*. at 1155.
735. *Id*.
736. *Id*. (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).
737. *Id*. at 1155–56 (citations omitted).
738. *See supra* notes 570–80 and accompanying text (discussing the Court's analysis of what level of deference to give the Attorney General in *Gonzales v. Oregon*).
739. *Holowecki*, 128 S. Ct. at 1156.
740. *Id*.

noted that the EEOC's interpretation had been binding on the EEOC staff for five years.[741] Moreover, although application of the EEOC's interpretation had been inconsistent across offices and cases, "[t]hese undoubted deficiencies in the agency's administration of the statute and its regulatory scheme are not enough . . . to deprive the agency of all judicial deference. Some degree of inconsistent treatment is unavoidable when the agency processes over 175,000 inquiries a year."[742] In addition, the EEOC's interpretation was consistent with the agency's previous directives, and there was no evidence that the agency was adopting that interpretation merely as a litigation position.[743]

In addition, the Court emphasized the EEOC's role under the ADEA. Specifically, the EEOC functions both as the enforcement agency and as the public education agency.[744] As such, the agency had to have some way of sorting its education and enforcement functions in response to filings from the public.[745] As a result, the plaintiff employee's position regarding the breadth of § 1626.6 "is in considerable tension with the structure and purposes of the ADEA. The agency's interpretive position—the request-to-act requirement—provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under *Skidmore*."[746]

Having thus arrived at an interpretation of *charge*, the Court also clarified that the EEOC does not have to act on a filing to make it a charge.[747] As a result, the Court agreed with the EEOC that the plaintiff had filed a proper "charge," in large part because "[t]he agency's determination is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces."[748]

Justice Thomas dissented, joined by Justice Scalia. According to the dissenters, "Today the Court decides that a 'charge' of age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) is whatever the Equal Employment Opportunity Commission (EEOC) says it is."[749] Notably, the dissenters would have begun the analysis not with the proper level of deference, but instead with the Court's own analysis of the

741. *Id*.
742. *Id*.
743. *Id*. at 1156–57.
744. *Id*. at 1157.
745. *Id*.
746. *Id*.
747. *Id*. at 1158–59.
748. *Id*. at 1159.
749. *Id*. at 1161 (Thomas, J., dissenting).

plain meaning of the term *charge*.[750] Moreover, because they concluded that this plain meaning—accusation or indictment—included a requirement of a formal charge against the respondent, they would have denied the EEOC any deference.[751]

e. United States v. Eurodif S.A.

In *United States v. Eurodif S.A.*,[752] in an opinion by Justice Souter, the Supreme Court unanimously upheld, pursuant to a *Chevron* analysis, the Commerce Department's interpretation of a provision of the Tariff Act that calls for "antidumping" duties on "foreign merchandise" sold in the United States at less than its fair value.[753] This provision does not apply to international sales of services.[754]

The issue was whether antidumping duties should apply to separative work unit (SWU) contracts for uranium processing. Under these contracts, domestic utilities send uranium abroad to be processed into low enriched uranium (LEU). Overseas processors mixed sources of uranium, so that it was unlikely that domestic utilities received back exactly the same uranium that they sent abroad. Moreover, domestic utilities allegedly paid less than fair market value for the LEU they received pursuant to SWU contracts. Thus, the SWU arrangements constitute both a sale of services, exempt from the duty, and a sale of goods, subject to the duty. The Commerce Department determined that the antidumping duties apply to the LEU received pursuant to these contracts.

Almost without pause (or much analysis), the Supreme Court deferred to the Commerce Department, engaging in only an abbreviated *Chevron* analysis, despite the fact that the Commerce Department's interpretation contradicted precedent in the U.S. Court of Appeals for the Federal Circuit.[755] The Court emphasized, "The issue is not whether, for purposes of 19 U.S.C. § 1673, the better view is that a SWU contract is one for the sale of services, not goods."[756] Instead,

> The statute gives this determination to the Department of Commerce in the first instance, and when the Department exercises this authority in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.[757]

750. *Id*. at 1162.
751. *Id*. at 1163.
752. 129 S. Ct. 878 (2009).
753. 19 U.S.C. § 1673 (2006).
754. *Eurodif*, 129 S. Ct. at 882.
755. *Id*. at 886; *see also infra* Part II.F.
756. *Id.* at 886.
757. *Id*. at 886 (citation omitted).

Moreover, the Department's change in position regarding the status of SWU contracts did not affect the *Chevron* analysis.[758] According to the Court, "'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"[759]

The Court emphasized that SWU contracts do not fall neatly into either regulatory category—sale of goods or sale of services—but rather were a blend of both. As such,

> This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable.[760]

Thus, the Court concluded, "Where a domestic buyer's cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as the sale of a good under § 1673."[761]

f. Entergy Corp. v. Riverkeeper, Inc.

The Clean Water Act's technology-based effluent limitations created an issue of statutory silence for the Supreme Court—one with, arguably, too much statutory context rather than too little. Specifically, § 1326(b) of the Act applies to facilities that pump in cooling water from waters of the United States and requires that "[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect *the best technology available for minimizing adverse environmental impact* [BTA]."[762] Section 1311 governs technology-based effluent limitations for *existing* point sources and generally requires that they incorporate "the best available technology economically achievable" (BAT or BATEA).[763] Section 1316 governs new point sources and requires them to comply with effluent limitations based on "the best available demonstrated control technology" (BADT).[764]

When the EPA promulgated regulations to implement § 1326(b) for

758. *Id*. at 887.
759. *Id*. (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005)).
760. *Id*. at 888.
761. *Id.* at 890.
762. 33 U.S.C. § 1326(b) (2006) (emphasis added).
763. *Id.* § 1311(b)(2)(A).
764. *Id.* § 1316(a).

large existing sources whose primary activity is the generation and transmission of electricity (the "Phase II regulations"), it allegedly engaged in an active cost–benefit analysis, comparing the costs of various kinds of technological retrofitting to the environmental benefits produced—in general, the prevention of entrainment and impingement of aquatic organisms in and against the intake pipes and screens. As a result, the EPA refused to require existing facilities subject to the rule—about 500 facilities representing about 53% of the nation's power generation—to use closed-cycle cooling systems, which had been the BTA requirement for new facilities. Instead, the EPA required most existing facilities to reduce "impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from [a] calculated baseline," using a mix of technologies that the EPA considered to be "commercially available and economically practicable."[765]

Environmental groups challenged these Phase II regulations on the grounds that the EPA could not engage in cost–benefit analyses when setting BTA standards. The U.S. Court of Appeals for the Second Circuit agreed, concluding that the EPA could consider only what costs could be reasonably be borne by the industry and which technologies were most cost effective.[766]

The Supreme Court, however, concluded in *Entergy Corp. v. Riverkeeper, Inc.*[767] that the EPA reasonably determined that it *could* use cost–benefit analysis to establish BTA for existing sources. In a 5–1–3 decision authored by Justice Scalia, the majority concluded that § 1326(b) is not clear regarding the applicability of cost–benefit analysis and hence that it would defer to the EPA's interpretation pursuant to *Chevron*.[768] The majority emphasized that Congress used a bewildering panoply of technology-based standards in the Clean Water Act, some of which clearly require the "elimination" of certain kinds of discharges of pollutants,[769] some of which clearly contemplate cost–benefit analysis,[770] and some of which are intermediate.[771]

As a result, § 1326(b)'s silence regarding costs was uninstructive, especially in light of the fact that while "two of the other tests authorize

765. 40 C.F.R. § 125.94(b)(1) (2008); National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576, 41,602 (July 9, 2004) (codified in scattered sections of 40 C.F.R.).

766. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83, 99–100 (2d Cir. 2007) (establishing two permissible ways EPA may consider costs).

767. 129 S. Ct. 1498 (2009).

768. *Id.* at 1505, 1510.

769. 33 U.S.C. § 1311(b)(2)(A) (2006).

770. *Id.* § 1314(b)(1)(B).

771. *Id.* §§ 1314(b)(4)(B), 1314(b)(2)(B), 1316(b)(1)(B).

cost–benefit analysis, . . . *all four* of the other tests expressly authorize *some* consideration of costs."[772] Moreover,

> The inference that respondents and the dissent would draw from the silence is . . . implausible, as § 1326(b) is silent not only with respect to cost–benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 1326(b)—an obvious logical impossibility.[773]

Thus, "it was well within the bounds of reasonable interpretation for the EPA to conclude that cost–benefit analysis is not categorically forbidden."[774]

The majority also considered the EPA's application of its cost–benefit analysis reasonable because "the EPA sought only to avoid extreme disparities between costs and benefits."[775] Moreover, the EPA's regulation actually imposed costs of $389 million, while producing "annualized use-benefits of $83 million and non-use benefits of indeterminate value, . . . demonstrat[ing] quite clearly that the agency did not select the Phase II regulatory requirements because their benefits equaled their costs."[776]

Justice Breyer viewed § 1326(b) as being one of those statutory provisions where legislative history is crucial to constructing statutory meaning. Specifically, he agreed with the majority that "the relevant statutory language authorizes the Environmental Protection Agency (EPA) to compare costs and benefits," but he dissented from their final conclusion because "the drafting history and legislative history of related provisions makes clear that those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost–benefit comparisons."[777]

Justices Stevens dissented, joined by Justices Souter and Ginsburg. They would have agreed with the Second Circuit that Congress's silence in § 1326(b) was a prohibition against using cost–benefit analysis to set BTA, noting that "[e]vidence that Congress confronted an issue in some parts of a statute, while leaving it unaddressed in others, can demonstrate that Congress meant its silence to be decisive."[778] In their interpretation, "Unless costs are so high that the best technology is not 'available,' Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact."[779] The need for congressional

772. *Entergy Corp*, 129 S. Ct. at 1508.
773. *Id*.
774. *Id*.
775. *Id*. at 1509.
776. *Id*. (citations omitted).
777. *Id*. at 1512 (Breyer, J., concurring in part and dissenting in part) (citation omitted).
778. *Id*. at 1517 (Stevens, J., dissenting).
779. *Id*. at 1516.

control and concern was made obvious by the EPA's actual assessment of environmental benefits in the Phase II regulations, which ended up giving short shrift to the environment.[780]

Cost–benefit analysis was therefore an issue of congressional concern. Specifically, "Because benefits can be more accurately monetized in some industries than in others, Congress typically decides whether it is appropriate for an agency to use cost–benefit analysis in crafting regulations."[781] Like Justice Breyer, Justice Stevens argued, "The appropriate analysis requires full consideration of the CWA's structure and legislative history to determine whether Congress contemplated cost–benefit analysis and, if so, under what circumstances it directed the EPA to utilize it."[782] Going further than Justice Breyer, however, the dissenters concluded that this approach to interpretation was determinative and that § 1326(b)'s silence on the issue was in fact instructive. According to Justice Stevens, "Congress granted the EPA authority to use cost–benefit analysis in some contexts but not others," indicating "that Congress intend[ed] to control, not delegate, when cost–benefit analysis should be used."[783] As a result, there was no gap for the EPA to fill and it was entitled to no *Chevron* deference.[784]

4. The Roberts Court and Chevron *Deference in the Absence of Court Precedents: A Summary*

The Roberts Court's track record to date indicates that it will generally accord far less deference to a federal agency when the agency is determining the scope of its own jurisdictional authority. This inclination is particularly strong when the agency is expanding its authority into realms that the Court perceives as the states'—for example, regulation of doctors, retention of legal authority over land, and land-use planning.

The Court did defer to an agency interpretation of jurisdictional authority in *Coeur Alaska*, but the circumstances were notably different in that case. First, the issue was not *whether* a federal agency had authority to act, but rather which one—the EPA or the Army Corps. No one argued that the Clean Water Act did not apply to Coeur Alaska's discharge. Second, the two federal agencies involved were in agreement that § 404 of the Clean Water Act governed the discharge, so the Supreme Court did not have to decide a dispute between two federal agencies competing for

780. *See id.* at 1516–17 (describing the drop in benefits' dollar value depending on the EPA's decision of whether to value fish not recreationally or commercially harvested).
781. *Id.* at 1517.
782. *Id.* at 1518.
783. *Id.*
784. *See id.*

jurisdiction. As a result, the essential competition in the case was between environmental preservation and development, and in the absence of any strong federalism concerns, development won.

In contrast, the Roberts Court deferred to the agency's interpretation in all six of the nonjurisdictional decisions that also did not involve federalism or Supreme Court precedent. Thus, in the absence of any countervailing considerations, the Court consistently defers to federal agencies, occasionally stretching its statutory interpretation principles to do so.

F. The Supreme Court and Federal Agencies: Chevron *Deference and the Problem of Precedent*

1. Brand X *and the Nonbinding Nature of Most Federal Court Precedent*

The Supreme Court's deference to the Executive and to administrative agencies becomes even more obvious when federal court decisions on the same topic as agency regulations already exist. Immediately prior to the start of the Roberts Court, the Rehnquist Court decided *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[785] in which it reviewed the FCC's declaratory ruling that cable companies providing broadband Internet access were exempt from mandatory regulation under Title II of the Telecommunications Act.[786] The Telecommunications Act subjects all providers of "telecommunications service" to mandatory common-carrier regulation. In March 2000, the FCC concluded that broadband Internet service provided by cable companies is an "information service" but not a "telecommunications service," "[b]ecause Internet access provides a capability for manipulating and storing information" and because of "[t]he integrated nature of Internet access and high-speed wire used to provide Internet access."[787]

Ultimately, on the merits, the Court, in a 6–3 decision by Justice Thomas, upheld the FCC's decision under both *Chevron*[788] and "arbitrary and capricious" analyses.[789] However, before reaching the merits, eight Justices agreed that federal agencies are free to "overrule" federal court constructions of the statutes that the agencies administer, unless the federal court finds that the statute is unambiguous.[790]

785. 545 U.S. 967 (2005).
786. 47 U.S.C. §§ 151–615b (2006).
787. *Brand X*, 545 U.S. at 977–78.
788. *Id*. at 989.
789. *See id.* at 1000–02 (finding the Commission provided adequate rational justification for its conclusions).
790. *See id.* at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

When numerous parties petitioned for judicial review of the FCC's declaratory ruling, a judicial lottery sent the case to the U.S. Court of Appeals for the Ninth Circuit. Rather than use the *Chevron* analysis to review the FCC's construction of the Communications Act, the Ninth Circuit invalidated the ruling based on its own precedent in *AT&T Corp. v. City of Portland*.[791]

The Supreme Court held that the Ninth Circuit should have used the *Chevron* analysis, not its own precedent, to evaluate the FCC's construction of the Act. First, the *Chevron* analysis applied because Congress delegated authority to execute and enforce the Telecommunications Act to the FCC and "the Commission issued the order under review in the exercise of that authority."[792] Second, with regard to the role of federal courts' constructions in the first step of the *Chevron* analysis, "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[793] The Court reasoned that "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."[794] The Court distinguished its own prior precedent in *Neal v. United States*,[795] in which a prior Court construction resulted in no deference to the agency, on the grounds that the judicial precedent at issue in *Neal* "had held the relevant statute to be unambiguous."[796] Third, the Supreme Court indicated that a federal court will not be found to have held that a statute is unambiguous unless the court's decision clearly indicated that its reading is "the *only permissible* reading of the statute."[797] The Ninth Circuit's decision in *AT&T Corp. v. Portland* did not achieve this level of exclusiveness because the Ninth Circuit made no explicit holding that the Telecommunications Act was unambiguous regarding whether cable Internet providers were "telecommunications carriers."[798]

Brand X thus signaled that the Supreme Court is willing to subjugate federal courts' interpretations of statutes to federal agencies' interpretations of statutes. The theory behind this result is that Congress delegates to

791. 216 F.3d 871, 880 (9th Cir. 2000).
792. *Brand X*, 545 U.S. at 980–81.
793. *Id*. at 982.
794. *Id*.
795. 516 U.S. 284 (1996).
796. *Brand X*, 545 U.S. at 984.
797. *Id*.
798. *Id*. at 984–85.

federal agencies the authority to implement and interpret the statutes at issue, and hence, out of respect for Congress, the agencies' interpretations are to be preferred to those of the courts.[799] While the Roberts Court is still wrestling with the implications of this view of the federal courts' role, especially in connection with its own prior decisions, *Brand X* caused much consternation in the lower courts.[800]

The Roberts Court addressed the role and value of the Supreme Court's own precedent and stare decisis in several decisions. Taken together, these decisions indicate that a majority of the Roberts Court is willing to assert authority to determine whether the Court's own precedents are binding, even on federal agencies, but that agency decisions on how to implement statutes are still to be preferred.

2. Agency-Administered Statutes, Applicable Court Precedent, and Stare Decisis

Despite the *Brand X* decision, the Supreme Court appears unwilling to discard its existing precedent when that precedent seems directly applicable to agency-administered regimes. Three decisions illustrate this impulse—although the last was deeply divided and suggests that *Brand X* may play a more important role in the future.

In the first case, a unanimous Court indicated in November 2005 that stare decisis—at least with respect to the Supreme Court's own interpretive precedents—is still important to statutory interpretation, even in federal-agency-administered regulatory programs. In *IBP, Inc. v. Alvarez*,[801] the Court addressed the issues of whether the FLSA,[802] as amended by § 4 of the Portal-to-Portal Act of 1947,[803] required employers in meat and poultry

799. *Id*. at 982.

800. *See* Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1242–43 (10th Cir. 2008) (concluding that under *Brand X*, "a subsequent, reasonable agency interpretation of an ambiguous statute, which avoids raising serious constitutional doubts, is due deference notwithstanding" any "prior Supreme Court construction of the statute applying the canon of constitutional avoidance"); Levy v. Sterling Holding Co., 544 F.3d 493, 502–03 (3d Cir. 2008) (citing *Brand X* for the proposition that if a court interprets an ambiguous statute one way, and an agency subsequently interprets the same statute another way, even the same court cannot ignore the agency's interpretation); Gonzales v. Dep't of Homeland Sec., 508 F.3d 1227, 1235–36 (9th Cir. 2007) (noting the proviso that a court must accord *Chevron* deference to an agency's subsequent interpretation only if the "court's earlier precedent was an interpretation of a statutory ambiguity"); Fernandez v. Keisler, 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* but noting that that decision did nothing to alter the effect of a finding that Congress spoke clearly to the issue under *Chevron* step one); Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 16–17 (1st Cir. 2006) (noting the Supreme Court's intent in *Brand X* was to eliminate the possibility that *Chevron* applicability would turn on the order in which judicial and agency interpretations issue).

801. 546 U.S. 21 (2005).

802. 29 U.S.C. §§ 201–219 (2006).

803. *See id.* § 254 (describing certain activities not compensable under the FLSA).

processing plants to pay workers for the time that (1) meat and poultry workers spent walking from the locker rooms to the production areas after donning special protective gear and clothing, (2) poultry workers spent waiting to take off such protective gear at the end of the work day, or (3) poultry workers spent waiting at the beginning of the work day to don protective clothing.[804]

On the merits, the unanimous Court held that walking time for the meat processors and end-of-the-day waiting time for the poultry workers were not "preliminary or postliminary" activities excluded from FLSA coverage but instead were "integral and indispensable" to the "principal activit[ies]" for which the workers were paid, and hence were included in the workday under the "continuous workday" rule.[805] In contrast, the time that the poultry workers spent waiting to don special clothing at the beginning of the workday *was* "preliminary or postliminary," and hence the Portal-to-Portal Act *did* exclude that time from the FLSA's coverage.[806]

In interpreting the FLSA and the Portal-to-Portal Act, the Supreme Court focused almost entirely on its own prior interpretations of the FLSA and Congress's reactions to those interpretations; the Department of Labor's regulations implementing the FLSA and its amendments played a confirming but not determinative role.[807] The Court noted that its "early cases" interpreted the FLSA "broadly,"[808] but that Congress designed the 1947 Portal-to-Portal Act to scale back those judicial interpretations.[809] Nevertheless, that Court noted that "consistent with *our prior decisions* interpreting the FLSA, the Department of Labor has adopted the continuous workday rule . . . . These regulations have remained in effect since 1947."[810] Finally, in 1956, the Court interpreted the FLSA to hold that activities are part of the paid continuous work day if they are an "'integral and indispensable part of the principal activities.'"[811]

While the Department of Labor's continuous workday regulation thus

804. *IBP, Inc.*, 546 U.S. at 24, 30.

805. *Id*. at 30, 39–40.

806. *See id*. at 39–40 (noting that such waiting time occurs before the principal activity).

807. *See id*. at 25–26 (discussing the Supreme Court's early FLSA decisions defining compensable work and Congress's reaction to those decisions in the Portal-to-Portal Act); *see also id.* at 29–30 (discussing the Supreme Court's prior interpretation of compensable work time in *Steiner v. Mitchell*, 350 U.S. 247, 248, 252–53, 256 (1956)).

808. *Id*. at 25–26 (discussing Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944); Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690–92 (1946)).

809. *See id*. at 26–27 (explaining that the Portal-to-Portal Act limited employer liability for failure to pay minimum wages or overtime compensation, as well as the employer obligation to compensate for certain activities previously considered preliminary or postliminary to a principal activity).

810. *Id*. at 29 (emphasis added).

811. *Id*. at 29–30 (quoting Steiner v. Mitchell, 350 U.S. 247, 252–53 (1956)).

applied in the case, it did not specifically resolve the interpretive issue at hand. However, the regulation did "support respondents' view that when donning and doffing of protective gear are compensable activities, they may also define the outer limits of the workday."[812]

In this context, Supreme Court precedent was still relevant. "Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades."[813] Indeed, facing the employer's argument that some of the Department of Labor's regulations suggested a different result, the Court first noted "that the Secretary assumed that there would be some cases" where its exclusionary regulations would not apply.[814] However, the Court also characterized those potentially contradictory regulatory provisions as "ambiguous (and apparently ambivalent)," diminishing their force and applicability so that they were "not sufficient to overcome the statute itself, whose meaning is definitively resolved by" the Supreme Court's 1956 decision in *Steiner*.[815]

The Supreme Court was similarly unwilling to discard its own precedent toward the end of its 2007–2008 Term when it examined FERC's justifications for a rate decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*.[816] Under the Federal Power Act,[817] FERC regulates the sale of electricity in interstate commerce, including overseeing rate schedules, or "tariffs." The Act requires that all wholesale electricity rates be "just and reasonable."[818]

In *Morgan Stanley*, in a 5–2 decision by Justice Scalia (Chief Justice Roberts and Justice Breyer took no part in the decision; Justices Stevens and Souter dissented), the Supreme Court acknowledged that "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."[819] However, in two cases in 1956, the Supreme Court also determined that utilities cannot freely abrogate rates set in bilateral contracts by unilaterally filing a new tariff with FERC.[820] Thus, when FERC reviews a tariff notification where relevant bilateral rate contracts exist, FERC is generally bound under this "*Mobile–Sierra* doctrine" to uphold the contract rates because the doctrine creates a

812. *Id*. at 35.
813. *Id*. at 32.
814. *Id*. at 37.
815. *Id*.
816. 128 S. Ct. 2733 (2008).
817. 16 U.S.C. §§ 824–824v (2006).
818. *Id*. § 824d(a).
819. *Morgan Stanley*, 128 S. Ct. at 2738.
820. *See id*. at 2738–39 (describing the so-called *Mobile–Sierra* doctrine).

presumption that the contract rate is itself "just and reasonable" and not in need of amendment.[821]

Morgan Stanley, however, involved long-term contracts that western utilities entered into in 2000 and 2001, when electricity rates were "very high by historical standards," especially in California.[822] When that energy crisis passed, the utilities wished to purchase power at much cheaper rates and asked FERC to approve new tariffs.[823] The utilities argued first that the *Mobile–Sierra* doctrine should not apply because FERC had never approved the contract without the presumption and therefore had never independently determined that the contract rates were just and reasonable.[824] They also argued that, even considering the *Mobile–Sierra* presumption, the contract rates were so high that they violated the public interest, rendering those contracts unjust and unreasonable.[825] The administrative law judge (ALJ) reviewing the case "concluded that the *Mobile–Sierra* presumption should apply to the contracts and that the contracts did not seriously harm the public interest."[826] FERC affirmed the ALJ's determination, but the U.S. Court of Appeals for the Ninth Circuit reversed and remanded.[827]

FERC's order "agreed with the Ninth Circuit's premise that the Commission must have an initial opportunity to review a contract without the *Mobile–Sierra* presumption, but maintained that the authorization for market-based rate authority qualified as that initial review."[828] Before the Supreme Court, however, FERC attempted to change the rationale for its decision, "arguing that there is no such prerequisite—or at least that FERC could reasonably conclude so and therefore that *Chevron* deference is in order."[829]

The Supreme Court disagreed, although it avoided the *Brand X* issue. Instead, it invoked its reasoning in *SEC v. Chenery Corp.*:[830] "We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion."[831]

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821. *See id.* at 2739–40 (noting that although private parties may contract around *Mobile–Sierra*, the "*Mobile–Sierra* presumption remains the default rule").
822. *Id*. at 2743.
823. *Id.*
824. *Id*.
825. *Id*.
826. *Id*.
827. *Id*. at 2744.
828. *Id*. at 2745.
829. *Id*.
830. *See* SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943) (holding that an "administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").
831. *Morgan Stanley*, 128 S. Ct. at 2745.

Nevertheless, the Supreme Court did not invalidate FERC's decision or remand on the basis of the *Chenery* doctrine. Instead, having concluded that FERC was *required* under the Supreme Court's decision in *Sierra* to apply the *Mobile–Sierra* presumption, it upheld FERC's decision.[832] The fact that FERC "provided a different rationale for the necessary result is no cause for upsetting its ruling. 'To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game.'"[833]

In dissent, Justice Stevens, joined by Justice Souter, questioned the validity and import of the *Mobile–Sierra* doctrine itself, concluding that the presumption distorted the statutory "just and reasonable" standard.[834] However, they also criticized the majority for misapplying the *Chenery* doctrine, emphasizing that reviewing courts cannot accept an agency's post hoc rationalizations as grounds for upholding its decision.[835] Moreover, "even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary," the orders would be too ambiguous to uphold.[836]

In addition, the net effect of the majority's decision to require the *Mobile–Sierra* presumption, according to the dissenters, was to inappropriately cabin FERC's discretion in rate review in violation of *Chevron* deference. Congress "used the general words 'just and reasonable' because it wanted to give FERC, not the courts, wide latitude in setting policy."[837] The dissenters emphasized that the Court traditionally upholds FERC's ratemaking authority when the rates fall within a "zone of reasonableness" and argued that no statutory basis for the *Mobile–Sierra* doctrine existed.[838] By concluding that FERC was required to apply the *Mobile–Sierra* presumption, the dissenters argued that

> [t]he Court has curtailed the agency's authority to interpret the terms "just and reasonable" and thereby substantially narrowed FERC's discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers.[839]

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832. *Id*.
833. *Id*. (quoting NLRB v. Wyman–Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).
834. *See id.* at 2752–54 (Stevens, J., dissenting) (arguing that Congress used the general terms just and reasonable because "it wanted to give FERC, not the courts, wide latitude in setting policy").
835. *Id.* at 2758.
836. *Id*.
837. *Id*. at 2752.
838. *Id*. at 2753.
839. *Id*. at 2759.

The Supreme Court issued its third *Brand X*-related decision, *Cuomo v. Clearing House Ass'n*,[840] in June 2009, at the very end of the Roberts Court's first phase. That decision split 5–4 and resulted in an opinion by Justice Scalia for the unusual majority of Justices Scalia, Stevens, Souter, Ginsburg, and Breyer. The case should have raised the *Brand X* issue regarding the Supreme Court's own precedent, but the majority again ducked the issue, relegating the *Brand X* argument to the dissent. Notably, however, the four dissenters indicated that they were willing to apply *Brand X* to the Supreme Court's own decisions, and all four are still on the Court.

In *Clearing House*, the attorney general for the State of New York sent letters to several national banks in the state, "in lieu of subpoena," asking for certain nonpublic information in order to ascertain whether the banks were complying with the state's fair lending laws.[841] The federal OCC and the Clearing House Association brought suit to enjoin the request, claiming that the National Bank Act (NBA) regulations preempt enforcement of state law against national banks.[842]

The NBA states,

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or either House thereof or by any committee of Congress or of either House duly authorized.[843]

The OCC's regulation implementing this provision, adopted through notice-and-comment rulemaking, states that "visitorial powers" include, inter alia, "[i]nspection of a bank's books and records" and "[e]nforcing compliance with any applicable federal or state laws concerning" activities authorized or permitted pursuant to federal banking law.[844]

The question for the Supreme Court was whether the OCC regulation preempted enforcement of nonbanking state laws against national banks. The majority stated both that the *Chevron* doctrine provided the framework for evaluating the OCC's regulation and that "[t]here is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers,' especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally enforced—are not in vogue."[845] Thus, the case seemed ripe for deference to the OCC's interpretation that state enforcement was preempted.

840. 129 S. Ct. 2710 (2009).
841. *Id*. at 2714.
842. *Id*.
843. 12 U.S.C. § 484(a) (2006).
844. 12 C.F.R. § 7.4000(a)(2)(ii), (iv) (2009).
845. *Clearing House Ass'n*, 129 S. Ct. at 2715.

> Nevertheless, the majority was unwilling to defer, noting that
>
> > the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term "visitorial powers" even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law.[846]

Instead the Court stated that, historically, visitorial powers referred to the state-as-sovereign's supervisory role over corporations and charitable institutions.[847] According to the majority, "No one denies that the National Bank Act leaves in place some state substantive laws affecting banks, . . . [and] reading 'visitorial powers' as limiting only sovereign oversight and supervision would produce an entirely commonplace result" that allowed states to enforce their laws against national banks.[848]

As a result, "The Comptroller's regulation . . . does not comport with the statute."[849] Moreover, "Neither does the Comptroller's *interpretation* of its regulation, which differs from the text and must be discussed separately."[850] In the statement of basis and purpose in the *Federal Register* announcement of its regulation, the OCC attempted to limit the regulation's scope to state enforcement of state laws directly related to banking and to exempt states' enforcement of their laws related to, for example, "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[851] This interpretation did not square with the regulation's text, and "[a]nyway, the National Bank Act *does* specifically authorize and permit activities that fall within what the statement of basis and purpose calls 'the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.'"[852] Therefore, the OCC's regulatory interpretation could not save the regulation.

Nevertheless, the Court noted, state enforcement must proceed in court in order for the state power to be "vested in the courts of justice," as the NBA requires.[853] Because the New York attorney general relied on his *executive* enforcement authority—not the power of the state courts—the NBA preempted his attempted enforcement action.[854]

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846. *Id*.
847. *See id.* at 2716–17 (noting that the Court's precedents confirm "that a sovereign's 'visitorial powers' and its power to enforce the law are two different things").
848. *Id*. at 2717–18.
849. *Id*. at 2719.
850. *Id*.
851. Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 7).
852. *Clearing House Ass'n*, 129 S. Ct. at 2719–20.
853. *Id.* at 2721–22.
854. *Id*.

The OCC's regulation was key to the majority's decision. Nevertheless, as in *IBP, Inc. v. Alvarez* and *Morgan Stanley*, the majority also assumed the continued vitality of the Court's own applicable precedents and relied on the Court's prior interpretations of the NBA. According to the majority, "Our cases have always understood 'visitation' as this right to oversee corporate affairs, quite separate from the power to enforce the law."[855] As a result,

> the unmistakable and utterly consistent teaching of our jurisprudence, both before and after the enactment of the National Bank Act, is that a sovereign's "visitorial powers" and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the [OCC]'s regulation says, the National Bank Act preempts only the former.[856]

Thus, in the majority's interpretation, "'Visitorial powers' in the National Bank Act refers to a sovereign's supervisory powers over corporations."[857]

> When, however, a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of "visitorial powers" and thus the Comptroller erred by extending the definition of "visitorial powers" to include "prosecuting enforcement actions" in state courts.[858]

The majority could have easily cast its decision into the *Brand X* framework by holding that its prior decisions construed the NBA to be unambiguous regarding the interpretive point at issue—the relationship between visitorial powers and state enforcement. However, the Court did not do so. Instead, it acknowledged the NBA's ambiguity and relied on traditional evaluations of the OCC's reasonableness, such as pragmatic considerations of what the OCC's interpretation would mean.[859] It therefore skirted the *Brand X* decision.

The dissenters—Justice Thomas, joined by Chief Justice Roberts and Justices Kennedy and Alito—did not avoid *Brand X*. They agreed with the majority that the term *visitorial powers* was ambiguous. However, in light of historical ambiguities in the common law governing corporations, they would have upheld the OCC's regulatory interpretation as reasonable due to those historical and statutory ambiguities.[860]

Importantly, the dissenters specifically disagreed with the majority's

855. *Id*. at 2716; *see also id*. at 2716–17 (discussing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 676, 681 (1819) (Washington, J., concurring)).
856. *Id*. at 2717.
857. *Id*. at 2721.
858. *Id*. (citing 12 C.F.R. § 7.4000 (2009)).
859. *See id*. at 2717–18 (discussing the consequences of the OCC's interpretation).
860. *Id*. at 2722–27 (Thomas, J., concurring in part and dissenting in part).

conclusion that the OCC's interpretation "is unreasonable because it conflicts with several of this Court's decisions."[861] They instead noted that under *Brand X*, the New York attorney general

> cannot prevail by simply showing that this Court previously adopted a construction of § 484 that differs from the interpretation later chosen by the agency. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[862]

Even Supreme Court precedent "is insufficient to deny *Chevron* deference to OCC's construction of § 484(a)."[863]

The dissenters were also unconvinced by the petitioners' arguments that federalism concerns and the possibility of federal preemption were sufficient to deprive the OCC of *Chevron* deference.[864] Specifically,

> Petitioner's federalism-based objections to *Chevron* deference ultimately turn on a single proposition: It is doubtful that Congress preempted state enforcement of state laws but not the underlying state laws themselves. But it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even "[b]izarre." The Court must decide only whether the construction adopted by the agency is unambiguously foreclosed by the statute's text.[865]

Thus, the dissenters expressed great willingness to defer to the OCC's view of the NBA's preemption, despite the Court's own precedent, federalism concerns, and the potential impact of the OCC's interpretation on the overall structure of the NBA.

3. Agency-Administered Statutes, Nonapplicable Precedent, and the Importance of Remand

While the Supreme Court has not yet been willing to overturn its own directly applicable precedents in favor of agency interpretations, it *has* displayed, despite *Morgan Stanley*, a *Brand X*-like preference for agency decisions that has limited its willingness to let federal courts—including itself—resolve cases. In particular, when the Court determined that its own precedent did not determine the interpretive outcome, it insisted on remand to the administrative agency, even for pure legal issues of statutory interpretation.

For example, in the April 2006 per curiam decision in *Gonzales v.*

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861. *Id*. at 2728.
862. *Id.* at 2728–29 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).
863. *Id*. at 2730.
864. *Id*. at 2731–33.
865. *Id*. at 2733 (citation omitted) (alteration in original).

Thomas,[866] the Roberts Court vacated the U.S. Court of Appeals for the Ninth Circuit's en banc decision to grant asylum to South African immigrants on the basis of persecution as members of a family group, in favor of a remand to the Immigration and Naturalization Service (INS).[867] Legally, the Ninth Circuit decision held that a family group may constitute a "social group" for the purposes of refugee status under the Immigration and Nationality Act (INA).[868] Nevertheless, because the Ninth Circuit also decided that the facts of the immigrants' case met this standard without the benefit of a prior agency decision on the issue, the Supreme Court held that it committed "obvious" legal error in light of the "ordinary remand" rule announced in *INS v. Ventura*.[869]

Quoting extensively from *Ventura*, the *Thomas* Court emphasized that "'[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision,'"[870] and that "'judicial judgment cannot be made to do service for an administrative judgment.'"[871] As a result, "A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"; instead, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."[872] Thus, because "[t]he agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group,'" or brought its expertise to bear on the facts of the case, remand was required.[873]

Similarly, in March 2009, the Supreme Court remanded a case to the Board of Immigration Appeals (BIA) after concluding that the BIA had mistakenly relied on the Supreme Court's own precedent in interpreting the INA's "persecutor bar." The persecutor bar denies refugee status and asylum to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[874] The petitioner, Daniel Girmai Negusie, had been conscripted against his will by the Eritrean government to act as a prison guard for

866. 547 U.S. 183 (2006) (per curiam).
867. *Id*. at 187.
868. Thomas v. Ashcroft, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc) (overruling Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991)), *vacated sub nom.* Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam).
869. *Thomas*, 547 U.S. at 185–86 (discussing the applicability of INS v. Ventura, 537 U.S. 12, 18 (2002) (per curiam)).
870. *Id.* at 186 (quoting *Ventura*, 537 U.S. at 16).
871. *Id*. (quoting *Ventura*, 537 U.S. at 16) (internal quotation marks omitted).
872. *Id*. (quoting *Ventura*, 537 U.S. at 16) (internal quotation marks omitted).
873. *Id*.
874. 8 U.S.C. § 1101(a)(42) (2006).

Ethiopian prisoners, raising the issue of whether the INA's persecutor bar requires voluntary action. The BIA concluded that the Supreme Court's interpretation of the Displaced Persons Act's persecutor bar in *Fedorenko v. United States*[875] controlled and barred Negusie from refugee status.

In the 6–3 decision in *Negusie v. Holder*,[876] in an opinion by Justice Kennedy, the Supreme Court concluded that *Fedorenko* was not controlling because the INA served different purposes than the Displaced Persons Act and remanded the case to the BIA for reconsideration. The Court emphasized that the BIA was entitled to *Chevron* deference in interpreting ambiguous provisions of the INA and that "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[877]

In distinguishing the *Fedorenko* decision, the Court discussed the importance of a statute's context and purpose to the construction of specific provisions. Thus, in the Displaced Persons Act, enacted to address persons displaced from World War II and to punish Nazi conduct, Congress required voluntary conduct in some provisions but not in the persecutor bar, supporting the Court's conclusion in *Fedorenko* that voluntary conduct was not required for the persecutor bar to apply.[878] In contrast, Congress enacted the INA as part of the Refugee Act to create a general rule for refugees and displaced persons, and the INA does not contain provisions that emphasize voluntary conduct. As a result, *Fedorenko* did not control the interpretation of the INA's "persecutor bar."[879] Instead, unlike in the Displaced Persons Act, the statutory silence in the INA "persecutor bar" represented a gap for the BIA to fill rather than a congressional indication that voluntariness was not required,[880] and "[w]hatever weight or relevance these various authorities," including the Supreme Court's own related cases, "may have in interpreting the statute should be considered by the agency in the first instance."[881]

The most interesting debate in *Negusie* was how to proceed from there. According to the majority, because the BIA mistakenly thought *Fedorenko* controlled, BIA had "not exercised its interpretive authority" regarding the issue.[882] As a result, because the agency had not yet exercised its *Chevron*

875. 449 U.S. 490 (1981).
876. 129 S. Ct. 1159, 1161 (2009).
877. *Id*. at 1163–64 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).
878. *Id*. at 1164–65.
879. *Id*. at 1165–66.
880. *Id*.
881. *Id*. at 1166.
882. *Id*. at 1167.

discretion, the proper remedy was to remand without interpreting the statute because Congress delegated gap-filling authority to the BIA and the BIA should therefore, in light of difficult policy choices, be the first to exercise that authority.[883]

In contrast, Justices Stevens and Breyer concurred in part and dissented in part specifically to argue that *the Court* should have determined whether the INA's "persecutor bar" included or rejected a voluntariness requirement.[884] Arguing that the case involved a "narrow question of statutory construction," they concluded that *Chevron* did not require remand to the agency.[885] Noting "that statutory interpretation is a multifaceted enterprise, ranging from a precise construction of statutory language to a determination of what policy best effectuates statutory objectives,"[886] Justice Stevens emphasized that courts are the final authorities on a statute's meaning. "The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its importance."[887] Moreover, "The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice."[888] Drawing parallels to the adjudication context, Justice Stevens distinguished between questions of pure statutory construction and applications of statutes to particular sets of facts, arguing that the former remains well within the courts' expertise.[889] Thus, while "[t]he BIA's formulation of a test to apply the statutory standard in individual cases and its application of that test in respondent's case were precisely the sort of agency actions that merited judicial deference," the question before the Court was a pure and narrow legal question about whether voluntary action was required for the INA "persecutor bar" to apply.[890] The two Justices would have answered that legal question in the negative and then remanded the case to the BIA to apply that definitive interpretation to Negusie's application.

More emphatically, Justice Thomas dissented "[b]ecause the INA unambiguously precludes any inquiry into whether the persecutor acted

883. *Id*.
884. *Id*. at 1170 (Stevens, J., concurring in part and dissenting in part).
885. *Id*. at 1170–71.
886. *Id*. at 1171.
887. *Id*.
888. *Id*.
889. *Id*. at 1172.
890. *Id*. at 1173.

voluntarily."[891] As a result, there was no role for the BIA to play in interpreting the statute, and its denial of asylum should have been affirmed.[892]

4. Brand X*, Supreme Court Precedent, and Agencies: A Mixed-Message Court*

While the *Brand X* rule that federal agencies can overrule federal courts' interpretations of federal statutes remains a viable consideration in the Supreme Court, the Roberts Court has so far declined—although generally without any *Brand X* analysis—to allow federal agencies to override interpretations in its own precedents. Moreover, as *Morgan Stanley*, *Negusie*, and *Clearing House* demonstrate, the Supreme Court also claims authority to determine the scope of its own prior decisions and how determinative they are regarding agency interpretations of statutes.

Thus, just as the Roberts Court is generally unwilling to defer to an agency's interpretation of its own statutory jurisdiction, so too the Court has been reluctant to allow agencies to define (explicitly or by implication) the administrative law import of prior Court interpretations of statutes. However, just as the Roberts Court fairly consistently defers to federal agencies when no jurisdictional or federalism concerns are present, it also consistently carves out and preserves jurisprudential "space" for agencies to exercise their congressionally delegated interpretive authority, insisting in *Negusie* and *Thomas* that agencies be accorded the right to remand regarding the application of law to facts and a first opportunity to interpret statutes within the corrected boundaries of Supreme Court precedent—even when federal courts could have easily and competently resolved the issues at hand.

Finally, *Clearing House* and *Negusie*, both 2009 decisions, reveal a Court that is deeply divided philosophically regarding the "proper" respective roles of courts and agencies in interpreting and applying the law. This divide, moreover, is made more complicated by the Justices' equally divisive approaches to statutory interpretation. Thus, for example, Justice Thomas is generally the champion of strong *Chevron* deference to agencies, as evidenced by his promotion of the *Brand X* doctrine in his *Clearing House* dissent. Rather than join the pro-agency majority in *Negusie*, however, he again dissented because his rather strict approach to statutory interpretation found no ambiguity in the INA's persecutor bar for the agency to work with.

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891. *Id*. at 1176 (Thomas, J., dissenting).
892. *Id*. at 1185.

CONCLUSION

Distilling absolutely consistent jurisprudential principles across the Roberts Court's administrative law decisions to date is difficult. Instead, what one discerns most readily is an ongoing struggle among the Justices themselves to define the Court's "proper" role in both a tripartite federal government and a federalism system. Moreover, the edges of these jurisprudential skirmishes are generally most obvious in split decisions addressing deference to administrative agencies.

A number of factors have become relevant to the Court's decision to grant or withhold deference. Fairly consistently, agencies receive less deference if they provoke federalism concerns, otherwise test constitutional boundaries, or somehow seek to expand their statutory jurisdiction through statutory interpretation. Conversely, the Court routinely and less divisively defers to agency decisions that neither raise these issues nor confront or challenge Supreme Court precedent—that "merely" apply the law to the facts.

The greatest tensions arise when the Court must define its own interpretive authority against an agency's. These often deeply divided opinions reveal a Court that is generally willing to protect an agency's "right" to be the first interpreter of a statute but not yet willing to sacrifice its own precedent to the full implementation of *Brand X* deference—although the *Clearing House* decision suggests how razor thin this majority may in fact be.

Generalizing these observations across all of the Court's decisions, the Roberts Court appears to be pursuing a "spheres of action" approach to administrative law, accepting for itself the roles of constitutional interpreter, constitutional mediator, and interpreter of Supreme Court precedent, but otherwise largely content to defer to Congress and the Executive Branch—sometimes even insisting upon that deference. Under this model, the Roberts Court's primary function is to ensure that the various governmental actors, including itself, remain confined to their "proper" roles and exhibit proper respect for both other governmental actors and the rights of persons subject to government action. Conversely, under this model the Court's role is also to ensure that the various governmental actors' functions, perspectives, and intents remain dominant when such actors operate within their "proper" roles.

The Court's recurring and sometimes dominating attention to federalism concerns illustrate the workings of this "spheres of action" approach. Even during the Rehnquist Court, federalism considerations resurfaced as a check on both Congress's authority, through revived limitations on the Commerce Clause, and on agency authority, through a "constitutional

boundaries" limitation on *Chevron* deference. In the Roberts Court, this role of the Court as constitutional mediator, both among the various branches of the federal government and between the federal government and the states, has manifested in some very traditional federal court functions, such as playing referee for the ever-varying issues of federal preemption of state law. However, the constitutional-mediator role also caused the first iteration of the Roberts Court to reexamine some basic constitutional doctrines, such as the dormant Commerce Clause doctrine. Moreover, in the federalism context, the Court's constitutional-mediator role generally induces the Court to review skeptically agency assertions of jurisdiction when they intrude into traditional state spheres of regulation and agency claims of *Chevron* deference for expansive interpretations of statutes. Finally, federalism concerns induce the Court to examine more carefully the potential ramifications of different statutory constructions in the process of statutory interpretation itself.

As a pragmatic matter, the administrative law jurisprudence in phase I of the Roberts Court resulted in the largely silent, and not yet fully consistent, creation of a hierarchical approach to federal court review of federal agency action and the actions of other governmental actors. Initially, the Court examines whether the challenge is properly before the federal courts, and the Roberts Court's decisions in this area, more often than not, shield federal agencies from federal court review. If the lawsuit can be heard, the Court engages in a second-level inquiry into the basic propriety of the agency's, or other governmental actor's, action, which generally does not defer to that agency's or actor's own view of its jurisdiction. However, if the agency or actor is deemed to be acting within the proper bounds of its authority, the Court engages in a highly deferential review of what the agency or actor actually did or decided, generally upholding that decision.

COMMENTS

REGULATION RELOADED: THE ADMINISTRATIVE LAW OF FIREARMS AFTER *DISTRICT OF COLUMBIA V. HELLER*

JONATHAN ZIMMER*

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* J.D. Candidate, May 2011, American University Washington College of Law; B.S.F.S. International Politics, Georgetown University, 2002. Staff, 2009–2010, *Administrative Law Review*. I would like to thank Professor Jeffrey Lubbers (American University Washington College of Law), Professor Adam Winkler (University of California Los Angeles School of Law), and Professor David Kopel (University of Denver Sturm College of Law) for their helpful comments on earlier drafts. Special thanks to Jenna Hudson and Colleen O'Boyle for their editorial assistance and to Baylen Linnekin, Andrew Paul Kawel, Alexia Emmermann, and the editors and staff of the *Administrative Law Review* for their generosity of time, talent, and inspiration. This Comment is dedicated to my parents, Walter and Cynthia Zimmer, for everything they have taught and given me.

INTRODUCTION

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[1]

With its 5–4 decision in *District of Columbia v. Heller*,[2] the United States Supreme Court at last gave effect to the Second Amendment to the Constitution.[3] This watershed case declared that the Second Amendment guarantees an individual right to keep and bear arms for self-defense.[4] It also struck down two District of Columbia laws that banned all handgun possession and required that all firearms in the home be kept inoperable.[5] A delight to advocates of a strong right to keep and bear firearms,[6] and a horror to advocates of stronger controls on firearms,[7] *Heller* leaves "a *tabula* much more *rasa* than is ordinarily the case."[8]

The headlines following *Heller* naturally focused on the majority opinion's emphatic statement that there is now an outer limit to firearms regulation that the political branches cannot pass without risking judicial intervention. Justice Scalia, concluding the majority opinion in *Heller*, gives a glimpse of how the Supreme Court now sees its role in protecting the Second Amendment:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces

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1. U.S. CONST. amend. II.
2. 128 S. Ct. 2783 (2008).
3. *Heller* was decided sixty-nine years after *United States. v. Miller*, 307 U.S. 174 (1939), a case that was much less about the Second Amendment than the federal government's power to tax and regulate firearms. *See infra* note 17.
4. *Heller*, 128 S. Ct. at 2799.
5. *Id.* at 2821–22.
6. "The 32-year nightmare of the law-abiding citizens of Washington, D.C. is over. They can legally use firearms in defense of their homes against violent predators. . . . A new chapter has opened in the story of mankind's struggle for freedom." ALAN KORWIN & DAVID B. KOPEL, THE HELLER CASE: GUN RIGHTS AFFIRMED! 259 (2008).
7. "Today's opinion turns legal logic and common sense on its head. . . . [T]he Court has ignored our nation's history of mass shootings, assassinations, and unparalleled gun violence. It has instead accepted an abstract academic argument with dangerous real-world results for residents of the District of Columbia." Press Release, Violence Policy Center, Statement of Violence Policy Center on Supreme Court Ruling in *District of Columbia v. Heller* Overturning DC Handgun Ban (June 26, 2008), http://www.vpc.org/press/0806heller.htm.
8. Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 NW. U. L. REV. 2035, 2035 (2008).

> provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[9]

Less noted in the extensive commentary on *Heller* is the role that administrative agencies play in shaping the course of firearms law. Firearms laws and regulations are inextricably linked; they rise and fall together, and as the *Heller* case itself showed, a single, careless, unheralded government act in furtherance of a seemingly uncontroversial regulation may contain the seed of a court challenge that ultimately strikes down the law the agency aims to enforce.[10] Although much has been written on *Heller*'s future as a legal doctrine, nothing has yet been written on what this decision means for those charged with the administration of firearms through regulations. This Comment will attempt to provide a roadmap through this uncharted territory for firearms regulators.

Part I summarizes the holding in *Heller*—what the Court's interpretation of the Second Amendment covers, what it exempts from its holdings, and what it says nothing about. Part II examines the debate that will most influence the Second Amendment's administrative future—whether the Amendment will be incorporated against the states as virtually all other provisions of the Bill of Rights have—and what incorporation would mean for state firearms regulations facing new scrutiny post-*Heller*. Part III considers the likely due process and evidentiary standards courts will use when reviewing administrative and regulatory adjudications involving firearms in light of *Heller*.[11] This Comment concludes by noting that *Heller* is not the end of all gun control, but that those who seek to restrict the right to keep and bear arms in its wake through state regulation will have to approach these rights with a clear justification for their restriction and the same care and deference shown to the other rights enumerated in

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9. *Heller*, 128 S. Ct. at 2822.

10. In fact, the plaintiff in *Heller*, who sought to keep a pistol in his home in the District of Columbia while the D.C. gun laws challenged in the case were still in effect, may have saved his eponymous case when a friend urged him

> to do something that was, on the surface, pointless: . . . go down to the gun control office . . . and fill out the form to try to register one of the handguns Heller owned but stored away from his District home.
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> That act turned out to be one of the most *important* futile, pointless, meaningless bureaucratic gestures in American history. Without that sad, ignored, rejected piece of government-issued paper, a copy of which was dutifully attached to all the early filings in the case . . . not a single one of the carefully selected [plaintiffs] would have been legally considered to have had standing.

BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 65 (2008).

11. *See* 5 U.S.C. § 706(2) (2006) (allowing federal courts to hold unlawful administrative actions found to be arbitrary, capricious, an abuse of discretion, contrary to constitutional right, or unsupported by substantial evidence on the record or facts reviewed de novo by the court).

the Constitution.

I. *DISTRICT OF COLUMBIA V. HELLER*

District of Columbia v. Heller was the culmination of over twenty years of work, study, and debate by academics and activists seeking to preserve the original meaning of the Second Amendment[12] from its detractors who

12. *See generally, e.g.*, STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984) (surveying the history of the Second Amendment's legislative drafting and finding that it protected an individual right to keep and bear arms); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994) (tracing the history of the right to keep and bear arms in Great Britain from the medieval era to the 20th Century); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (noting that fundamental rights are those guaranteed to citizens and not states, and that some "hybrid" provisions of the Bill of Rights protecting both may need to "shed their state-right husk" before being incorporated); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996) (arguing that the conditions that motivated the Founders to draft the Second Amendment still persist today); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1995) (reviewing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994)) (expanding on Malcolm's history of the right to bear arms in Great Britain, including its late 20th century "evisceration" there); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) (noting the importance of the right to keep and bear arms in securing minority rights against hostile majorities); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983) (critiquing the judicial analysis of the Second Amendment in the early 1980s); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991) (concluding that the Framers understood the "militia" as a collection of individuals and not as a creature of the states); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151 (1986) (concluding that the Framers intended the right to bear arms to encompass concealed carrying of weapons); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992) (analyzing the works of founding-era philosophers on the topic of self-defense); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) (analyzing what arms and practices the Founders believed the Second Amendment did not protect); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (calling upon the legal academy to take the individual-rights interpretation of the Second Amendment seriously); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999) (criticizing restrictions on firearms ownership resulting from restraining orders as overbroad and unevenly applied); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) (noting that the Second Amendment can still fulfill its purpose after advances in arms just as the First Amendment has after advances in communications); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (noting substantial agreement among legal scholars between 1985 and 1995 that the Second Amendment protects an individual right to keep and bear arms); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) (analyzing the connections between the right to keep and bear arms and the "republican" philosophy of the Founders); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1241 (1994) ("To trust to [an] arrested treatment of the Second Amendment—and

argued that it was anachronistic, guaranteed no substantive rights, and was rightfully outweighed by larger social interests.[13] It was also a carefully crafted test case designed to avoid the snare that had trapped most other Second Amendment litigation: where most plaintiffs asserting a right to keep and bear arms were criminals challenging their convictions in court,[14] *Heller*'s lawyers specifically chose plaintiffs without criminal records who needed firearms for self-defense.[15] With a surprise victory in the D.C.

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of the Fourteenth Amendment—in 1994, in short, is as though one were inclined so to trust to the arrested treatment of the First Amendment in 1904."); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (analyzing state and federal constitutional provisions with a similar grammatical structure to the Second Amendment, and concluding that rights attached to justificatory clauses do not automatically expire when the justifications do). Nine years before *Heller*, this scholarship attracted the attention of Supreme Court justices. *See* Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) ("Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right.").

13. There were still many academics critical of the individual-rights model. *See* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000) (contending that an interpretation of the Second Amendment limiting the scope of gun control is not justified by any interpretive theory and effectively nullifies the Amendment's prefatory "militia clause"); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000) (claiming that the Second Amendment was concerned with limiting the powers of the federal government and not an infringement of the states' police powers); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (explaining how the "collective right" interpretation of the Second Amendment is justified by changes to constitutional text and interpretation since the Founding Era); Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365 (1993) (asserting that the Second Amendment's purpose was to allow states to maintain militias to control their subjugated slave populations, and that the end of slavery did not shift the Amendment's focus to an individual right); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (contending, contra Cottrol and Diamond, that the Afro-American experience with firearms only proves that all citizens should be subject to strict gun-control regulations); Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's* The Embarrassing Second Amendment, 99 YALE L.J. 661 (1989) (arguing that the republican state and polity Professor Levinson imagined are historical figures with no relevance to their modern descendants); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984) (arguing that the Founders' intention in the Second Amendment was to create a militia to obviate the need for standing armies, not to create an individual right to arms).

14. In every major Supreme Court case pre-*Heller* dealing with the Second Amendment, the appellant was a criminal defendant appealing a conviction. *See, e.g.*, United States v. Miller, 307 U.S. 174, 174 (1939) (appealing conviction for possessing an illegal sawed-off shotgun); Presser v. Illinois, 116 U.S. 252, 253 (1886) (appealing conviction for possessing a rifle unconnected to militia service). For in-depth discussion of pre-*Heller* Second Amendment precedents generated by criminal appellants and their frequent misinterpretation by courts, see generally DOHERTY, *supra* note 10. *See also* KORWIN & KOPEL, *supra* note 6; Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & LIBERTY 48 (2008).

15. Robert A. Levy, *Anatomy of a Lawsuit:* District of Columbia v. Heller, ENGAGE, Oct. 2008, at 28. Dick Anthony Heller—the only one of the six plaintiffs found to have

Circuit Court of Appeals that confirmed a circuit split,[16] the individual-rights view of the Second Amendment received the full Supreme Court hearing it had been denied in the Court's last Second Amendment case, *United States v. Miller*.[17] Oral arguments in *Heller* demonstrated the weakness of the collective-rights view.[18]

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standing by the D.C. Circuit Court of Appeals—was a D.C. Special Police Officer who, although entitled to carry a gun at his job as a security guard at the Federal Judicial Center near the Capitol, could not keep one at his home in the District. *Id*. at 28–29.

16. *Compare* Parker v. District of Columbia, 478 F.3d 370, 401 (D.C. Cir. 2007) (finding that the Second Amendment guarantees an individual right to keep and bear arms), *and* United States v. Emerson, 270 F.3d 203, 227 (5th Cir. 2001) (finding, in dicta, that the Second Amendment guarantees an individual right to keep and bear arms), *with* Silveira v. Lockyer, 312 F.3d 1052, 1066 (9th Cir. 2002) (holding that the Second Amendment guarantees no individual right to keep and bear arms apart from militia service), *and* Quilici v. Village of Morton Grove, 695 F.2d 261, 270 (7th Cir. 1982) (finding no state or federal constitutional right to keep and bear arms independent of militia service).

17. 307 U.S. 174 (1939). This case, again involving criminals caught in possession of an illegal weapon—here, a sawed-off shotgun that the defendants had not paid federal taxes on in violation of the National Firearms Act of 1934—resulted in an oddly argued case; Miller's lawyer did not present a case and told the Court to rely on the Government's brief alone. KORWIN & KOPEL, *supra* note 6, at 400. The result was a muddled decision that stated, in dicta, that the purpose of the Second Amendment was to guarantee the existence of state militias and the arms needed for them, which did not include sawed-off shotguns. *Miller*, 307 U.S. at 178. Subsequent cases and scholarship concluded that *Miller*'s holding was actually quite narrow: it found only that Congress possessed the power to tax firearms, and all the discussion of the right to bear arms "suitable for militia service" is dicta. *See, e.g.*, Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942) ("[W]e do not feel that the Supreme Court in this case was attempting to formulate a general rule applicable to all cases. The rule which it laid down was adequate to dispose of the case before it . . . ."); Frye, *supra* note 14, at 50 ("*Miller* did not adopt a theory of the Second Amendment guarantee, because it did not need one.").

18. Former Solicitor General Walter Dellinger, arguing on behalf of the District of Columbia, told the Justices that the D.C. handgun ban contained a self-defense exception. Transcript of Oral Argument at 85, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 731297. Justice Roberts caught this inaccuracy, noting that the D.C. handgun ban was so comprehensive it even banned a handgun's owner from carrying it from one room of the owner's house to another. *Id.* at 87. Alan Gura, arguing for the plaintiffs, later pointed out that D.C. had twice been presented with an opportunity to urge the courts to adopt a self-defense exception to the handgun ban, and they declined to do so in both cases. *Id.* at 49–50; *see also* McIntosh v. Washington, 395 A.2d 744, 755 (D.C. 1978) (holding that the District's Firearms Act rightfully made no distinction between residences and businesses in terms of self-defense, for the reason that the city council found "that for each intruder stopped by a firearm there are four gun-related accidents within the home"); Parker v. District of Columbia, 311 F. Supp. 2d 103, 104 (D.D.C. 2004) (recognizing, at the district court level of the case, that the D.C. handgun ban contains no self-defense exception). Along these lines, one of Dellinger's more egregious but less noticeable distortions was an assertion that rifles and shotguns are as adequate for personal self-defense as handguns. Transcript of Oral Argument, *supra*, at 85. One commentator later deduced that this reasoning likely came from the pro-gun-control Violence Policy Center, which itself was quoting literally a tongue-in-cheek passage from a firearms training manual that said "the only purpose of a handgun is to battle your way back to your rifle." KORWIN & KOPEL, *supra* note 6, at 259. Gura, by contrast, made an important concession that would weigh heavily on the Court's final analysis, noting that nothing in the Second Amendment forbade a gun-licensing law that was enforced objectively rather than "in an

A. *What* Heller *Said*

Prior to *Heller*, there was no "right of the people to keep and bear arms" in the nation's capital.[19] The plaintiffs in *Heller* sought to challenge Washington, D.C.'s ban on handguns, which was passed in 1976. Under this law, all handguns (save those registered before the law was enacted) were forbidden to private citizens. Even handguns that had been registered prior to the ban had to be secured with trigger locks, and kept unloaded and inoperable at all times, as did all rifles and long guns.[20] The majority opinion in *Heller*, written by Justice Antonin Scalia and joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito, struck down this de facto total ban on handguns as well as the requirement that all allowed guns be stored unloaded and with a trigger lock.[21] Further, it held that the Second Amendment right to keep and bear arms was not contingent upon service in an organized militia and that the prefatory clause of the amendment ("A well regulated Militia, being necessary to the security of a free State") did not limit the scope of the Amendment's operative clause ("the right of the People to keep and bear arms shall not be infringed"), which granted the individual right.[22] The

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arbitrary and capricious manner." Transcript of Oral Argument, *supra* note 18, at 75.

19. U.S. CONST. amend. II.

20. D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504, 22-4515 (2001). In theory, long guns could be unlocked if kept in a person's "place of business" or "while being used for lawful recreational purposes within the District of Columbia." § 7-2507.02. However, there is only one record of a case asserting (unsuccessfully) the "place of business" exception, and no record of any case asserting the "lawful recreational purpose" exception at all. § 7-2507.02 (notes of decisions).

21. 128 S. Ct. at 2821–22.

22. U.S. CONST. amend. II; *Heller*, 128 S. Ct. at 2803. Of interest is that the majority opinion considers the operative clause of the Amendment first, then the prefatory justification clause, a mode of interpretation consistent with laws and court decisions contemporary to the Second Amendment's drafting. *See generally* Volokh, *supra* note 12, at 812 (noting that it is both possible and common to interpret an operative clause in light of a prefatory justification clause while giving full effect to both). *But see* Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1107 (2009) (criticizing Scalia's interpretation as a "Cheshire Cat Rule of Construction [where] the preamble disappears during interpretation and only reappears if there is an ambiguity that needs to be resolved"). The majority defined the "right of the people" in the Second Amendment's operative clause as extending to the same class of people protected by the First Amendment's Assembly and Petition Clauses, and the Fourth Amendment's Search and Seizure Clause, a class broader than the "militia." *Heller*, 128 S. Ct. at 2790. The majority, analyzing the term *arms*, relied on the definitions used at the time of the Second Amendment's drafting, as contained in dictionaries and state laws; it found that the word included weapons designed for military use, even if used for nonmilitary purposes. The majority further dismissed the commonplace argument that only firearm types in common use at the Founding were protected by its terms; in a simple analogy, the majority said that just as the First Amendment protects forms of communication which did not exist at the Founding, such as radio and television, the Second Amendment similarly protected arms which did not exist at

majority concluded that none of the Court's prior cases precluded this interpretation of the Second Amendment, commenting that it took between 150 and 200 years for crucial questions arising under the First Amendment to receive consideration by the Court and that, like those questions, the scope of the Second Amendment's effect on gun laws did not present itself until now.[23]

Turning to the District of Columbia gun laws under challenge, the majority noted that under any standard of constitutional review used for enumerated constitutional rights, both the handgun ban and the trigger-lock requirement would fail.[24] Additionally, it held that issuing handgun licenses to Heller and other citizens who need a firearm for self-defense was an acceptable and far less draconian way for the District to preserve its interests than a de facto total ban.[25] Justices John Paul Stevens and Stephen Breyer, joined by Justices Ruth Bader Ginsburg and David Souter, criticized the majority's reasoning, with Stevens's dissent criticizing the majority's historical interpretations.[26]

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the Founding. *Id.* at 2791. The majority then defined *keep arms* as simply the right to have weapons, and *bear arms* as the right to carry these weapons on one's person. *Id.* at 2792–93. The majority criticized Stevens's definition in the dissent of *keep and bear arms* as the right to carry arms connected with militia service; it said that this was not the meaning that the terms had to the drafters of the Second Amendment, that such a definition was "an absurdity that no commentator has ever endorsed," and that if such a definition were adopted, the resulting right would be "incoherent." *Id.* at 2794. Only then did the majority construe the meaning of *well-regulated Militia*, as "all males physically capable of acting in concert for the common defense," a body that, the majority notes, "is assumed by Article I already to be *in existence*," and is not something created by Congress. *Id.* at 2799–2800 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)). *Well regulated*, according to the majority, simply meant subject to discipline and training. *Id.* Finally, *security of a free State*, according to the majority, means "security of a free polity," not simply the security of individual states. *Id.* at 2800; *see also* Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 6 (2007) (citing sources familiar to the Founders in defining a "free state" as one which preserved popular liberty and prevented despotism).

23. 128 S. Ct. at 2816.

24. On the handgun ban itself, the Court noted that a handgun is "the quintessential self-defense weapon. . . . [I]t can be pointed at a burglar with one hand while the other hand dials the police. . . . [A] complete prohibition of their use is invalid." *Id.* at 2818. The trigger-lock rule likewise failed to meet any standard of constitutional review as the majority found that this law was a de facto prohibition on all armed self-defense, inside the home and out. *Id.*

25. *Id.* at 2819.

26. In contrast to Scalia, Stevens begins his textual analysis with the prefatory clause of the Second Amendment, noting that it "makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free state; and it recognizes that the militia must be 'well-regulated.'" *Id.* at 2824 (Stevens, J., dissenting). After an equally exhaustive review of previous precedent, Stevens concludes that the Second Amendment's purpose is the protection of the militia, not the militia's arms, noting that the prefatory clause "both sets forth the object of the Amendment and informs the meaning of the remainder of its text." *Id.* at 2826. Turning to the operative clause's "right of the people," Stevens criticizes Scalia's analogy of the Second Amendment to the protections of the First and Fourth

B. What Heller *Exempted*

The Supreme Court, however, made it clear that "the right secured by the Second Amendment is not unlimited."[27] Having defined the scope of the right to keep and bear arms, the majority turned to its exceptions. The majority noted that the right to keep and bear arms "was not a right to keep and carry any weapon whatsoever and for whatever purpose."[28] Specifically, the majority pointedly acknowledged that four classes of restrictions on the right to bear arms do not violate the Second Amendment: (1) laws banning possession by felons and the mentally ill, (2) laws banning carrying weapons in "sensitive places" such as government buildings, (3) laws placing conditions and qualifications on the sale of arms, and (4) laws limiting the right to keeping and bearing arms "in common use."[29] The Court also said this list was only exemplary, not comprehensive.[30]

C. What Heller *Left Undone*

The majority opinion leaves two major gaps. First, while the Court found that the D.C. handgun ban and trigger-lock rules were both unconstitutional, *Heller* did not provide any standard of review for other courts to follow in future cases challenging gun laws.[31] Although the

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Amendments, noting that "[t]hese rights contemplate collective action." *Id.* at 2827. Stevens then relies on the fact that the Framers could have, but chose not to, add explicit text to the Second Amendment specifically protecting a right to bear arms "for the defense of themselves" in concluding that the operative clause "'[K]eep and bear arms' thus perfectly describes the responsibilities of a framing-era militia member." *Id.* at 2828, 2830 (alteration in original). Stevens concludes that the Second Amendment right to arms refers only to the militia; "no more than that was contemplated by its drafters or is encompassed within its terms." *Id.* at 2831.

27. *Id.* at 2816 (majority opinion).

28. *Id.* at 2819.

29. *Id.* at 2816–17.

30. *Id.* at 2817 n.26.

31. A brief review of these standards is in order. The lowest, most deferential standard of review is rational-basis scrutiny. Defined broadly, it requires only that a court ask whether a legislative rule bears a "rational relationship" to a constitutionally permitted end of government. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 14.3 (3d ed. 2007). The end does not have to be dramatically vital, just within the legislature's legitimate ends, and the means chosen need only be rational as well—a standard which applies to a majority of laws. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 9.1.2 (2d ed. 2002). Under rational-basis scrutiny, a law's challengers bear the burden of proof, and it is rare for laws to fail to meet this bare minimum standard of review, *id.*, though not impossible, *see, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that state constitutional provision prohibiting gays and lesbians from enjoying benefits of class-based protections did not meet rational-basis scrutiny). The second level of scrutiny, intermediate scrutiny, requires more searching judicial review and has a higher burden of proof. Intermediate scrutiny requires a challenged law to have a "substantial relationship" to an "important government interest." *See* United States v. Virginia, 518 U.S. 515, 533

majority sharply criticizes Justice Breyer's dissent for proposing "a free-standing 'interest-balancing' approach" as the test for Second Amendment challenge cases,[32] the majority specifically declined to set down a standard, preferring "to expound upon the historical justifications for the exceptions [to the Second Amendment] we have mentioned if and when those exceptions come before us."[33] Second, *Heller* did not answer whether the Second Amendment is "incorporated" against the states through the Fourteenth Amendment's Due Process Clause. Although the majority left these questions unanswered, examining the logic of the *Heller* majority gives clear signals as to how the Court will rule on these issues in the future.

II. INCORPORATION OF THE SECOND AMENDMENT: REASONING AND EFFECTS ON REGULATION

As originally drafted, the Bill of Rights applied only to the federal government and not the states.[34] With the adoption of the Fourteenth

(1996) (holding that in intermediate scrutiny cases the "burden of justification is demanding and it rests entirely on the State"). The final and most demanding level of constitutional scrutiny is strict scrutiny. Under strict scrutiny, a court must not show any deference to the decision of the legislature, but must conduct its own inquiry into three questions: (1) whether the reviewing court must decide whether the government is acting in service of a compelling end, (2) whether the law is necessary to that end, *see* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (holding that, under strict scrutiny, race-based classifications "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose"), and (3) whether the law is "narrowly tailored" to meet that interest. To be narrowly tailored, a law cannot be either overinclusive—applying to more classes of people than would be necessary for the government to achieve its desired ends—or underinclusive—applying to some individuals that government sees fit, but not to others similarly situated. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 9.1 (2d ed. 2002). As in intermediate scrutiny, the government bears the burden of proof of showing that its laws pass review. *Id.*

32. Breyer writes that "any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry. . . . I would simply adopt such an interest-balancing inquiry explicitly." *Heller*, 128 S. Ct at 2852 (Breyer, J., dissenting). Breyer further comments that it is normally the job of courts to defer to legislatures, especially "where a legislature is likely to have greater expertise and greater institutional factfinding capacity. . . . Here, we have little prior experience." *Id.* at 2852–53. Scalia responds,

> We know of no other enumerated constitutional right whose core protection has been subjected to a free standing "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 128 S. Ct. at 2821 (majority opinion).

33. *Id.*

34. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment and the Bill of Rights applied only to the federal government).

Amendment after the Civil War,[35] the Supreme Court, through the process of "selective incorporation," used the power of the Fourteenth Amendment's Equal Protection and Due Process Clauses to extend most of the provisions of the first eight amendments of the Bill of Rights to the states.[36] *Heller* may be the first step in the Second Amendment joining its contemporaries as a provision that binds states as well.

A. Footnote 27 Anticipates Heightened Scrutiny

The *Heller* majority opinion contains very little discussion of which, if any, standards of review the Supreme Court should adopt, but the discussion it does contain is very significant. It is only in footnote 27 of the opinion that Justice Scalia and the *Heller* majority anticipate future decisions on the constitutionality of gun laws and look to a standard of review. The text of that note states, in full,

> Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.[37]

This footnote includes two citations for support. The first citation is to a case decided mere months before *Heller*—*Engquist v. Oregon Department of Agriculture*,[38]an employment discrimination case where Chief Justice Roberts noted that the Fourteenth Amendment's guarantee of equal protection requires a "rational reason" before like persons can be treated differently under the law.[39] Scalia thus implies that rational basis is the standard for as-applied challenges to valid laws or regulations but not for

35. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

36. *See* 2 RONALD P. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.2 (4th ed. 2007).

37. *Heller*, 128 S. Ct. at 2817 n.27 (citations omitted).

38. 128 S. Ct. 2146 (2008).

39. "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" *Id.* at 2153.

facial challenges to laws or regulations such as those in *Heller*. The second, earlier and more well-known citation is the famed "Footnote Four" of *United States v. Carolene Products Co.*,[40] which, as quoted and interpreted by Justice Scalia, says that "'[t]here may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.'"[41] So according to Justice Scalia, if the Second Amendment is construed as the *Heller* majority construes it—as an individual right to keep and bear arms—rational basis cannot be the standard of review in cases where legal or administrative restrictions on the right itself come under Second Amendment attack.[42] However, rational basis may be the standard when the challenge is an as-applied challenge to a restriction that already comports with the Second Amendment.

With rational basis excluded, the only remaining choice for the *Heller* majority, short of elaborating an entirely new standard of review, is to apply a form of heightened scrutiny to facial challenges to gun regulations—either intermediate scrutiny or strict scrutiny. Neither footnote 27 nor any other parts of the *Heller* majority opinion suggest which of the two should apply.[43]

But in practice, a safe bet for gun regulators is to assume that strict scrutiny will be the standard. As a matter of logic, any regulation that

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40. 304 U.S. 144, 152–53 n.4 (1938).

41. *Heller*, 128 S. Ct. 2783, 2817–18 n.27 (quoting *Carolene Products*, 304 U.S. at 152 n.4).

42. *But see* Mark Tushnet, *Permissible Gun Regulations After* Heller, 56 UCLA L. REV. 1425, 1428–29 (2009) ("[L]ower courts will, I think, be reluctant to apply strict scrutiny because of concern that such a standard imperils too many well-established, long standing gun regulations."). Tushnet argues that federal courts will apply either intermediate scrutiny or rational-basis scrutiny to gun regulations, and will do so following state precedent on the level of protection given to the right to keep and bear arms. *Id.* However, Tushnet concedes that this "speculation is predicated on the assumption that the Supreme Court will not take up another Second Amendment case in the near future," *id.* at 1430, an assumption challenged by the Supreme Court's recent grant of certiorari in a new Second Amendment case dealing with the incorporation of the Second Amendment against the states. *See infra* note 60.

43. Justice Breyer suggests that Justice Scalia and "the majority implicitly, and appropriately, rejects" strict scrutiny by carving out such a broad list of exceptions. *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting); *see also supra* Part I.B (listing gun regulations the *Heller* majority found allowable). And there could, in fact, be other forms of scrutiny entirely. *See, e.g.*, Tushnet, *supra* note 42, at 1437 (suggesting that courts will apply an "undue burden" analysis drawn from the Court's decisions on abortion, despite the fact that "abortion jurisprudence itself has given it almost no content"); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL'Y 607, 628 (2008) (suggesting that the Supreme Court will have to construct a new standard of review for Second Amendment cases, with the most likely analogue found in the Court's prior jurisprudence on First Amendment freedom-of-speech protections).

passes the strict-scrutiny standard, the narrowest standard used by the Supreme Court, would also pass any other standard the Supreme Court might impose, whether intermediate scrutiny or an entirely new standard. This is not as radical as it sounds; even under strict scrutiny, many gun regulations would likely survive. While some claim that strict-scrutiny review almost always results in the challenged law being struck down,[44] the empirical evidence demonstrates that many laws do, in fact, pass strict scrutiny.[45] Reading section III of the majority opinion, the restrictions on the Second Amendment that are specifically constitutional—bans on felons and the mentally ill possessing guns, place restrictions on carrying, qualifications for the sale of arms, and limitations to arms "in common use at the time"[46]—do not simply pass rational basis, but would likely pass strict scrutiny. Consider bans on possession of firearms by felons and the mentally ill: there is little doubt of a compelling government interest in preventing felons[47] and the mentally ill[48] from having lethal weapons, and the classification is narrowly tailored to achieve that end.[49] True, there might still be challenges over the definitions of terms like *felon*[50] or

44. *See* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny review as "'strict' in theory and fatal in fact").

45. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (calculating that overall as many as 30% of all challenges to laws under strict scrutiny result in the law being upheld). Nevertheless, Professor Winkler argues that the Supreme Court will not use strict scrutiny as the standard of review in Second Amendment cases since gun regulations are not based on invidious motives and the rights are not considered central to democracy, the two hallmarks of strict scrutiny. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 700–05 (2007). Professor Winkler writes, as Justice Breyer does in his dissent, that any attempt to apply strict scrutiny in Second Amendment cases will end up applying a de facto rational basis standard, a standard that both Justice Breyer and Professor Winkler would explicitly adopt. *Id.* at 725–26.

46. *Heller*, 128 S. Ct. at 2816–17 (majority opinion) (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

47. According to a 1997 survey, 17.2% of all repeat state offenders and 18.4% of all repeat federal offenders carried a gun during the commission of their latest crimes; for repeat offenders convicted of a violent crime, 28.4% of state repeat offenders and 38.4% of federal repeat offenders did so. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FIREARM USE BY OFFENDERS 6 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf.

48. One recent and tragic example is the April 2007 massacre at Virginia Tech, where student Seung-Hui Cho, who had been previously declared by a state magistrate to be mentally ill and "an imminent danger" to himself, was nonetheless allowed to purchase two handguns, which he used in a rampage that killed thirty-two people and injured seventeen more. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 5, 23–24 (2007), http://www.governor.virginia.gov/TempContent/techPanelReport.cfm.

49. *See, e.g.*, 18 U.S.C. § 922(d)(1) (2006) (prohibiting the sale of firearms to any person who has been convicted of or is under indictment for a felony, is a fugitive from justice, or has been previously involuntarily committed to a mental institution or "adjudicated as a mental defective").

50. *See id.* § 922(d) (defining a felon as a person who "is under indictment for, or has

mentally ill,[51] but if there is a basis for the classification, then the person so classified is not entitled to the same rights as a person who does not have that classification; per Justice Scalia's implication in footnote 27 of *Heller*, those would be decided under the rational-basis test.[52] Given how many firearms regulations have a clear safe harbor under the strict-scrutiny standard and the logic of the *Heller* majority, an assumption that the Supreme Court will apply strict scrutiny in facial challenges to firearms laws and regulations is reasonable.[53] And if the Court does apply it in a future case, gun regulators whose regulations fall under *Heller*'s exceptions, and who have empirical evidence showing a compelling government interest,[54] will have a much easier time defending their regulations in court than those whose regulations do not.

B. Incorporation Follows Heightened Scrutiny

Applying heightened scrutiny to Second Amendment cases answers the other question left open by the Supreme Court in *Heller*: the right to keep and bear arms is incorporated against the states through the Fourteenth Amendment. As a general rule, if the Supreme Court applies heightened scrutiny, it is a strong indicator that the underlying right is fundamental[55] and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment under the title of "substantive due process."[56] The

been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, is a fugitive from justice, or is an unlawful user of or addicted to any controlled substance"). *But see* Small v. United States, 544 U.S. 385, 391–92 (2005) (holding that a person convicted in a foreign court of weapons smuggling is not a *felon* for purposes of U.S. firearms regulation because Congress did not intend to include such convictions).

51. *See* 27 C.F.R. § 478.11 (2008) (defining *adjudicated as a mental defective* to include persons found insane or incompetent to stand trial in a criminal proceeding).

52. *See supra* Part II.A. This would explain why the majority of litigants making *Heller* claims, who are by and large felons, are not succeeding in their claims. *See* Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1566 (2009) (tallying cases challenging gun-control laws as "Exceptions: 75, Individual Right: 0."). As Gura and the *Heller* litigation team recognized, it is difficult to mount a facial challenge to a law that seeks strict-scrutiny review with a client who falls into one of the law's as-applied exceptions and consequently gets rational-basis review. *See supra* note 18.

53. *But see* Dennis A. Henigan, *The* Heller *Paradox*, 56 UCLA L. REV. 1171, 1197 (2009) (arguing that *Heller*'s "discussion of other presumptively constitutional [gun] laws surely must be read as a rejection of the strict scrutiny standard").

54. *See infra* Part III.B.

55. *See* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (defining *fundamental rights* as "immunities that are valid as against the federal government by force of the specific pledges of particular amendments [that] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states"), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 795 (1969) (footnote omitted).

56. *See* ROTUNDA & NOWAK, *supra* note 36, § 15.6(b) (discussing the incorporation of the Bill of Rights into the Fourteenth Amendment); *see also* Nelson Lund, *Anticipating*

language of the Second Amendment's prefatory clause—"necessary to the security of a free State"[57]—testifies that its authors thought the right to keep and bear arms was fundamental and that it should be incorporated under the Fourteenth Amendment.[58] Thus, if the Supreme Court follows its own incorporation precedent, the Second Amendment will be incorporated, and the states will be bound by its meaning.

Whether the Second Amendment is incorporated is the subject of a current circuit split between the Ninth Circuit on the one side—which found that it is incorporated—and the Second and Seventh Circuits on the other—which found that it was not.[59] The Seventh Circuit's cases will be heard in the Supreme Court's current Term,[60] with the same team that

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Second Amendment Incorporation, 59 SYRACUSE L. REV. 185, 192 (2008) (noting that the majority of the rights in the Bill of Rights are applied against the states under substantive due process). Lund, however, notes that "the [Supreme] Court has never developed a legal test that provides a coherent way of explaining all of its incorporation decisions." *Id.*

57. U.S. CONST. amend. II.

58. The Second Amendment, unlike any other provision of the Bill of Rights, includes a prefatory phrase expressing its sense of the fundamental importance of the Amendment. Moreover, that phrase contains language whose meaning is virtually identical to that of the language in the *Palko* incorporation test: the Supreme Court's reference to those rights that are 'of the very essence of a scheme of ordered liberty' is nothing but a slightly reworded version of the Second Amendment's reference to what is 'necessary to the security of a free State.' It is as though the Court had taken its legal test for incorporation directly from the Second Amendment itself . . . .

Lund, *supra* note 56, at 194 (quoting *Palko*, 302 U.S. at 325, and U.S. CONST. amend. II). *But see* Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 5–6 (2009) (arguing that historical evidence on the issue of Second Amendment incorporation is unreliable when viewed from either the intent of the drafters or the original public meaning of the amendment, and provides "no satisfactory basis for resolving the incorporation question").

59. *Compare* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) (holding that the Second Amendment is incorporated against the states through the Fourteenth Amendment Due Process Clause), *reh'g en banc granted*, No. 07-15763 (9th Cir. July 29, 2009), *with* Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856, 860 (7th Cir. 2009) (declining to incorporate the Second Amendment against the states until the Supreme Court does so), *and* Maloney v. Cuomo, 554 F.3d 56, 58–59 (2d. Cir. 2009) (same).

60. On September 30, 2009, the Supreme Court granted certiorari in a parallel case that was argued with *National Rifle Ass'n* in the Seventh Circuit, which also presents the question of whether the Second Amendment is incorporated against the states. McDonald v. City of Chicago, *cert. granted*, 130 S. Ct. 48 (U.S. Sept. 30, 2009) (No. 08-1521). The legal arguments for each set of plaintiffs are distinct. The NRA simply seeks to have the Supreme Court overturn Chicago's de facto handgun ban. Petition for Writ of Certiorari, at i, 5, Nat'l Rifle Ass'n v. City of Chicago, 2009 WL 1556563 (No. 08-1497), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/06/certpetitionchicago.pdf. McDonald's argument encompasses *National Rifle Ass'n* but is much broader; not only does it seek to overturn Chicago's de facto handgun ban, it also challenges, under *Heller*'s rule incorporating the Second Amendment, Chicago's ordinances that require pre-registration of guns before purchase and the annual re-registration of all guns, and which make it impossible to re-register any gun if its registration lapses. Petition for Writ of Certiorari at 5, McDonald v. City of Chicago, 2009 WL 1640363 (No. 08-1521), *available at* http://www.chicagoguncase.com/wp-content/uploads/2009/06/mcdonald_cert_petition1.pdf.

successfully argued *Heller* making the case for incorporation[61] with the support of thirty-three states; [62] meanwhile, the Second and Ninth Circuit's cases wait for their own resolution.[63] Based on the Supreme Court's own prior precedent in incorporation cases, incorporation of the Second Amendment seems likely.[64] First, the only reason the Second and Seventh

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In addition, McDonald also asks the Court to take the unprecedented step of overturning the *Slaughter-House Cases* and give effect to the Fourteenth Amendment's long-dormant Privileges or Immunities Clause, which would effectively incorporate the entire Bill of Rights against the states. *Id.* at 22 ("[R]eversal is also commanded by adherence to the text, purpose, and original public meaning of the Fourteenth Amendment's Privileges or Immunities Clause. The almost meaningless construction given this provision in *Slaughter-House* was wrong the day it was decided and today stands indefensible."). *See generally* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); The Slaughter-House Cases, 83 U.S. 36, 76–77 (1873) (holding that the Privileges or Immunities Clause guarantees no substantive rights). However, at oral arguments held shortly before this Comment went to press, the Court did not appear sympathetic to the Privileges or Immunities Clause argument, though it did signal that it thought the Second Amendment was nonetheless incorporated against the states. *See* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/2010/03/analysis-2d-amendment-extension-likely/ (March 2, 2010, 11:26 EST) ("The dominant sentiment on the Court was to extend the Amendment beyond the federal level, based on the 14th Amendment's guarantee of 'due process,' since doing so through [the Privileges or Immunities Clause] would raise too many questions about what other rights might emerge.").

61. In an odd case of legal déjà vu, Otis McDonald, a private citizen challenging Chicago's de facto handgun ban, is represented by Alan Gura, the attorney who successfully argued *Heller*, while the NRA's counsel to its challenge to Chicago's ban is its longtime counsel Stephen Halbrook. Gura and Halbrook once sparred over the legal strategies to be used in the case that eventually became *Heller*, with Halbrook and the NRA even filing a competing lawsuit to *Heller* that was thrown out of the D.C. district court for a lack of standing. DOHERTY, *supra* note 10, at 63. The two lawyers ultimately allied on the *Heller* case: while Gura was lead counsel, Halbrook authored an influential NRA-backed amicus brief on behalf of Congress that was endorsed by 250 representatives, 55 senators, and then-Vice President Dick Cheney. *Id.* at 84. Post-*Heller*, Gura and Halbrook argued the consolidated *National Rifle Ass'n* case together before the Seventh Circuit. Transcript of Oral Argument at 1, Nat'l Rifle Ass'n v. Chicago, 567 F.3d 856 (7th Cir. 2009), 2009 WL 1556531.

62. Brief for State of Texas et al. as Amici Curiae in Support of Petitioners, McDonald v. City of Chicago, 2009 WL 1970185 (No. 08-1521), *available at* http://www.chicagoguncase.com/wp-content/uploads/2009/07/texas_states_cert_stage.pdf.

63. *See* Petition for Writ of Certiorari, Maloney v. Rice, 2009 WL 1863992 (No. 08-1592), http://homepages.nyu.edu/~jmm257/cert-petition-w-appendix.pdf. On September 24, 2009, the Ninth Circuit issued an order vacating a scheduled en banc hearing in *Nordyke* pending the Supreme Court's disposition of *McDonald*, *National Rifle Ass'n*, and *Maloney*. Nordyke v. King, No. 07-15763 (9th Cir. Sept. 24, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/09/9th-CA-Nordyke-order-9-24-09.pdf.

64. Beginning with the First Amendment guarantee of freedom of speech in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the Supreme Court has incorporated the lion's share of the first eight amendments of the Bill of Rights against the states because of their fundamental nature. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating Fifth Amendment protection against self-incrimination against the states); Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (incorporating Sixth Amendment guarantee of the assistance of counsel in criminal cases against the states); Robinson v. California, 370 U.S. 660, 667

Circuits declined to incorporate the Second Amendment was because of the Supreme Court's instruction that the circuits follow current Supreme Court precedent, even if doing so puts them in apparent conflict with a new Supreme Court decision, until the Court clarifies the issue.[65] In both the Seventh and Second Circuit cases, the circuits followed this instruction with respect to *Heller*;[66] these circuits are likely upholding the status quo because it is the status quo, not necessarily because the argument against incorporation is stronger. Second, both the Seventh and Second Circuit decisions appear to ignore prior Supreme Court decisions on incorporation generally,[67] where the Ninth Circuit's decision paid heed to them.[68]

(1962) (incorporating Eighth Amendment protection against cruel and unusual punishments against the states); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating Fourth Amendment protection against unreasonable searches and seizures against the states); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (incorporating First Amendment prohibition of establishments of religion against the states); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931) (incorporating First Amendment guarantee of freedom of the press against the states). Only two provisions of the first eight amendments have been explicitly held to not be incorporated against the states. *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (declining to incorporate the Seventh Amendment's guarantee of a right to a jury trial in civil cases against the states); Hurtado v. California, 110 U.S. 516, 535 (1884) (declining to incorporate the Fifth Amendment requirement of indictment by grand jury against the states). The incorporation status of the rarely asserted Third Amendment is an open question, but what precedent there is suggests that it is also incorporated. *See* Engblom v. Carey, 677 F.2d 957, 962 (2d Cir. 1982) (incorporating Third Amendment prohibition against quartering of soldiers in private property against the states). For a fuller examination of incorporation, see ROTUNDA & NOWAK, *supra* note 36, § 15.6(b) (containing a comprehensive list of cases incorporating provisions of the Bill of Rights against the states).

65. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

66. *Nat'l Rifle Ass'n*, 567 F.3d at 857; Maloney v. Cuomo, 554 F.3d 56, 59 (2d Cir. 2009).

67. The decisions relied on by the Seventh Circuit, *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), *see Nat'l Rifle Ass'n*, 567 F.3d at 858, all predate the Supreme Court's modern incorporation jurisprudence by at least thirty years. *See* cases cited *supra* note 64. In particular, Judge Easterbrook says that in *Heller* the Supreme Court said that "*Presser* and *Miller* 'reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government.'" *Nat'l Rifle Ass'n*, 567 F.3d at 858 (quoting District of Columbia v. Heller, 128 S. Ct. 2783, 2813 n.23 (2008)). However, in the immediately preceding sentence of that same *Heller* footnote, Justice Scalia wrote, "With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n. 23. For its part, the Second Circuit panel in *Maloney*, which included recently sworn in Supreme Court Justice Sonia Sotomayor, applied the "rational-basis" test to the law being challenged under the Second Amendment, 554 F.3d at 59, which the decision in *Heller* explicitly precludes. *See Heller*, 128 S. Ct. at 2817–18 n.27; *see also supra* Part II.A.

68. Judge O'Scannlain of the Ninth Circuit engaged in a far longer and more detailed

C. Incorporated Rights Require Effective Due Process of Law

A constitutional right which has been incorporated against the states requires that the procedural due process guaranteed by the Fourteenth Amendment be given before the right can be limited or circumscribed by law or regulation;[69] the constitutional right to keep and bear arms advanced in *Heller*, if incorporated, would be no different. The core of procedural due process, from an administrative law standpoint, is the opportunity to be heard.[70] At the very least, an incorporated Second Amendment will require states and the federal government to have robust due process protections and a basic level of procedural fairness in their firearms regulation and permitting schemes.[71] The sort of arbitrary and capricious regulatory activity at issue in *Heller*,[72] which is still quite common where guns are

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analysis of the incorporation doctrine that examined prior Supreme Court precedent on the subject of incorporation before concluding that the Second Amendment was incorporated. Nordyke v. King, 563 F.3d 439, 445–57 (9th Cir. 2009).

69. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

70. "The fundamental requisite of due process of law is the opportunity to be heard." The hearing must be "at a meaningful time and in a meaningful manner." In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed [action], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (citations omitted). The specific procedural entitlements envisioned by the Court in *Goldberg* include an unbiased tribunal, a notice of the proposed action and the legal grounds asserted for it, an opportunity for the person affected to present reasons why the action should not take place, the right of the person affected to call witnesses and know the evidence used against him, the right to a decision based only on evidence documented in the hearing's record, the right to have counsel present, the right to have a record maintained, the obligation of the agency to present a statement of reasons explaining its decision, the right to public attendance at the hearing, and the right to judicial review of the agency action. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279–95 (1975).

71. As two administrative law experts write, "All politics may be local—and much of administrative law is practiced at the state and local level—but that does not relieve the state government of [the] basic obligation to provide a fair process for adjudicatory determinations, including articulating 'ascertainable standards' prior to making adjudicatory determinations." ANDREW F. POPPER & GWENDOLYN M. MCKEE, ADMINISTRATIVE LAW 557 (1st ed. 2009); *see also* Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964) ("The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.").

72. As described by one of the plaintiffs in the case that eventually became *Heller*, when he attempted to register a handgun in the District of Columbia in June 2007 before the decision,

He found out he had to bring the unregistered firearm to the police station where the registration office was. Who is going to do such an insane thing? he wondered. [Recall that the law challenged in *Heller* essentially criminalized all handgun possession in D.C.] He was told that if he was stopped, he should just tell the officer he was bringing the gun in to be registered. But when he said he wanted to register a

heavily regulated, is going to come under increased scrutiny by the courts.

Although critics argue otherwise, police protection does not provide sufficient due process to obviate the need for specific due process in firearms permitting for self-defense.[73] Despite the fact that the common motto of police forces nationwide is "to serve and protect," courts in the United States uniformly hold that state officials, including law-enforcement officials, have no legally enforceable constitutional duty of care to protect citizens as a matter of administrative law.[74] Particularly salient to the *Heller* decision striking down District of Columbia gun laws are two cases from the District of Columbia—*Morgan v. District of Columbia*[75] and *Warren v. District of Columbia*[76]—where the D.C. Metropolitan Police Department was held immune from tort liability for failure to respond to calls from citizens who were in imminent danger. In *Warren*, the victims of a savage home invasion in 1975 (six months before the D.C. handgun ban went into effect)[77] sued the city for failing to protect them.[78] The D.C.

> pistol, not a legal long gun, the clerk literally snatched the form from his hand. Would she be willing to write down that she was refusing to let him even fill out the form? Palmer asked. The woman on duty refused. He was given no explanation. One woman he was talking to, he recalls, flipped her badge around so he couldn't even get her name.

DOHERTY, *supra* note 10, at 67–68.

73. In his dissent in *Heller*, Justice Breyer makes this argument when he says that "the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, [moves] any such right even further away from the heart of the amendment's more basic protective ends." District of Columbia v. Heller, 128 S. Ct. 2783, 2866 (2008) (Breyer, J., dissenting).

74. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196–202 (1989) (holding, in the context of social services protection, that a person has no affirmative constitutional right to government protection unless a "special relationship" is established by specific state assurances of protection); Town of Castle Rock v. Gonzalez, 545 U.S. 748, 768 (2005) (holding that the police department could not be held civilly liable under 42 U.S.C. § 1983 for failure to enforce a restraining order that resulted in three murders). For state applications of the rule, see, for example, Pinder v. Johnson, 54 F.3d 1169, 1179 (4th Cir. 1995) (holding that 42 U.S.C. § 1983 does not create an exception to immunity if state officers are sued in federal court); Davidson v. City of Westminster, 649 P.2d 894, 897–98 (Cal. 1982) (holding that police recognition of a suspect before an assault did not create a "special relationship" and thus police were entitled to immunity); Kircher v. City of Jamestown, 543 N.E.2d 443, 448 (N.Y. 1989) (holding that police department maintained immunity from suit by victim of crime because police had not given witnesses to crime any assurance of a response). *But see* Calloway v. Kinkelaar, 659 N.E.2d 1322, 1331 (Ill. 1995) (holding that immunity does not apply if a special duty is created by state statute or in cases of "willful or wanton misconduct" on the part of police officers).

75. 468 A.2d 1306, 1319 (D.C. 1983).

76. 444 A.2d 1, 8–9 (D.C. 1981) (en banc).

77. *See Heller*, 128 S. Ct. at 2816–17 (majority opinion) (explaining generally the effects of the handgun ban).

78. The facts of *Warren* are as grisly as they are illustrative: Around 6:00 a.m. in March 1975, a home shared by three women and the four-year-old daughter of one of the residents was burglarized by two men. The burglars entered the room of one of the women and raped her. Her screams attracted the attention of her housemates, who fled onto a

Court of Appeals explicitly held that "[t]he duty [of police officers] to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists."[79] *Morgan* involved a D.C. police officer—ironically, one of the few people who could *legally* carry a handgun before *Heller*[80]—who attacked his family and supervisors with his service weapon.[81] This case drew an even more direct response from the D.C. Court of Appeals: "[L]aw enforcement officials and, consequently, state governments generally may not be held liable for failure to protect individual citizens from harm caused by criminal conduct."[82] The court's fundamental rationale was the same as

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neighbor's roof and called D.C. police for help. Inexplicably, the dispatcher broadcasted this request for help as a non-urgent "Priority 2" call. Two officers arrived; one went to the front door, knocked, and seeing no one visible inside, left. The burglars were still inside and the housemates called police again. Again, the call was flagged as non-urgent, and despite the dispatcher's assurance that police were on the way, no officers were dispatched. Believing the police were on the way, the housemates called down to their friend. This attracted the attention of the burglars, who quickly found the other two housemates. The burglars then abducted the three women at knifepoint and forced them to go back to the burglars' apartment. For the next fourteen hours the burglars held the three women captive, robbed them, raped them, beat them, and forced them to commit sexual acts upon each other. *Warren*, 444 A.2d at 2.

79. *Id.* at 3.

80. D.C. Code § 7-2502.02(a)(4) (2001) (exempting D.C. Metropolitan Police officers from handgun registration requirements), *invalidated by Heller*, 128 S. Ct. at 2821–22.

81. Morgan was a D.C. police officer who threatened his wife with his legal service pistol, after which she fled with their children and informed Morgan's commander, a police captain. Morgan himself had been a troublesome officer, with a history of derelictions of duty and lying to his superiors. After Morgan's wife asked Morgan's captain to "make him stay away from her," Morgan and his wife agreed to separate. A few months later, Morgan's wife again called the captain to find out when Morgan would be on duty so she could move into a new apartment without him finding out where she would be living. Nevertheless, three months later, Morgan broke into his wife's new apartment, choked her unconscious, and forced her at gunpoint to drive to her parents' house, where her children by Morgan were staying. Morgan then abducted the children at gunpoint, after which his wife and her parents called the police. Morgan's superiors ordered him to surrender, which he offered to do at his in-laws. At the surrender he pulled his gun, shot his wife twice, shot and killed his father-in-law, wounded his son with a stray bullet, and shot his commanding lieutenant. Morgan was subsequently convicted of murder in the first degree and two counts of assault with intent to kill while armed. Morgan v. District of Columbia, 468 A.2d 1306, 1308–09 (D.C. 1983).

82. *Id.* at 1310. The court further reasoned,

> [A] special relationship does not come into being simply because an individual requests assistance from the police. Otherwise, a police officer's general duty to the public inevitably would narrow to a special duty to protect each and every person who files a complaint with the department and attaches a request for help. Under these circumstances, the no-liability rule is particularly salutary: individual citizens are in no position to direct the discretion of police officers whose primary responsibilities must be focused broadly in attending to the safety of the public at large. A plaintiff, in short, "cannot unilaterally call into existence a special relationship."

Id. at 1313 (citations omitted). It seems not even a frantic 911 call can overcome this immunity.

in *Warren*: "[T]he duty to prevent crime is a general duty owed to the public and, therefore, unenforceable by any one individual."[83] As one amicus brief submitted to the Supreme Court in *Heller* grimly noted, "it is accurate to state that the law is similar in all 50 states: the police have no duty to protect you, and it is almost impossible to construct a fact pattern that will trigger liability when the police fail to protect citizens."[84] Since police protection is not guaranteed by right or by due process, it is no substitute for a right to keep and bear arms and the due process that follows such a right.

III. ADJUDICATORY STANDARDS, DUE PROCESS, AND FIREARMS REGULATIONS AFTER *HELLER*

As noted above, courts applying *Heller* will likely be applying heightened scrutiny to gun regulations, scrutiny that will apply to both federal regulations through the Administrative Procedure Act[85] and state regulations through the Fourteenth Amendment.[86] Most of the key challenges to firearm regulations will come in regulatory adjudications, particularly permitting and licensing challenges posed by aggrieved firearms owners seeking to challenge the denial of permits or licenses.[87] The stricter judicial scrutiny of restrictions on the right to keep and bear arms that *Heller* anticipates will manifest in administrative practice in two ways: by elevating the right to keep and bear arms from a property interest to a liberty interest and by requiring courts to take a more skeptical view of

83. *Id.* at 1311.

84. Brief for Buckeye Firearms Found. LLC et al. as Amici Curiae Supporting Respondent at 38, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290), 2008 WL 383532.

85. The Supreme Court's constitutional power to apply strict scrutiny to federal regulatory agencies, grounded in the Fifth Amendment's requirement of due process of law, *see* U.S. CONST. amend. V, is reflected in the Administrative Procedure Act, *see* 5 U.S.C. § 706(2)(b) (2006), which allows federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity."

86. The Fourteenth Amendment gives Supreme Court decisions applying strict scrutiny power over state regulatory agencies. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (applying the strict scrutiny test to state agency and holding that a denial of unemployment benefits to a woman who refused to work on Saturdays for religious reasons violated the incorporated Free Exercise Clause of the First Amendment).

87. The administrative rulemaking process will not pose nearly so much of a challenge, as legislatures usually make the decisions on what to regulate and the agencies follow them closely. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FED. FIREARMS REGULATIONS REFERENCE GUIDE 228–42 (2005), http://permanent.access.gpo.gov/lps41631/2005/p53004.pdf (cross-referencing federal gun-control laws in the *U.S. Code* with their counterpart regulations in the *Code of Federal Regulations* and industry circulars, including many *Code of Federal Regulations* sections taken verbatim from the *U.S. Code*). Consequently, it is not discussed in this Comment.

the evidence used to justify restrictions on firearms.

A. Liberty Interests, Property Interests, and the "Arbitrary and Capricious" Standard

Administrative adjudications, under the Due Process Clause, deal with two kinds of interests: liberty interests and property interests. Liberty interests, as defined by the Supreme Court, include "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men," which are protected by federal constitutional law.[88] In contrast, property interests are created by sources independent of the Constitution, chiefly state law.[89] While officially coequal, judges and lawyers have found in practice that liberty interests generally receive broader protections than property rights do.[90] An object being regulated may be a property interest, but a person being regulated has a liberty interest, and liberty interests receive greater consideration.[91] In determining what process is due to protect liberty and property interests from governmental intrusion, courts use a balancing test weighing three factors: (1) the private interest affected,

88. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); *see also* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) ("[T]he right to keep and bear arms is deeply rooted in this Nation's history and tradition. . . . The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is . . . necessary to the Anglo–American conception of ordered liberty that we have inherited." (internal quotation marks omitted)).

89. *Roth*, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); *see also* Perry v. Sindermann, 408 U.S. 593, 601 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.").

90. *See* Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting) ("When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred."); Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 315–16 (2009) (stating that the Supreme Court's due process jurisprudence implies "a hierarchy that generally values liberty interests above mere property interests," and that the right of the poor to welfare benefits is consequently a liberty interest with a greater effect on the *Mathews* balancing test than a property interest).

91. This is not to suggest that all firearms interests are liberty interests. Permits to sell firearms as a business are considered a property interest. Spinelli v. City of New York, 597 F.3d 160, 168–69 (2d Cir. 2009). However, the *Mathews* balancing test, *see infra* note 92 and accompanying text, still applies in such cases, and courts will reverse state actions that fail the test. *Spinelli*, 597 F.3d at 172 (holding that suspending a gun-shop owner's license and seizing the weapons while providing inadequate notice and delaying a hearing for fifty-eight days violated the owner's property interest).

(2) the government interest affected, and (3) the risk of erroneous deprivation of due process in the procedures used versus the value of other procedures or additional safeguards.[92]

Heller's incorporation of the right to keep and bear arms as a liberty interest instead of a property interest has a quiet but definite influence on this calculus.[93] Already, federal courts are balking at enforcing laws that deprive accused felons of their Second Amendment rights while not requiring a particularized finding of danger. In two cases arising under a new federal law denying any person accused of possessing child pornography the legal ability to possess a firearm,[94] two federal district courts refused to enforce such provisions absent a particularized showing that the defendants posed a threat to the community.[95] In both of these cases, the judges cited the *Mathews* balancing test and the importance of procedural due process in their decisions.[96]

Allowing firearms regulators too much discretion in regulating the liberty interest is likely an infringement of due process, and legislators should be wary of doing so. Concealed-carry weapon (CCW) permitting schemes, which allow a person holding a permit to carry a weapon concealed from public view on their person, are relevant examples. Dating

92. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

93. "[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008). This understanding is percolating down to lower courts, even in criminal cases. *See* United States v. Arzberger, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) ("To the extent . . . that the Second Amendment creates an individual right to possess a firearm unrelated to any military purpose, it also establishes a protectible liberty interest."); *see also* Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1263 (2009) ("These cases suggest that, as an enumerated right, the right to possess firearms is not something that can be withdrawn at a legislative whim. Rather, it is sufficiently important to trigger individualized due process protections . . . .").

94. 18 U.S.C. § 3142 (c)(1)(B)(viii) (2006) (conditioning pretrial release of a person accused of certain offenses against a minor victim on that person "refrain[ing] from possessing a firearm, destructive device, or other dangerous weapon").

95. *See* United States v. Kennedy, 593 F. Supp. 2d 1221, 1231 n.4 (W.D. Wash. 2008) ("If the government's position in this case is sustained, this constitutional right would be taken away not because of a conviction, but merely because a person was charged. . . . Certainly no particularized need has been established in this case that the Defendant should [be] prohibited from possessing a firearm."); *Arzberger*, 592 F. Supp. 2d at 603 ("[A]n accused [cannot] be required to surrender his . . . right to possess a firearm without [an] opportunity to contest whether such a condition is reasonably necessary in his case to secure the safety of the community. Because the Amendments do not permit an individualized determination, they are unconstitutional on their face."); *see also* Denning & Reynolds, *supra* note 93, at 1263 ("One suspects that the nexus between child pornography possession and firearms crimes is likely to be slight; certainly these two cases do not suggest otherwise.").

96. *See Kennedy*, 593 F. Supp. 2d at 1229; *Arzberger*, 592 F. Supp. 2d at 602.

back to the earliest days of America,[97] concealed-carry laws have never been immune from arbitrary application and enforcement.[98] Whether issuing more of these permits reduces crime is a matter of academic debate,[99] but they are increasingly popular among state legislatures. Only two states now forbid all concealed carry.[100] Twelve states issue permits on a "may issue" basis, where discretion to issue a permit is left to law enforcement.[101] Thirty-four states issue concealed-carry permits on a "shall issue" basis, where law enforcement officers have no discretion in issuing permits,[102] and two states require no permit at all.[103] The Supreme Court

97. The primary purposes of early prohibitions on concealed carry were to keep black slaves away from weapons and to end the practice of dueling. CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 9, 127–28 (1999).

98. *See* CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 141 (1994) (noting that juries in concealed weapons cases were given instructions allowing them to find persons accused of concealed carrying not guilty "if the defendant successfully proved his good character and motives").

99. *See* COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., FIREARMS AND VIOLENCE 150 (2005) [hereinafter FIREARMS AND VIOLENCE] ("No link between right-to-carry laws and changes in crime is apparent in the raw data . . . it is only once numerous covariates are included that the negative results in the early data emerge."). This was the only part of the report that any member of the National Academies Review Committee dissented from; Professor James Q. Wilson noted that "with only a few exceptions, the studies cited . . . do not show that the passage of [right-to-carry] laws drives the crime rates up . . . . The direct evidence that such shooting sprees occur is nonexistent. Indeed, the [exception paper] shows that there was a 'statistically significant downward shift in the trend' of the murder rate." *Id.* at 270; *see also* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 94 (1998) (concluding that nondiscretionary "shall issue" concealed-carry permit schemes had the greatest effect on reducing crime, and that racial minorities and women benefit the most from such permitting schemes). *But see* EVALUATING GUN POLICY 324 (Jens Ludwig & Phillip J. Cook eds., 2003) (concluding that the correlation observed by Lott and his coauthors cannot definitively show a causal relationship due to the unreliability of the data available).

100. *See* 720 ILL. COMP. STAT. ANN. 5/24-1(a)(4), (a)(10) (West 2008) (prohibiting the carrying of concealed weapons within one's vehicle or person in public unless meeting the exemptions); WIS. STAT. ANN. § 941.23 (West 2005) (prohibiting any person except a peace officer from carrying a concealed and dangerous weapon).

101. In "may issue" states, law enforcement officials may deny permits to a person at their own discretion based on various statutory criteria. *See, e.g.*, CAL. PENAL CODE §§ 12050–12054, 12590 (West 2008) (listing various penal provisions limiting the issuance of permits).

102. In "shall issue" states, law enforcement officials must issue concealed-carry permits; they have no discretion to deny permits to any person who meets the defined statutory criteria. *See, e.g.*, GA. CODE. ANN. §§ 16-11-126 to 16-11-130 (2007) (stating that when no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license, the blank license shall be returned directly to a judge who will have sixty days from the date of the initial application to issue the license); OHIO REV. CODE ANN. §§ 2923.11–2923.24 (LexisNexis 2006) (prohibiting issuance of a license only when negative information is found against the applicant).

103. *See, e.g.*, ALASKA STAT. § 11.61.220(a) (2008) (allowing concealed carry without application for permit but listing rules of conduct when a concealed weapon must be removed or revealed); VT. STAT. ANN. tit. 13, §§ 4004, 4016 (1998) (listing only restrictions of certain places or behavior that would be a violation of concealed-carry laws).

implied in *Heller* that a permitting scheme for handguns was permissible as long as it was not arbitrarily or capriciously applied.[104] Although this may seem an easy standard to meet, "may issue" CCW permit schemes appear inherently arbitrary and capricious. For example, New York City's application of the state's handgun permit law,[105] in practice, is so labyrinthine that only wealthy or politically connected citizens can get handgun licenses,[106] while the city routinely denies handgun licenses to taxi drivers because it claims they do not carry enough cash to be an attractive target for robbers.[107] California, also a "may issue" state, gives its counties such broad discretion in CCW permitting that county sheriffs even have the power to effectively revoke previously issued CCW permits.[108] This kind of discretion on the part of local officials to grant or deny CCW permits infringes on the Second Amendment liberty interest of firearms owners that *Heller* recognizes and is unlikely to survive the renewed due process scrutiny that *Heller* portends and administrative law has long recognized as essential.[109] Overbroad discretion in the regulation of a liberty interest will not hold up in court, especially when the liberty interest comes from an

104. *Cf.* District of Columbia v. Heller, 128 S. Ct. 2783, 2819 (2008) (stating that the licensing requirement will not be addressed because respondent conceded that a licensing scheme is permissible as long as it is not enforced in an arbitrary and capricious manner, thus relief is found if a license is issued to respondent).

105. *See* N.Y. PENAL LAW § 400.00 (McKinney 2008) (allowing handgun licenses if the applicant is, among other things, of "good moral character," "no good cause exists for the denial of the license," and "proper cause" exists showing a need for a license).

106. *See* Colum Lynch, *Elite in NYC are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993, at 3 (identifying, among other New York City handgun license holders, *New York Times* publisher Arthur Ochs Sulzberger, prominent gun-control advocate Laurence Rockefeller, *National Review* founder William F. Buckley, actors Bill Cosby and Joan Rivers, real estate developer Donald Trump, and radio "shock jock" Howard Stern).

107. *See* Jeffrey R. Snyder, *Fighting Back: Crime, Self Defense, and the Right to Carry a Handgun* (CATO Policy Analysis No. 284, 1997), https://www.cato.org/pubs/pas/pa-284.html (noting that one state based its decision on the fact that carrying less than $2,000 in cash does not make taxi drivers a target, despite the profession's high risk of robbery).

108. "[Orange County, California Sheriff Sandra] Hutchens' new policy requires that to get a concealed-firearm permit, applicants must prove there is a legitimate threat to their safety and agree to undergo possible psychological, polygraph or medical testing." Stuart Pfeifer, *Tighter Policy on Concealed Weapons in O.C.*, L.A. TIMES, Aug. 12, 2008, at B4. Describing her new standards, "Hutchens explained that she will issue the permits 'to persons of good and upstanding character who possess credible, significant and substantiated cause to fear for their safety[,]'" criteria which are inherently subjective. *Id.* Noting strong statistical evidence that more-liberal concealed-carry weapons (CCW) permitting has led to a decrease in crime, one critic reports Hutchens is now encountering resistance from Orange County's 1,100 CCW permit holders (out of a population of three million residents), "including the 442 who have been sent letters saying that they have to justify keeping the permit they were issued by the previous sheriff. 'There's so much important stuff going on with the department, I didn't expect there to be so much feedback on this,' she is quoted as saying." Posting of Bob Owens to Pajamas Media, http://pajamasmedia.com/blog/concealed-carry-permits-go-poof-in-california/ (Nov. 19, 2009, 12:30 EST).

109. *See supra* note 92 and accompanying text.

incorporated provision of the Bill of Rights and the Court applies heightened scrutiny.[110] Indeed, the District of Columbia has already repealed a series of post-*Heller* handgun regulations aimed at restricting the models, types, features, and even colors of handguns D.C. residents can register rather than face yet another lawsuit.[111]

B. Judicial Review of Firearms Regulation and Supporting Evidence Under the APA

While state regulations of firearms are guided by varied state administrative procedure laws and rules, subject only to federal constitutional scrutiny if they violate the Fourteenth Amendment,[112] the future of federal firearms regulations post-*Heller* also requires consideration of the role of the federal government in regulating gun manufacturers and dealers.[113] The Fifth Amendment explicitly bars the federal government from taking life, liberty, or property without due process of law.[114] The main federal agency responsible for the regulation of firearms, the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE),[115] like most federal agencies, is subject to judicial review of its actions under the Administrative Procedure Act (APA) as a means of guaranteeing Fifth Amendment due process.[116] BATFE permit systems are a form of adjudication, and the BATFE uses informal adjudication in hearings concerning the required federal firearms licenses (FFLs) that all gun dealers are required to have.[117] The APA,

110. Depending on the outcome of *McDonald*, discussed *supra* in note 60, a test case with non-felon plaintiffs challenging state "may issue" CCW permitting laws under *Heller* appears a logical next step.

111. *See* Tim Craig, *D.C. Expands List of Allowed Guns to Avert Lawsuit*, WASH. POST, June 20, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/19/AR2009061901822_pf.html. In addition, D.C. initially only allowed residents to register revolvers and not semiautomatic pistols. That ban was also lifted in September 2008 in response to public and congressional pressure. *Id*.

112. *See supra* note 86.

113. *See generally* 18 U.S.C. § 922 (2006) (defining offenses related to the sale of firearms that are shipped, transported, or received in interstate commerce, including, inter alia, lists of prohibited purchasers, limits on the sale of fully automatic weapons and certain types of ammunitions, background-check requirements, and dealer record-keeping requirements).

114. U.S. CONST. amend. V.

115. *Heller* does not apply to explosives. *See* United States v. Tagg, 572 F.3d 1320, 1326 (11th Cir. 2009).

116. *See* 5 U.S.C. § 702 (2006) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

117. *See* 18 U.S.C. § 923 (2006) (establishing federal firearms license (FFL) permitting scheme that applies to all importers, manufacturers, and dealers in firearms and ammunition); *Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE): Reforming Licensing and Enforcement Authorities: Hearing Before the Subcomm. on Crime,*

however, still sets "minimum requirements" for informal adjudication,[118] and although ex parte communications between parties and hearing officers are allowed, an agency must still preserve a written record that provides a sufficient basis for judicial review of the agency action.[119] Additional requirements for informal adjudication may arise under the Due Process Clause.[120] But in informal adjudications, if a decision is not based on facts contained in the evidentiary record, an adversely affected party must receive an opportunity to appeal and rebut the finding.[121] Unless the agency statute explicitly precludes judicial review, or the law gives the agency complete discretion, the agency's actions are subject to judicial review.[122] BATFE's authorizing statutes do neither.[123] Additionally, so long as the BATFE's actions are final, they are reviewable by courts.[124]

Under the APA, courts review agency actions that are alleged to be "arbitrary, capricious, [or] an abuse of discretion;"[125] "contrary to constitutional right, power, privilege, or immunity;"[126] "unsupported by substantial evidence;" or "unwarranted by the facts."[127] As a result of this explicit linkage in the APA between the "arbitrary and capricious" review used in administrative law, scrutiny of regulations affecting "rights, powers, privileges and immunities" protected by constitutional law, and the

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Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 106th Cong. 11–12 (2006), *available at* http://ftp.resource.org/gpo.gov/hearings/109h/26765.pdf (statement of Audrey Stucko, Deputy Assistant Director, Enforcement Programs and Services, BATFE) (stating that FFL revocation hearings are conducted under informal procedures which are more amenable to unrepresented license holders, and that BATFE hearing officers are trained to give unrepresented license holders meaningful opportunity to participate in the hearing).

118. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990) ("the minimal requirements for [informal adjudication] are set forth in the APA, 5 U.S.C. § 555"). Among these rights are the right of an affected party to appear before the agency, for affected parties to be represented by counsel, 5 U.S.C. § 555(a) (2006), and if the permit sought is denied, prompt notice of the denial and a written statement of reasons for the denial, 5 U.S.C. § 555(e).

119. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (holding that an administrative record composed of "'post hoc' rationalizations" for agency action is "an inadequate basis for review").

120. *Cf. Pension Benefit Guar. Corp.*, 496 U.S. at 655–56 ("A failure to provide [protections beyond the minimum of § 555] *where the Due Process Clause itself does not require them* (which has not been asserted [in this case]) is therefore not unlawful.") (emphasis added). Such due process requirements are discussed in Part II.C, *supra.*

121. 5 U.S.C. § 556(e).

122. *Id.* § 701(a).

123. *See* 28 U.S.C. § 599A (2006) (leaving out an explicit preclusion of judicial review); 28 U.S.C. § 599A(b) (authorizing that BATFE is responsible for investigating "criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws," yet not stating that the BATFE's actions are solely within its discretion).

124. 5 U.S.C. § 704.

125. *Id.* § 706(2)(A).

126. *Id.* § 706(2)(B).

127. *Id.* § 706(2)(E)–(F).

rules of evidence, federal courts clearly have the power to overturn federal agency action regulating firearms under the rules established in *Heller*.[128] If the agency action does not fall into one of the defined exceptions in *Heller* itself,[129] then its constitutionality will be put to the test.

The strongest challenges to gun regulations will arise when agency actions are supported by questionable facts or evidence, particularly as the APA recognizes that a lack of supporting evidence can be fatal to a regulation.[130] As gun-control laws themselves generally rest upon statistics claiming a causal relationship between guns and social ills, courts can use the rules of evidence, particularly those regarding expert evidence, to weigh the value and credibility of those statistics.[131] In doing so, gun regulations after *Heller* may reignite a long-simmering debate in administrative law over how closely the rules of evidence used by agencies like BATFE should follow the rules used by courts.

The defining case governing expert evidence in the federal courts is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[132] Under the *Daubert* standard, expert testimony is judged by four factors. First, can the expert's theory be, or has it been, tested?[133] Second, has the expert's theory been subjected to peer review?[134] Third, if a particular technique has been used in arriving at a theory, what (if any) error rate does it have?[135] Finally, has the theory been generally accepted within the scientific community?[136] The *Daubert* Court noted that this four-part test is flexible and that no one factor is dispositive; the court must focus "solely on the principles and methodology, not on the conclusions they generate," and the expert testimony must be supplemented by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof . . . ."[137] The Court in *Daubert* established that the role of the federal district judge in cases of expert evidence is that of a gatekeeper, with the

128. *See supra* Part II.B.

129. To wit, bans on possession by felons and the mentally ill, carrying in "sensitive places" such as government buildings, conditions and qualifications on the sale of arms, and a limitation of the right to arms "in common use" are all permissible under the Second Amendment. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008); *supra* Part I.B.

130. 5 U.S.C. § 706 (2)(E)–(F).

131. *See* FED. R. EVID. 702 (allowing testimony by expert witnesses "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact at issue"); FED. R. EVID. 705 ("The expert may . . . be required to disclose the underlying facts or data on cross-examination.").

132. 509 U.S. 579 (1993) (granting certiorari in order to resolve deep divides among federal courts concerning the proper standard for admitting expert testimony).

133. *Id.* at 593.

134. *Id.*

135. *Id.* at 594.

136. *Id.*

137. *Id.* at 594–96.

power to exclude expert evidence that fails the *Daubert* test on grounds of relevancy.[138] The Supreme Court, in later cases, made two other holdings that further clarify the rules regarding expert evidence. First, it explicitly allowed courts to "conclude that there is simply too great an analytical gap between the data and the opinion proffered" and consequently exclude the proffered evidence.[139] Second, the Court emphasized that the *Daubert* standard and the "gatekeeping" function of federal judges applied to all instances of expert testimony, including testimony from fields not traditionally considered scientific per se, such as engineering.[140]

Does the *Daubert* standard have relevance in administrative adjudication? Academic commentators are divided,[141] and the general principle requiring judicial deference to agencies under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* remains.[142] Yet Congress directly addressed the rules of evidence agencies must follow in their adjudications in the APA,[143] and the Supreme Court has noted that all

138. *Id.* at 597; *see also id.* at 591 n.9 ("In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*."); FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

139. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (further noting that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert").

140. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (holding that the purpose of the *Daubert* requirement "is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

141. *Compare* Claire R. Kelly, *The Dangers of* Daubert *Creep in the Regulatory Realm*, 14 J.L. & POL'Y 165, 209 (2006) ("[*Daubert*] lacks any administrative law grounding. It is ill-suited to apply across the board to all agencies, it is likely to be used in a rhetorical and meaningless way, and it is likely to be overused, morphed, and stretched to fit any conceivable situation."), *with* J. Tavener Holland, Comment, *Regulatory* Daubert*: A Panacea for the Endangered Species Act's "Best Available Science" Mandate?*, 39 MCGEORGE L. REV. 299, 326 (2008) ("Regulatory *Daubert* has much to offer . . . . By instituting a new framework for judicial review of the methodologies behind agency science, regulatory *Daubert* will help agencies effect a needed separation between policy and science. This will result in a lower risk of substantive bias, greater accountability, and greater transparency."), *and* Alan Charles Raul & Julie Zampa Dwyer, *"Regulatory* Daubert*": A Proposal to Enhance Judicial Review of Agency Science by Incorporating* Daubert *Principles into Administrative Law*, 66 LAW & CONTEMP. PROBS. 7, 8 (2003) ("*Daubert* principles should [be used] under the APA because these principles are consistent with the APA requirement that agencies engage in reasoned decisionmaking, would assure better documentation of agencies' scientific decisions, and would enhance the rigor and predictability of judicial review of agency action based on scientific evidence.").

142. 467 U.S. 837, 842–43 (1984) (requiring courts to defer to agency interpretations of federal statutes if (1) the statutes are ambiguous or silent on the issue in question and (2) if the agency's interpretation is a permissible construction of the statute).

143. *See* 5 U.S.C. § 556(d) (2006) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence

regulatory action under the APA must be supported by "substantial evidence" based on the record as a whole, including contradictory evidence contained in the record.[144] As a matter of substantive law, federal trial courts can and do exclude evidence in criminal firearms cases that is not supported by substantial evidence or underlying data under the *Daubert* standard.[145] Given that federal courts exclude unsupported evidence in constitutional cases as well,[146] it is likely that they can and will apply *Daubert* and exclude unsupported evidence in administrative firearms cases arising under the Second Amendment's interpretation in *Heller*. If the prevailing *Daubert* rules used by courts are imposed upon administrative agencies like the BATFE as well,[147] gun regulations facing *Heller* challenges will face the added burden of demonstrating that they are based on objective facts and that those facts demonstrate a causal relationship, not simply a correlation, between firearms possession and social ills and between firearms regulation and social benefit.[148]

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may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.").

144. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

145. To give one example, federal judges have actively excluded expert evidence and conclusions of firearms examiners, which were unsupported under the *Daubert* test. *See, e.g.*, United States v. Diaz, No. CR 05-00167 WHA, 2007 U.S. Dist. LEXIS 13152, at *35 (N.D. Cal. 2007) (forbidding firearms examiner from testifying that a ballistics match permits "the exclusion of all other guns" as possible sources of shell casings fired in a crime); United States v. Montiero, 407 F. Supp. 2d 351, 355 (D. Mass. 2006) (coming to the same conclusion as the *Diaz* court).

146. *See, e.g.*, Carhart v. Ashcroft, 331 F. Supp. 2d 805, 808 (D. Neb. 2004), *rev'd on other grounds sub nom*. Gonzalez v. Carhart, 550 U.S. 124, 168 (2007) (concluding that substantial evidence in the record did not support congressional fact findings that a banned abortion procedure was never necessary for the preservation of the health of the woman).

147. Two commentators have noted that the "relevance and reliability" standard in *Daubert* bears a striking similarity to the "hard look" review standard elaborated by the Supreme Court in a decision requiring agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," a decision which would provide a firm basis for bringing *Daubert* into administrative law. Raul & Dwyer, *supra* note 141, at 22–23 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)). And they point out that in *Daubert* itself, the Court approvingly cited a passage from a book that links good science and good regulatory decisionmaking, which it would not have done "if it had not been comfortable with the notion that the new good-science mandate announced in *Daubert* could be extended by analogy to administrative law and judicial review of agency science." *See Daubert*, 509 U.S. 579, 593 (1993) (citing SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS 61–76 (1990)); *see also* Raul & Dwyer, *supra* note 141, at 24.

148. *But see* Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1092–93 (2009) ("To the extent that Second Amendment litigation prompts deeper and empirically driven evaluation of firearms regulation, it will come with gun control in a systematically defensive posture. We have little confidence that this one-sided drag on

Justifying regulation with empirical, causal evidence is one of the main ways firearms regulators can avoid having their regulations overturned for being arbitrary, yet many firearms regulations seem to lack such supporting evidence. The basic link relied upon by firearms regulators, that more guns cause more homicides and suicides, is actually very weak. A comprehensive critical literature review conducted by the National Academy of Sciences dealing with links between firearms possession and crime, after examining 253 journal articles, ninety-nine books, forty-three government reports, and eighty gun-control measures, concluded that "existing research studies[,] . . . because of the limitations on existing data and methods, do not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide."[149] The link between firearms possession and suicide is particularly suspect. One well-cited study published in the *New England Journal of Medicine* reported that handguns accounted for 83% of all firearms used in suicide attempts.[150] However, the National Academy review dealing with links between firearms possession and suicide found that although there is a strong *correlation* between owning a firearm and an elevated risk of suicide, there is no evidence of *causation*—no proof that an increase in firearms ownership causes an increase in suicides.[151] After a comprehensive review of more than twenty studies, some demonstrating a direct causal relation and some not, the authors were forced to conclude that although there was a positive correlation between gun ownership and suicide, "the causal relation remains unclear."[152] Regulators seeking to justify their firearms regulation policy would do well to seek out evidence of causation, not merely correlation, between firearms and the social ills they seek to prevent.

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policy innovation can produce a net benefit.").

149. FIREARMS AND VIOLENCE, *supra* note 99, at 6. The review panel further concluded that the only reliable data that could show a causal relationship between firearms and violence had to come from comprehensive, individual-level studies linking firearms and violence, surveys which as of 2004 did not exist. *Id.*

150. *See* JERVIS ANDERSON, GUNS IN AMERICAN LIFE 76 (1984).

151. *See* FIREARMS AND VIOLENCE, *supra* note 99, at 153. Indeed, this review found four possibilities that each explain the correlation: (1) a direct causal relationship between firearms ownership and risk of suicide; (2) a complete lack of any causation at all; (3) a reverse causal relationship where people contemplating suicide actively seek out firearms; and (4) unmeasured and confounding "third factors" that correlate with both firearms ownership and suicide, such as a lack of public social services that leads to both increased neighborhood crime rates and a lack of available mental health treatment. *Id.*

152. *Id.* at 192.

CONCLUSION

Through its decision in *District of Columbia v. Heller*, the Supreme Court signaled that the Second Amendment protects an individual right to keep and bear arms, and that the right is sufficiently fundamental to be worthy of incorporation. Incorporation portends a higher level of scrutiny for firearms regulations under the Due Process Clauses, both procedurally by guarding against arbitrary and capricious regulatory action and substantively by ensuring that regulations are based on solid empirical evidence that demonstrates a causal link between regulation and social benefit.

Heller is not the end of the world for gun control; indeed, the majority opinion says as much.[153] *Heller* does signal, however, that gun regulators must now approach the right to keep and bear arms with a renewed commitment to constitutionally mandated due process.[154] The purpose of requiring gun regulations to pass heightened scrutiny is so that judicial review will be as effective in its protection of the Second Amendment as it has been for all of the other amendments of the Bill of Rights.[155]

The Framers of the Bill of Rights, while certainly not able to predict the future, understood that the need of free citizens and human beings to defend their lives by lethal force is a tragic but inevitable fact of life in a world run and populated not by angels, but by men.[156] *Heller* ultimately stands only for that position. The essential right to bear arms in defense of life must be respected by those responsible for the administration of firearms regulation and conscientiously defended by the Judicial Branch. If and when it is protected as such, prudent regulation of firearms will still be possible. Congress, state legislatures, and local governments—and the

153. *See supra* Part I.B.

154. *See* Denning & Reynolds, *supra* note 93, at 1266 ("[A]n important consequence of *Heller*'s individual right holding [is] the normalization of firearms possession. . . . [F]irearms possession is now something contemplated by the Constitution—something not deviant, but normal, with the burden shifting from those who would possess firearms to those who would deny their possession.").

155. *See* Alan Gura, Heller *and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1161 (2009) ("Undoing political mischief aimed at subverting constitutional rights is the very business of the federal courts. . . . The courts' duty is to come back, time and again, and challenge every harebrained legislative device contrived to deny Americans their constitutional rights."). *But see* Amanda C. Dupree, Comment, *A Shot Heard 'Round the District: The District of Columbia Circuit Puts a Bullet in the Collective Right Theory of the Second Amendment*, 16 AM. U. J. GENDER SOC. POL'Y & L. 413, 436 (2008) (concluding that the right to keep and bear arms should be subject to a "reasonableness" review instead of a form of heightened scrutiny).

156. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) ("If men were angels, no government would be necessary.").

agencies that serve them—are and should remain free to restrict the keeping and bearing of arms so long as these restrictions are consistent with the individual right the Second Amendment guarantees, and are clearly supported by evidence and not emotion. However, as *Heller*'s example demonstrates,[157] regulators who treat the keeping and bearing of arms as unimportant, or the right of self-defense as worth less than some "greater good," will seal the doom of the very laws they aim to uphold.

157. *See supra* note 9 and accompanying text.

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SECURITIES PIRATES: WHY A MORE EXPANSIVE BASIS FOR JURISDICTION OVER TRANSNATIONAL SECURITIES FRAUD WILL PREVENT THE UNITED STATES FROM TURNING INTO THE BARBARY COAST

JONATHAN WANG*

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* J.D. Candidate, 2011, American University Washington College of Law; B.A. Business-Economics, 2005, University of California, Los Angeles. I would like to thank Professor Randall Quinn for your guidance in developing this Comment. Special thanks to Colleen O'Boyle and Anita Ghosh for their countless hours of directing during this process and to my *Administrative Law Review* colleagues for their continued diligence. To my family, thank you for your instrumental support and encouragement in all things.

INTRODUCTION

In an ever-expanding global economy where securities are being purchased in domestic and foreign markets, questions regarding the scope of regulations are particularly ripe. The regulation of a particular subset of transnational securities, known as "foreign cubed" securities, has garnered a great deal of attention.[1] Foreign cubed securities litigation generally entails actions against foreign issuers by a class of foreign plaintiffs who purchased securities on a foreign exchange and now wish to bring those actions in United States courts based upon United States securities laws.[2] The jurisdictional issues involved in foreign cubed securities affect both class actions by foreign plaintiffs and the Securities and Exchange Commission's (SEC's) ability to regulate the market for fraudulent acts.

Under SEC rule 10b-5, it is "unlawful for any person . . . by the use of any means or instrumentality of interstate commerce,[3] or of the mails or of any facility of any national securities exchange, [t]o employ any device, scheme, or artifice to defraud."[4] Additionally, the rule prohibits the use of interstate commerce "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[5] Lastly, the rule also prohibits a person from "engag[ing] in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[6] The difficulty with transnational securities fraud cases lies in the fact that neither Congress nor the Supreme Court has addressed the extent of rule 10b-5's jurisdictional reach in its oversight of fraud on the market. Rule 10b-5 does not specify a limitation on its application because it applies to any transaction connected to the purchase or sale of a security.[7] The Securities Act of 1933 and the Securities Exchange Act of

1. *See* Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, *in* SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2004, at 91, 96 (PLI Corp. Law & Practice, Course Handbook Series No. B-1442, 2004) (explaining the colloquially coined term *foreign cubed* as actions involving plaintiffs who are "foreign investors who have purchased foreign securities on foreign exchanges").

2. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 172 (2d Cir. 2008) (explaining the general elements of a foreign cubed securities action).

3. *See* 15 U.S.C. § 78c(a)(17) (2006) (defining *interstate commerce* as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof").

4. 17 C.F.R. § 240.10b-5(a) (2009).

5. 17 C.F.R. § 240.10b-5(b).

6. 17 C.F.R. § 240.10b-5(c).

7. *See* 15 U.S.C. § 78c(a)(14) (defining *sale* as "any contract to sell or otherwise dispose of [securities]"); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 19 (2007) (explaining that the broad reach of rule 10b-5 means that it applies whenever U.S.

1934 (the Acts), however, both contain language indicating congressional intent that they apply to both interstate and foreign commerce.[8] Unfortunately, Congress has not set forth the scope of this jurisdiction, thus leaving the difficult task for the Judiciary.[9]

This Comment will examine the treatment of jurisdictional issues in transnational securities fraud cases by various circuits and will discuss how each varying test affects the SEC's ability to regulate the securities market for fraudulent actions. Part I provides background information regarding the judicially developed conduct and effects tests for determining transnational securities fraud jurisdiction and describes how the application of these tests has varied from one circuit to another. Part II of this Comment compares the different judicial tests to the test proposed by the SEC and discusses which of these tests will afford the SEC the broadest ability to pursue its mandate of regulating the market for fraudulent activity. Part III explores the importance of choosing a solid standard for courts to apply and the reason the Supreme Court should clarify the standard for jurisdiction. Lastly, this Comment will argue that the Supreme Court should consider adopting two sets of rules for determinations of extraterritorial jurisdiction: one for SEC enforcement against fraud, which is quintessential to preventing rampant fraudulent activity in the United States, and another for private-plaintiff class actions, which are remedial and have fueled some of the main contentions against the broader reading of the jurisdictional tests. For SEC enforcement, the Supreme Court should adopt the test proposed by the SEC because it will allow for more-efficient monitoring of foreign fraudulent activity without overdeterring foreign commerce with the United States while contemporaneously limiting the possible abuses of United States securities laws by foreign class actions.[10]

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mail or phone service is used, and that this situation is present in virtually every case involving some contact with the United States, and presenting the major question of how to limit the application of U.S. law in cross-border cases, especially when weighing the varying concerns the courts have, which range from policy reasons for deterring fraud to judicial economy).

8. *See* SEC v. Kasser, 548 F.2d 109, 114 & n.21 (3d Cir. 1977) (stating that the term *interstate commerce* in both Acts entails any trade, commerce, transportation, and communication with "any foreign country" and is thus not restricted to merely commerce within the United States).

9. *See id.* at 114 (explaining how the Acts use relatively broad language when addressing the scope of jurisdiction).

10. *See* Phyllis Diamond, *High Court Seeks SG's Views in "Foreign-Cubed" Securities Controversy*, SEC. L. DAILY, June 2, 2009, http://news.bna.com/sdln/SDLNWB/split_display.adp?fedfid=12894533&vname=sldbulallissues&fcn=1&wsn=503234000&fn=12894533&split=0 (explaining that the United States Chamber of Commerce and the Securities Industry and Financial Markets Association argued in amicus briefs that allowing jurisdiction over transnational securities cases would create a "virtual 'Exhibit A' for any foreign jurisdiction seeking to demonstrate, for its competitive advantage," that doing business with the United States would be detrimental,

I. JUDICIAL ATTEMPTS AT CREATING A TEST FOR TRANSNATIONAL SECURITIES JURISDICTION

A. Development of Jurisdiction for Transnational Securities Fraud

The determination of a test that would impose United States laws upon foreign companies inherently requires a discussion of policy.[11] The major policy concern is the balance between preventing the United States from becoming a haven for fraudulent activity by foreign companies and the effect a United States court judgment would realistically have upon foreign countries.[12] Judge Friendly and subsequent judges have found that if the test for jurisdiction were too strict or were a bright-line rule against jurisdiction, it would lead to a situation where foreign companies would view the United States as a country that fosters the deception of investors abroad.[13] If the test for jurisdiction were too lenient and allowed

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and that heavy regulation would discourage foreign companies from bringing their business into the United States due to fear of overregulation). *See generally* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990) (arguing that Congress understood the international nature of the times from the 1920s onward and that their subsequent enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934 would reflect whether Congress felt these Acts should extend beyond the borders of the United States or if the Acts were designed solely to combat fraud committed against American investors trading on U.S. stock exchanges).

11. *See Kasser*, 548 F.2d at 116 (asserting that policy must come into discussion when determining transnational securities cases because rule 10b-5 is silent on the extent of jurisdiction, thus the court must weigh multiple United States policies to make a proper assessment).

12. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 & n.29 (2d Cir. 1975) (limiting the application of its holding to suits by the SEC or by named foreign plaintiffs, thus potentially excluding class action lawsuits due to additional problems that would arise in judgments for class actions as opposed to regulation within United States borders); IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 n.31 (2d Cir. 1975) (noting that class actions may stand differently primarily due to the likelihood that "a very small tail may be wagging an elephant" which leads to doubt that a judgment in an American court would protect defendants elsewhere since defendants who win a judgment in the United States may ultimately be sued multiple times in the courts of other countries applying their securities laws instead of United States securities laws, thus creating the possibility of conflicting judgments in different countries); *see also* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 466–68 (discussing the uncertainty that arises from the calculus of prescriptive jurisdiction due to whether a U.S. class action judgment or settlement will be recognized abroad and consideration of the type of alternative remedy that would otherwise be available to the foreign investors since a judgment found in favor of a claimant would have to be enforced either by the foreign country in which the business operates or an injunction of the business that is being conducted in the United States, which may only afford a claimant a minimal recovery of the damages that may be caused by the fraudulent action).

13. *See Kasser*, 548 F.2d at 116 (concluding that a determination of jurisdiction that is too strict would turn the United States into a "Barbary Coast" that harbors international securities "pirates" since there would be a strong incentive to place subsidiaries in the United States to do the dirty work while having the business headquarters in another foreign

jurisdiction to apply too often, then foreign companies, even those not intending to commit fraud, would be significantly discouraged from bringing their business to the United States as the costs and risks of doing business would be too great.[14] Thus, the Judiciary drew a fine line to prevent the wasting of American judicial resources on judgments that would not be honored and, at the same time, to protect the global economy by fostering an environment where the United States would serve as an example for its neighbors by preventing global-scale securities fraud.

Two of the earliest judicial opinions attempting to develop a test for transnational securities subject-matter jurisdiction came from Judge Friendly of the Second Circuit Court of Appeals. These two cases, decided on the same day, led to the development of a case-by-case examination of subject-matter jurisdiction.[15] Subsequent cases eventually refined Judge Friendly's theories and formulated the test for transnational securities fraud jurisdiction—these tests are the conduct and effects tests.

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country where United States securities laws do not apply); *see also Bersch*, 519 F.2d at 987 (explaining that "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners" because allowing a fraudulent base would ultimately lead to fraud in the global economy); *IIT*, 519 F.2d at 1017–18 (positing a comparison of how the United States "would surely look askance if one of [its] neighbors stood by silently and permitted misrepresented securities to be poured into the United States" as those securities would quite likely be out of the reach of the United States court system).

14. *See generally* Diamond, *supra* note 10 (describing consequences to foreign investments within the United States if foreign cubed securities regulation was allowed to proceed and how careful consideration must be made before expanding rule 10b-5 to the expanses of foreign securities fraud).

15. *See Bersch*, 519 F.2d at 977, 992–93 (holding that in the case where defendants were part of a Canadian corporation, federal securities laws apply to losses from sales of securities to American residents in the United States, whether or not acts or culpable failures to act of material importance occurred in the United States, while limiting its application of jurisdiction to situations where Americans are injured when the fraudulent activities within the United States were merely preparatory); *IIT*, 519 F.2d at 1003, 1017–18 (explaining that in this case, where an international investment trust organized under the laws of Luxembourg defrauded an international investment group, the application of securities laws should be extended to transnational transactions beyond prior decisions because "[if] there would be subject matter jurisdiction over a suit by the SEC to prevent the concoction of securities frauds in the United States for export, there would also seem to be jurisdiction over a suit for damages or rescission by a defrauded foreign individual"). *See generally* Buxbaum, *supra* note 7, at 18–21 (explaining the background and development of transnational securities subject-matter jurisdiction through an examination of congressional intent when writing the Securities Act of 1933 and the Securities Exchange Act of 1934, the wording of rule 10b-5, and the attempts by the district courts in establishing a workable test for determining subject-matter jurisdiction for transnational securities fraud); Choi & Silberman, *supra* note 12, at 468–72 (discussing the development of subject-matter jurisdiction for transnational securities cases specifically in regard to class actions brought by foreign plaintiffs under United States securities laws including a comparison of the two most recent cases in the Second Circuit that have applied the conduct test and the effects test for the determination of transnational securities fraud jurisdiction).

B. Effects Test

The effects test questions whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.[16] The United States has a strong incentive to protect its own citizens from fraudulent investments regardless of where the securities are located. This test was developed initially to protect domestic investors who had purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.[17] Generally, the effects test is a strong basis for jurisdiction over transnational securities; however, it is limited to the extent that the effects must be detrimental to specific interests within the United States—the mere claim of a general reduction of confidence in United States markets is not enough.[18]

C. Conduct Test

The conduct test focuses on whether the activities in the United States were more than merely preparatory to a fraud.[19] Additionally, the test questions whether the culpable acts or omissions occurring in the United

16. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008) (explaining that the effects test was generally applied together with the conduct test because "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court") (quoting Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995)).

17. *See* Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) (en banc) (developing the effects test); *see also* Buxbaum, *supra* note 7, at 21–22 (stating that "[t]he effects test was first fully articulated in *Schoenbaum*" and was developed due to the United States' prerogative in protecting its citizens from fraudulent transactions including those from foreign companies and also to remove the incentive of moving fraudulent activity into the United States by foreign businesses).

18. *See* Buxbaum, *supra* note 7, at 22–23 (explaining that courts do not allow a broad interpretation for fear that securities laws would be used for litigating general market conditions instead of specific harm suffered by some U.S. party).

19. *See, e.g.*, SEC v. Berger, 322 F.3d 187, 194–95 (2d Cir. 2003) (finding that Berger's actions were not merely preparatory because his creation of false financial information, transmission of that false financial information overseas, and approval of the resulting false financial statements prior to the statements being sent to advisors showed that his actions in the United States were material actions constituting fraud); Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 124 (2d Cir. 1995) (holding that the continued nondisclosure of the fraudulent statements had a deleterious effect and played as much of a role in the plaintiff's purchases of the stock as the price listings on the London Exchange and NASDAQ, and thus could not be described as incidental or merely preparatory); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983) (explaining the similarity of merely preparatory activity to conduct far removed from the consummation of the fraud and that establishing jurisdiction requires that conduct within the United States directly cause the loss); SEC v. Princeton Econ. Int'l Ltd., 84 F. Supp. 2d 452, 454 (S.D.N.Y. 2000) (explaining that "merely preparatory" fraudulent behavior means that the behavior was an insubstantial or insignificant contributing cause to the losses).

States directly caused losses to investors abroad.[20] Recently, the Second Circuit applied both the conduct test and effects test in *Morrison v. National Australian Bank Ltd.*,[21] in which it reaffirmed the possibility of subject-matter jurisdiction for foreign cubed securities cases if either test were met.[22] The case itself focused primarily on the conduct test, as there was no showing of any effects on American investors based on the actions of National Australian Bank and its subsidiary.[23] The conduct test generally requires a demonstration that the application of United States law to the claims will serve a legitimate United States regulatory interest. Specifically, the conduct test's basis lies with preventing the United States from becoming an area that fosters fraud.[24]

The conduct test has been difficult to apply as multiple circuits have created competing standards regarding the quantity of local conduct necessary to create jurisdiction over predominantly foreign transactions. Currently, the primary standard for the conduct test, reaffirmed in *Morrison*, is whether there was conduct in the United States that directly caused the claimant's losses and whether such conduct was more than merely preparatory to securities fraud conducted elsewhere.[25] Due to competing standards, the Second Circuit requested the SEC's opinion as to the basis for transnational securities jurisdiction. The Second Circuit examined this SEC standard alongside the conduct and effects tests it had traditionally followed. Although these tests have been created to determine the reach of rule 10b-5's provision against fraud, courts have applied these tests inconsistently, which has caused significant confusion as to whether the SEC can regulate.[26] The Seventh Circuit explained the varying

20. *See Morrison*, 547 F.3d at 171 (explaining that the "determination of whether American activities 'directly' caused losses to foreigners depends on what and how much was done in the United States and on what and how much was done abroad").

21. *Id.*

22. *Id.* at 175.

23. *See id.* at 171 (stating that the appellants were relying solely on the conduct component of the test as there was no contention that National Australia Bank's conduct caused any loss to the United States securities market).

24. *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (explaining general United States policy in encouraging proper securities regulation as a model in hopes that other countries will follow the example and set up their own regulatory systems to fight fraudulent securities transactions, thus encouraging the global economy through reciprocal transnational securities regulation and cooperation); Buxbaum, *supra* note 7, at 56–59 (explaining that in addition to deterring fraud in the United States, the conduct test also helps to achieve efficient resolution of disputes that touch multiple jurisdictions, thereby fostering a more conducive environment for transnational securities and commerce).

25. *See Morrison*, 547 F.3d at 171 (examining whether the particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad); *see also In re* Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 169 (S.D.N.Y. 2003) (reaffirming the narrow application of the conduct test used by the Second Circuit).

26. *See* Buxbaum, *supra* note 7, at 18–20 (discussing that because Congress and the Supreme Court have not addressed the subject-matter jurisdiction of transnational securities

applications of the conduct test in *Kauthar SDN BHD v. Sternberg*,[27] noting that the predominant difference among the circuits was the degree to which the American-based conduct must be causally related to the fraud and the resultant harm to justify the application of American securities law.[28] The Seventh Circuit divided the different approaches into a restrictive approach, a broad approach, and a balance approach.[29] This confusion has spawned the development of the SEC's proposed rule, which was designed to embody the concepts from the conduct and effects tests while being broader and more consistent in application.[30]

1. Restrictive Approach

In *Zoelsch v. Arthur Andersen & Co.*,[31] the D.C. Circuit used the restrictive approach to interpret the Second Circuit's conduct test.[32] Under the restrictive approach, plaintiffs must prove that the conduct in the United States satisfies the prima facie elements of a securities fraud case under rule 10b-5.[33] A plaintiff must show that "the fraudulent statements or misrepresentations originate[d] in the United States, [were] made with scienter and in connection with the sale or purchase of securities, and . . . cause[d] the harm to those who claim to be defrauded, even though the actual reliance and damages may occur [outside the United States]."[34] The restrictive approach was the narrowest of the conduct tests because its

litigation, lower courts have inconsistently and unpredictably applied the conduct test and the effects test, leading to added confusion across multiple jurisdictions where some jurisdictions are very expansive in their application while others, i.e., the Second Circuit, apply the tests very narrowly to limit extraterritorial jurisdiction).

27. 149 F.3d 659 (7th Cir. 1998).

28. *See id.* at 665–66 (explaining that the conduct "test" and the effects "test" should really be termed "approaches" for flexibility since the different circuits have been applying the tests inconsistently). The Seventh Circuit then explained that the difficulty with a conduct "test" was that there had not been a sufficiently precise description of the conduct occurring within the United States that ought to be adequate to trigger American regulation of the transaction. *See id.*

29. *See id.*; *see also* Michael J. Calhoun, Comment, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 LOY. U. CHI. L.J. 679, 696–98 (1999) (listing various circuit approaches to the conduct test).

30. *See* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, Morrison v. Nat'l Austl. Bank, Ltd., 547 F.3d 167 (2d Cir. 2008) (No. 07-0583-cv) (discussing the inconsistent application of the conduct test and the effects test across circuits, and even within the same circuits, and arguing that the Second Circuit should adopt the SEC's proposed rule).

31. 824 F.2d 27, 30 (D.C. Cir. 1987).

32. *See id.* at 30–32; *see also* Calhoun, *supra* note 29, at 698 n.133 (stating that the U.S. Court of Appeals for the District of Columbia Circuit was the only circuit to use the restrictive analysis to construe the conduct approach).

33. *Zoelsch*, 824 F.2d at 30–31.

34. *Id.* at 31 (citing IIT v. Vencap, 519 F.2d 1001, 1018 (2d Cir. 1975)) (explaining that finding jurisdiction is limited to the perpetration of fraudulent acts themselves).

objective was to ensure the principles of international comity,[35] to avoid waste of judicial economy, and to prevent the creation of numerous cumbersome jurisdictional tests.[36] Ultimately, this approach implies the possibility that American courts should never assert jurisdiction over domestic conduct that causes losses to foreign investors.[37]

2. Broad Approach

The Third, Eighth, and Ninth Circuits have adopted the broad approach to the conduct test.[38] Under this approach, courts hold that if there is some conduct in the United States meant to perpetuate fraud, the conduct is sufficient to confer jurisdiction over the fraudulent transaction.[39] The conduct must be material and not mere preparation.[40] The Eighth Circuit suggested that courts must examine the transaction as a whole to determine whether the conduct is significant enough to allow a federal court to exercise jurisdiction because the essential elements of a scheme to defraud may slowly unfold over time and across national borders.[41] In *SEC v. Kasser*,[42] the Third Circuit found that if at least some activity pertaining to

35. *See* Calhoun, *supra* note 29, at 688 (defining *international comity* as "the practice of courtesy and good will that one nation shows for the national interests of another nation"). *International comity* is also defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895).

36. *See Zoelsch*, 824 F.2d at 32 ("When . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975))). *See generally* Calhoun, *supra* note 29, at 687–90, 698–700 (explaining the reasoning behind international comity and the presumption against extraterritoriality and how these principles have shaped the support for the restrictive approach).

37. *See Zoelsch*, 824 F.2d at 32 (explaining that if not for the Second Circuit's preeminence in the field of securities law and the court's desire to avoid a multiplicity of jurisdictional tests, the court may have been inclined to never assert jurisdiction over domestic conduct that causes losses to foreign investors because Congress did not think about conduct that contributes to losses abroad in enacting the Securities Exchange Act of 1934).

38. *See* Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666 (7th Cir. 1998) (explaining that the Third, Eighth, and Ninth Circuits "generally require some lesser quantum of conduct" (citing Robinson v. TCI/US W. Commc'ns, Inc., 117 F.3d 900, 906 (5th Cir. 1997))). *See generally* Calhoun, *supra* note 29, at 700–08 (discussing thoroughly the development and adoption of the broader approach by the Third, Eighth, and Ninth Circuits).

39. *See, e.g.*, SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977).

40. *See id.* at 114–15 (citing IIT v. Vencap, 519 F.2d 1001, 1018 (2d Cir. 1975)).

41. Travis v. Anthes Imperial Ltd., 473 F.2d 515, 523–24, 26 (8th Cir. 1973).

42. 548 F.2d 109 (3d Cir. 1977).

the advancement of a transnational fraud scheme occurs within the United States, then a United States federal court has jurisdiction to hear the case.[43]

3. The Balance Approach

The Second, Fifth, and Seventh Circuits follow the balance approach developed by the Second Circuit. Under the balance approach, a court must weigh the competing interests of market integrity and constitutional limits on judicial jurisdiction.[44] The balance approach requires that the fraudulent conduct in the United States amount to substantial acts relating to the fraud.[45] The domestic conduct must directly cause the plaintiff's loss to establish jurisdiction.[46] The Fifth Circuit found that when conduct in the United States is of material importance to the fraud or directly causes the fraud, then American courts could have jurisdiction to preside over a case of transnational securities fraud.[47] The Seventh Circuit requires that the fraudulent conduct occurring in the United States be a substantial part of the fraud and material to its success.[48]

II. EXAMINATION OF THE SEC'S PROPOSED RULE

A. SEC Proposed Rule from Morrison v. National Australia Bank, Ltd.

The SEC submitted an amicus curiae brief in response to the Second Circuit panel's request for clarification on the SEC's position regarding the extent to which jurisdiction should be extended for transnational securities cases.[49] In its brief, the SEC formulated a standard guarding against

43. *See id*. at 114 (holding that the court has jurisdiction over an American party even where the only victim of the alleged fraud was a foreign corporation).

44. *See* Calhoun, *supra* note 29, at 708–09 (suggesting that the balancing approach is a middle ground between the two extremes of the restrictive and broad approaches) (citing Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666 (7th Cir. 1998)).

45. Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045–46 (2d Cir. 1983) (citing IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975)).

46. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) (concluding that antifraud provisions of federal securities laws do not apply to losses from sales of securities to foreigners unless the acts within the United States directly caused such losses); *see also* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008) (explaining that the determination of whether American activities "directly" caused losses to foreigners is made by comparing "what and how much was done in the United States and . . . what and how much was done abroad").

47. *See* Robinson v. TCI/US W. Commc'ns, Inc., 117 F.3d 900, 903, 907 (5th Cir. 1997) (adding that when the events occurring in the United States are "key events," a United States court may properly exercise its jurisdiction).

48. Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); *see also supra* notes 11–15 and accompanying text.

49. Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 1–2.

transnational securities fraud, stating that "antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme."[50] The SEC has pointed out that the inconsistent application of the conduct test and the effects test is based significantly on the Second Circuit's slow deviation into the use of a "substantial portion" or "material" test, which moves away from the "very fine distinctions" required by the rigid conduct and effects tests.[51]

Under the "material" test, antifraud provisions of the securities law apply "when the conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success."[52] The SEC asserts that the materiality inquiry would ensure that the domestic conduct would be an integral, thus not an incidental or ancillary, link in the chain of events in the transnational fraud that led to the foreign investor's losses.[53] The materiality test was designed to filter out litigation based upon conduct far removed from the consummation of the fraud.[54]

If materiality is determined, the test then examines the totality of the circumstances to determine if there was a sufficient quantum of conduct that occurred in the United States to "reasonably warrant application of the antifraud provisions in light of the competing policy concerns."[55] Substantiality would be satisfied even where there is limited conduct within the United States if the conduct is "highly significant to the fraud."[56] The SEC believes this test would be a synthesis of the prior Second Circuit decisions discussing transnational securities jurisdiction as well as a

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50. *Id*. at 2.

51. *See id*. at 25–27 (observing the district courts' confused application of the controlling test).

52. *See Kauthar*, 149 F.3d at 667 (adopting the Second Circuit conduct test but incorporating "substantial portion" and "material" within the test); *see also* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 23 (discussing *Kauthar* and noting the Second Circuit's prior use of "material to the completion of the fraud" and "substantial acts in furtherance of the fraud" tests).

53. *See* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 23–24 (elaborating upon the benefits of clarity and uniformity provided by adoption of the materiality standard).

54. *See* Psimenos v. E. F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983) (avoiding the extension of transnational securities fraud jurisdiction to situations where the majority of the fraudulent activity occurred in foreign countries such as what happened in *Bersch*).

55. Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 24.

56. *Id*. (suggesting that "communicating the misrepresentations to foreign investors in or from the United States, masterminding the scheme here, or using the United States as a base to consummate schemes concocted abroad" are potential examples of conduct highly significant to the fraud (citations omitted)).

slightly more expansive test that would allow the court to have a broader ability to find jurisdiction for transnational securities fraud cases.[57]

The SEC's proposed test falls in between the broad approach of the Third, Eighth, and Ninth Circuits and the Second, Fifth, and Seventh Circuits' balance approach. The proposed test borrows the broad approach's overarching concept of requiring some fraudulent conduct within the United States that is not merely preparatory and narrows the test so that it conforms more to the preeminent balance approach test by requiring that the conduct be both material and substantial.[58] By mixing the broader approach with the balance approach, the test becomes an expansive test with well-defined elements necessary to establish jurisdiction.[59]

B. Brief Facts of Morrison *and the Second Circuit's Holding*

In *Morrison*, National Australia Bank (NAB), an Australian corporation, traded its ordinary shares exclusively on the London Stock Exchange, Tokyo stock exchange, and the New Zealand stock exchange.[60] NAB did, however, trade its American Depositary Receipts (ADRs) on the New York Stock Exchange.[61] In 1998, NAB acquired HomeSide Lending, an American mortgage service provider located in Florida.[62]

In the first year after the acquisition, HomeSide Lending earned A$313 million[63] in mortgage servicing fees.[64] In 1999, HomeSide Lending earned A$153 million, which contributed about 5.4% of NAB's profits.[65] In 2000, HomeSide Lending earned A$141 million, contributing 4.1% of NAB's profits.[66] In 2001, NAB disclosed that HomeSide Lending's valuation model of mortgage servicing rights (MSRs) had been significantly overstated and NAB would have to adjust[67] the MSRs by $450 million.[68]

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57. *See id*. at 14–19 (examining relevant Second Circuit case law to develop a test that "both addresses the concerns reflected in the Circuit's decisions and offers more uniformity of analysis and predictability of results").

58. *See supra* notes 39–49 and accompanying text (discussing the broad and balancing approaches to the conduct test).

59. *See* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 23 (explaining that the SEC's formulation builds upon the Second Circuit's balance approach but brings the approaches together in a unified standard that will provide greater guidance to lower courts in resolving future cases).

60. Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 168 (2d Cir. 2008).

61. *Id*.

62. *Id*. at 168–69.

63. A$ signifies Australian dollars.

64. *Morrison*, 547 F.3d at 169.

65. *Id*.

66. *Id.*

67. *See id*. at 169 (explaining that NAB's "write-down" was a recalculation of its mortgage servicing rights (MSRs), which ultimately restated the amount that the MSRs

By the end of that year, NAB had disclosed an additional $1.75 billion write down of HomeSide Lending's MSRs, resulting in a 13% decline in NAB's ordinary shares and an 11.5% decline in NAB's ADRs.[69] Due to the massive write-downs from the misstatements of HomeSide Lending's MSRs, NAB was required to file an amended 10-Q with the SEC restating its previously issued financial statements in light of its prior adjustments.[70]

The Second Circuit ultimately found that since the claimants did not assert that there was an effect on the U.S. market, the court would only apply the conduct test.[71] The court concluded that there was no subject-matter jurisdiction because although HomeSide Lending was acting in a fraudulent manner by sending misstated accounting information to NAB, ultimately the accounting data was to be filtered by NAB in Australia before being disseminated to its investors.[72] HomeSide Lending's operations were found to be merely preparatory to the fraud that was actually committed outside of the United States because HomeSide Lending did not file financial statements with the United States but sent all of its financial data to NAB to be checked.[73] Thus, NAB was the actual entity committing fraud, as it was their duty to discover the fraudulent misrepresentations of their subsidiaries.[74]

C. Application of SEC's Proposed Rule to Morrison

Under the SEC's proposed rule as applied to the facts in *Morrison*, the SEC recommended that there was a basis for jurisdiction.[75] The two main components of the SEC's proposed rule are materiality and substantiality.[76]

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were worth as they had been overvalued as compared to a more accurate market price that was available for its determination).

68. *Id.* (explaining that HomeSide Lending used faulty interest assumptions in calculating its MSRs resulting in NAB incurring a $450 million write-down).

69. *Id.*

70. *Id.* 10-Qs are quarterly filings required by the Securities Exchange Act of 1934 meant to accurately and fairly reflect the transactions and dispositions of the assets of the securities issuer. *See* 15 U.S.C. § 78m(a)(2)–(b)(2)(A) (2006) (requiring the submission of quarterly reports).

71. *Morrison*, 547 F.3d at 170–71, 176.

72. *Id.* at 176–77.

73. *Id.* at 176 (concluding that "actions taken and the actions not taken by NAB in Australia were . . . central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida").

74. *See id*. (explaining that due diligence should have been performed at NAB's Australian corporate headquarters because it had the responsibility of overseeing operations, including subsidiary operations, and was a publicly traded parent company whose executives bore ultimate responsibility).

75. *See* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 30–31 (arguing that "the defendants' domestic conduct was both material to the scheme's success and a substantial part of the alleged fraud").

76. *See supra* notes 50–60 and accompanying text (explaining the requirements of

An examination of the materiality of HomeSide Lending's actions shows that due to its misrepresentations NAB wrote down its profits by approximately $2.2 billion,[77] which resulted in a 13% drop in the price of NAB's ordinary shares.[78] Within the United States, the restatement of its prior earnings caused an 11.5% drop in the ADR price.[79] These price drops demonstrate that HomeSide Lending's omissions constituted a direct link in investor losses.[80]

Additionally, HomeSide Lending's activities in the United States were a substantial, if not pivotal, component of the fraudulent misrepresentations to the foreign investing public. The bulk of the initial misrepresentation occurred within the United States, with the ancillary collection and distribution of the financial information in Australia.[81] The actual location where the fraud and misrepresentation occurred would likely make it a substantial component in the commission of fraud.[82] Even if the information was ultimately disseminated from another country, an integral piece of the fraud was committed within U.S. territory.

III. THE COURTS SHOULD ADOPT THE SEC'S PROPOSED RULE

In June 2009, the *Morrison* investors filed a petition for certiorari with the Supreme Court.[83] The Solicitor General has been invited to submit a brief discussing the United States' position regarding the test for transnational securities jurisdiction.[84] If certiorari is granted, the Supreme Court will be able to examine the circuit splits in the application of the

materiality and substantiality).

77. *See Morrison*, 547 F.3d at 169 (recalling the $450 million and $1.75 billion write-downs in the values of HomeSide's MSRs).

78. *Id*.

79. *Id*.

80. *See* Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 30–31 (explaining that "[w]ithout this domestic misconduct, there would have been no fraudulent release of information in Australia nor a resulting inflation of NAB's stock" and that the scheme was allegedly conceived in Florida where HomeSide Lending "took numerous steps in the United States to perpetrate that scheme by manipulating the assumptions in HomeSide Lending's MSR valuation modes"). Through this manipulation, HomeSide Lending was able to fraudulently value its models and incorporate this information in its Australian parent's financial statements.

81. *Morrison*, 547 F.3d at 171.

82. *See* SEC v. Berger, 322 F.3d 187, 193–95 (2d Cir. 2003) (finding subject-matter jurisdiction under the conduct test where the defendant prepared false statements in the United States, sent those statements to an offshore administrator for calculation, and then disseminated the statements to domestic and foreign investors).

83. *See* Diamond, *supra* note 10.

84. *See* Morrison v. Nat'l Austl. Bank, Ltd., 129 S. Ct. 2762, 2762 (2009) (stating that the Supreme Court had invited the Solicitor General to submit a brief explaining the United States' position regarding jurisdictional issues involved in transnational securities fraud cases).

conduct test and the effects test and weigh the traditional tests with the proposed test set forth by the SEC. If the Supreme Court were to adopt the SEC's proposed rule, it would significantly deter foreign companies from conducting fraudulent activities within the United States. Second, adoption of the SEC's rule would embrace the "materiality" test, which would keep the test consistent with the rules set forth for securities fraud under rule 10b-5. Lastly, adoption of the SEC's proposed rule would solve the inconsistent application of the conduct and effects tests that has spawned cases with very similar factual patterns but yielded completely opposite results.

A. Deterring Fraudulent Activities Within the United States by Foreign Companies

Deterrence of fraudulent activity is a primary and major concern of extending subject-matter jurisdiction to transnational securities fraud cases. As a matter of policy, the Second Circuit's application of the conduct and effects tests and its subsequent holding that there was no basis for jurisdiction creates an incentive for foreign corporations to open subsidiaries within the United States to commit fraud but, at the same time, incorporate in a country that has more-relaxed standards for securities regulation.[85] The narrow reading of the conduct and effects tests would actually create an incentive to defraud within the United States, which undermines the creation of a rule allowing jurisdiction in the first place.[86]

The SEC's more expansive rule would bring more cases within its ability to regulate as its primary function is to effectuate the laws created by the Securities Act of 1933 and the Securities Exchange Acts of 1934. Without this expansive rule, more financial frauds will be perpetuated against investors around the world, and the United States may one day find itself with the same reputation as Antigua.[87] Lenient regulations are generally a double-edged sword in that less regulation may promote an influx of businesses, but those businesses may not be of the type that are

85. *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (discussing concerns that an overly strict requirement for subject-matter jurisdiction in transnational securities cases would create an incentive to set up fraud within the United States but may also induce reciprocal responses on the part of other nations who will not regulate against fraud within their own countries).

86. *Id.*

87. *See* Alison Fitzgerald & Michael Forsythe, *Stanford Coaxed $5 Billion as SEC Weighed Powers*, BLOOMBERG.COM, Apr. 16, 2009, http://www.bloomberg.com/apps/news?pid=20670001&sid=aVCxRFrq1FPU# (quoting Jonathan Winer, a State Department official, who stated that being in Antigua should be a "supremo indicator" of fraud and that "[t]here's no reason for somebody to be located there, except to take advantage of bank secrecy laws and lax regulation" much like Berger operating out of Bermuda and possibly Kasser operating out of Canada).

ultimately beneficial.

B. SEC's Materiality Test Maintains Consistency with the Elements for Securities Fraud Under Rule 10b-5

The SEC's use of the word *material* allows for a more consistent application of securities laws. Since domestic securities fraud cases also use "materiality" to determine whether there was fraud, this would provide more guidance for applying the rule. The extension of rule 10b-5's materiality element for fraud to determinations of transnational securities jurisdiction would be consistent with existing U.S. securities laws, which require a showing of materiality.[88] For example, the Supreme Court has found that when pleading a securities fraud case, the claimant must show that the defendant had misrepresented or omitted a "material" fact.[89]

There has been a significant amount of litigation in the domestic securities fraud field, many proceeding to the Supreme Court, where the term *material* has been fleshed out and its meaning clarified.[90] This is unlike the use of the conduct test where the term *preparatory* has not been fully explained, thus causing significant confusion in its application across circuits.[91] The use of materiality essentially embodies the overall purpose

88. Buxbaum, *supra* note 7, at 24–29.

89. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (explaining that rule 10b-5 forbids making any untrue statement of material fact or omission of any material fact necessary to ensure the statements made are not misleading). Although private securities litigation is not the main focus of this Comment, it does help to develop a clearer understanding of the differing issues that a private litigant faces as opposed to what the SEC faces when regulating the securities market.

90. *E.g.*, *id.*; *see also In re* Time Warner Inc. Sec. Litig., 9 F.3d 259, 267–68 (2d Cir. 1993) (explaining that undisclosed information is material if there is a substantial likelihood that "disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available"). Materiality is also used in insider trading cases where insider trading occurs when a corporate insider buys or sells his corporation's securities using material, nonpublic information. *See* United States v. O'Hagan, 521 U.S. 642, 651–52 (1997); *see generally* BLACK'S LAW DICTIONARY 450 (9th ed. 2009) (defining *material* as "having some logical connection with consequential facts").

91. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (explaining that the Third, Eighth, and Ninth Circuits appear to have relaxed the Second Circuit's test by interpreting "conduct that directly causes losses" to mean either domestic conduct that was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment, or the even more permissive Third Circuit test, where *conduct* is defined as significant activity within the United States designed to further a fraudulent scheme); Brief of the SEC as Amicus Curiae, in Response to the Court's Request, *supra* note 30, at 14–15 (explaining that the Second Circuit's conduct test has proven to be problematic to apply as difficulty arises from an apparent shift in emphasis from a test of strict causation to one of materiality of the domestic acts, which lends support for the SEC's proposed rule as there seems to be a difference between the stated conduct test and effects test and the ultimate application of the rules); *see also* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1812–13 (1992) (describing the Second

of expanded jurisdiction, as the United States policy for securities regulation is to prevent fraudulent activity within the country.[92]

C. Inconsistent Application of Conduct Test

The SEC's most recent case dealing with transnational securities fraud was *SEC v. Berger*,[93] where the Second Circuit found that under the conduct test there was a sufficient basis for subject-matter jurisdiction.[94] In *Berger*, the defendant was located within the United States but selling securities to foreigners.[95] The defendant's fund, the Manhattan Investment Fund, was located partially within the United States, but all financial statements were sent out to foreign investors from Bermuda.[96] The Second Circuit found that Berger's conduct was not preparatory because the creation and transmission of the false financial information, and approval of the resulting false financial statements later sent to investors, all took place "materially" within the United States.[97]

The fact patterns in *Berger* and *Morrison* are very similar as the fraud in both cases was committed within the United States but the fraudulent financial information was transmitted from the United States to a foreign country to be processed and distributed to investors.[98] In *Berger*, the Second Circuit applied the conduct test and found that although the information was being disseminated from a foreign location, the fraudulent acts originated in the United States—thus the court had subject-matter jurisdiction.[99] In *Morrison*, the court applied the conduct test to NAB and HomeSide Lending and found that since it was NAB's duty to review HomeSide Lending's financial statements under Australian securities laws before distributing the information, the fraudulent conduct in the United

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Circuit's greater impact on transnational securities fraud subject-matter jurisdiction due to its location within the financial center of the country, while other jurisdictions have not been in "lock-step" with the Second Circuit's application of the conduct test and the effects test).

92. *See Zoelsch*, 824 F.2d at 29–30 (providing a historical analysis of the Acts' purposes through an examination of the language of select provisions and congressional intent).

93. 322 F.3d 187 (2d Cir. 2003).

94. *Id*. at 193–94.

95. *Id*. at 188.

96. *Id*. at 189.

97. *See id*. at 189, 195 (explaining that the fraudulent scheme was masterminded and implemented by Berger in the United States even though the business had its headquarters in Bermuda, which was where Berger sent out his fraudulent financials).

98. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 169 (2d Cir. 2008) (explaining that statements were prepared in the United States and sent to Australia for distribution); *Berger*, 322 F.3d at 189 (explaining that statements were prepared in the United States and sent to Bermuda for distribution).

99. *Berger*, 322 F.3d at 194–95.

States was only "preparatory."[100] These two scenarios had similar fraudulent conduct yet yielded completely different results because the Second Circuit's balancing approach was ambiguous in its definition and application of the elements necessary to confer jurisdiction.[101]

The balance approach's fact-intensive inquiry cannot provide clear procedural standards for jurisdiction, and this ultimately increases the number of jurisdictional standards in transnational securities cases.[102] The Seventh Circuit's renaming of the conduct "test" to an "approach" is testament to the balance approach's inefficiency at establishing clear procedural standards for circuits to follow.[103] The D.C. Circuit went so far as to say that the balance approach, or any approach that is heavily fact dependent, should not be adopted because experience from extraterritorial application of antitrust laws has demonstrated that fact-dependent jurisdiction tests are difficult to apply and inherently unpredictable.[104] Under the balance approach, the merits of the case will be decided during the determination of jurisdiction because so many facts must be plead in order to establish that any particular case is eligible for jurisdiction in American courts.[105]

Besides the ambiguity of the balance approach, another possible reason for this variation in results derives from a major distinction between these two cases. *Morrison* involved a class action[106] while *Berger* involved SEC regulatory enforcement.[107] Securities class actions present an additional concern for the courts, especially with the added layer that the claimants are entirely foreign.[108] With class actions, additional concerns include whether a judgment by an American court will actually be enforceable in another country and also, if the defendants were to win, whether an

100. *Morrison*, 547 F.3d at 176.

101. *See supra* notes 44–48 and accompanying text (explaining the Second Circuit's balance approach).

102. *See* Calhoun, *supra* note 29, at 724 (arguing why the broader approach should be adopted over the balance approach).

103. *See supra* notes 27–30 and accompanying text (explaining the Seventh Circuit's rationale for choosing "approach" instead of "test").

104. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987).

105. *See id.* (stating that balancing tests "present powerful incentives for increased litigation on the jurisdictional issue itself").

106. *See* Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 169 (2d Cir. 2008) (describing the claimants as a class of foreign investors who purchased NAB's ordinary shares in foreign markets, thus excluding the claimants who had purchased the ADR shares on the New York Stock Exchange).

107. *See* SEC v. Berger, 322 F.3d 187, 189 (2d Cir. 2003) (explaining that the SEC brought this civil enforcement action against Berger alleging violations of various provisions of the federal securities laws).

108. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (raising concerns about United States courts exercising jurisdiction over extraterritorial schemes that defraud only a small number of United States investors).

American judgment would actually protect the defendants in another country.[109] This opposes the SEC's purpose of enforcing United States securities law.[110] According to Judge Friendly, there may be reason to treat SEC enforcement differently than a foreign securities class action because the SEC is a responsible government agency and will take into account in framing its enforcement actions any foreign policy concerns communicated by the Department of State.[111] Because this Comment addresses only SEC enforcement, a distinction should be made between governmental regulation of securities and private securities class actions, which would exist within the same realm as rule 10b-5 regulations that restrict private securities litigation as opposed to SEC enforcement.

CONCLUSION

The SEC should generally be governed by a distinct set of rules as opposed to private securities class actions. With *Morrison* awaiting a decision regarding certiorari from the Supreme Court, there should be discussion of how to encourage SEC enforcement in the current financial environment, which has shown that the SEC's regulatory powers are, if anything, too limited for effective regulation.[112] As the SEC is hamstrung in its powers, more financial fraud will occur within the borders of the United States while protected by the relaxed regulatory schemes of other countries that may not have the same incentive as the United States in protecting its citizens and reputation from harm.[113]

Ultimately, should the Supreme Court grant certiorari, there is a strong argument to be made that the SEC's proposed rule should be adopted for SEC enforcement if not for private litigation. By adopting the "material" and "substantial component" test, the SEC would be better able to effect the United States' policy against harboring those who wish to defraud. A quick examination of the current financial climate shows that a clear rule needs to be established for the SEC to follow as uncertainties about the extent of its regulatory power have led to a plethora of frauds that have

109. *Id.* at 1018 n.31.

110. 15 U.S.C. § 78b (2006).

111. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 33 n.3 (D.C. Cir. 1987) (stating that a court may feel more comfortable asserting jurisdiction if it knows that foreign policy concerns can be accommodated by the plaintiff and are not left entirely to the court's untutored evaluation).

112. *See* Fitzgerald & Forsythe, *supra* note 87 (explaining how the SEC's time spent weighing whether it had the power to regulate mutual funds that were depositing in offshore accounts led to a four-year period where the Stanford Group was unregulated even though signs of fraudulent activity had emerged which perpetuated into the SEC, also missing the Bernard Madoff Ponzi scheme as regulatory schemes have been unclear for the SEC).

113. *See id.* (stating that the SEC currently has authority to regulate U.S. activities but has no jurisdiction over offshore banks).

only recently surfaced.[114] A clearer rule for the SEC may have allowed it to regulate HomeSide Lending earlier, which could have potentially prevented the 13% price fall and the avoidance of a $2 billion write-down.

114. *See id*. (discussing the SEC's failure to prevent recent frauds perpetrated by Bernard Madoff and Allan Stanford). With the increasing number of massive Ponzi schemes being uncovered, it would seem that increased regulation of hedge funds is underway. Since the Ponzi schemes currently in the media are not truly within the discussion of transnational securities fraud, the implications have not been fully examined. A possible result of the increased regulation of Ponzi schemes in the United States may lead to increased transnational securities regulation as Ponzi schemers will move out of the United States into countries with relaxed regulations but may continue to work out of the United States.

RECENT DEVELOPMENTS

REGULATORY REVIEW IN THE OBAMA ADMINISTRATION: COST–BENEFIT ANALYSIS FOR EVERYONE

HELEN G. BOUTROUS*

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INTRODUCTION

With the election of President Barack Obama, Office of Management and Budget (OMB) watchers have anxiously awaited his take on the regulatory review process and the controversial tool of cost–benefit analysis. A glimpse into President Obama's mind-set came quickly. Ten days into the new Administration, President Obama tasked his Director of OMB with producing, within 100 days, recommendations for a new executive order on regulatory review.[1] The President asked for suggestions regarding some of the most contentious aspects of regulatory review during the George W. Bush Administration—the relationship of the Office of

* Associate Professor, Department of History and Political Science, Mount St. Mary's College. Ph.D., Georgetown University; J.D., University of San Diego; B.A. University of California, Los Angeles. The author previously served as a regulatory lawyer for several federal agencies.

1. Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5,977 (Feb. 3, 2009).

Information and Regulatory Affairs (OIRA) with executive agencies and the role of cost–benefit analysis. That directive, combined with the President's request for suggestions regarding "the role of distributional considerations, fairness, and concern for the interests of future generations,"[2] led some industry representatives to fear the worst—that cost–benefit analysis would end and that the era of bureaucratic dominance, at least partially thwarted by President Reagan's institution of mandatory regulatory review and cost–benefit analysis, would return. Within thirty days of the President's memorandum, OMB, citing the "unusually high level of public interest" and "the evident importance and fundamental nature of the relevant issues" invited "public comments on the principles and procedures governing regulatory review."[3] However, now a year into the new Administration, no new executive order on regulatory review has been issued.

The next clue as to the Administration's regulatory review philosophy came with the nomination of Cass Sunstein to head OIRA.[4] Recognized as a preeminent scholar on bureaucracy and the law,[5] Sunstein has long favored presidential regulatory review and cost–benefit analysis of regulations.[6] It was now some environmentalists' and legal scholars' turn to fear the worst—that cost–benefit analysis is here to stay and that pro-industry politics will continue to dominate bureaucracy.[7] The Senate Homeland Security and Governmental Affairs Committee voted to affirm Sunstein's nomination on May 20, 2009.[8] However, two Senators, alarmed by Sunstein's support of "animal rights," placed holds on his nomination.[9]

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2. *Id.*

3. Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009).

4. Press Release, Office of the Press Sec'y, White House, President Obama Announces Another Key OMB Post (Apr. 20, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Another-Key-OMB-Post.

5. Cass Sunstein was the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence and the Felix Frankfurter Professor of Law at Harvard Law School. He has authored over thirty books and numerous articles on bureaucracy and cost–benefit analysis. *Id.*

6. *See, e.g.*, CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 128–30 (1997) (detailing the pros and cons of cost–benefit analysis and urging greater use of cost–benefit analysis).

7. *See* Greg Burns, *Left Frets over Regulatory Czar*, CHI. TRIB., Jan. 23, 2009, at 23 (discussing Sunstein's statements regarding deregulation and cost–benefit analysis and noting that "[t]o some, Obama's BFF [best friend forever] looks like a conservative in progressive garb").

8. 155 CONG. REC. S5699 (daily ed. May 20, 2009).

9. Senator Saxby Chambliss (R-Ga.) placed the first hold on the Sunstein nomination. *See* Alexander Bolton, *Chambliss Blocks Regulatory Pick over Animal Lawsuits*, HILL, June 28, 2009, http://thehill.com/leading-the-news/chambliss-blocks-regulatory-nominee-over-animal-lawsuits-2009-06-28.html. Senator Chambliss removed the hold, but a second hold was placed on the nomination by Senator John Cornyn (R-Tex.) on July 22, 2009.

Senate Majority Leader Harry Reid filed for cloture,[10] which was successfully invoked by a 63–35 vote.[11] Sunstein's nomination was confirmed by a vote of 57–40 on September 10, 2009.[12]

Another interesting development regarding the continued survival of cost–benefit analysis came in the *Entergy Corp. v. Riverkeeper, Inc.* decision on April 1, 2009,[13] when the Supreme Court overturned a Second Circuit Court of Appeals decision,[14] which held that § 326(b) of the Clean Water Act[15] did not allow the Environmental Protection Agency (EPA) to base performance standards on cost–benefit analysis.[16] That opinion was written by Obama Supreme Court nominee and now Associate Justice Sonia Sotomayor.[17] While not receiving the attention of some of her other opinions during her nomination proceedings, Justice Sotomayor's decision in *Riverkeeper* should be examined to provide regulatory practitioners insight as to her views on the authority of regulatory agencies to base decisions on cost–benefit analysis.

This Recent Development reports on the likely future of regulatory review and cost–benefit analysis under the Obama Administration. Section I describes the evolution of the presidential regulatory review process.

See Kelley Beaucar Vlahos, *Obama Regulatory Czar's Confirmation Held Up by Hunting Rights Proponent*, FOXNEWS.COM, July 22, 2009, http://www.foxnews.com/politics/2009/07/21/obama-regulatory-czars-confirmation-held-hunting-rights-proponent/. Sunstein has mused in his writings about the possibility of humans representing animals in court to assert rights under state animal-protection statutes. *See* Cass R. Sunstein, *Can Animals Sue?*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 252 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). At his confirmation hearing, Sunstein assured Senator Susan Collins (R-Me.) that as Administrator of the Office of Information and Regulatory Affairs (OIRA), he would have no role to play in such matters. *See* Video: Hearing to Consider the Nomination of Cass R. Sunstein to Be Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget Before the S. Comm. on Homeland Security and Governmental Affairs (May 12, 2009), http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=bd4574c9-9ca1-4f5c-9f0e-3618ee203a20 [hereinafter Hearing Video].

10. 155 CONG. REC. S9095–96 (daily ed. Aug. 7, 2009); Press Release, Senate Comm. on Homeland Sec. and Governmental Affairs, Lieberman, Collins Hail Senate Confirmation of Four Nominees (Aug. 7, 2009), http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=f664841c-5056-8059-76da-b7133b9a633b. Under the cloture (closure of debate) rule, a nomination or other matter can be brought to a vote, despite a hold or filibuster, if sixty members vote in favor of cloture. *See* ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 182 (12th ed. 2010).

11. 155 CONG. REC. S9172–73 (daily ed. Sept. 9, 2009).

12. 155 CONG. REC. S9233 (daily ed. Sept. 10, 2009).

13. 129 S. Ct. 1498 (2009).

14. Riverkeeper, Inc. v. EPA, 475 F.3d 83, 98–99 (2d Cir. 2007).

15. 33 U.S.C. § 1326(b) (2006).

16. *See Entergy Corp.*, 129 S. Ct. at 1510 (holding that the EPA impermissibly relied on cost–benefit analysis in setting national performance review standards).

17. *See* Charlie Savage, *Sotomayor, After a Pair of Oaths, Officially Joins the Nation's Highest Court*, N.Y. TIMES, Aug. 9, 2009, at A12.

Section II examines the efforts to construct a new Obama regulatory review executive order, including the views of the man President Obama has chosen to be his regulatory czar and those of the woman he has chosen to be his first Supreme Court nominee. In light of these indicators, this Recent Development concludes that presidential regulatory review and cost–benefit analysis will continue to play a major role in the Obama Administration, as it has under every president since Ronald Reagan. However, detractors of cost–benefit analysis need not presume that this practice will inevitably favor industry or that environmental and humanitarian concerns will not be sufficiently considered. Nor should industry representatives presume that some reforms to the current procedures will inevitably lead to runaway regulatory costs and irrational bureaucratic decisionmaking. The record suggests that the Obama Administration will take a pragmatic approach to regulation that will allow for political accountability and be reflective of the true value of regulation to society—in other words, cost–benefit analysis for everyone.[18]

I. THE EVOLUTION OF PRESIDENTIAL REGULATORY REVIEW

For much of the history of federal regulatory agencies, it was believed that regulation should be insulated from political influence.[19] Scholars and politicians alike argued that agency experts should be allowed to base decisions on technical, objective data, unimpeded by "irrelevant" political considerations.[20] But this "technocratic theory" of regulation has been described as "gravely flawed."[21] The decisions that agency personnel face every day are inherently political. Therefore, bureaucrats, who have no electoral accountability but can be motivated by promotions, turf building, and maintenance of the status quo, are making decisions that rightfully belong to political representatives.[22] Political accountability, under this

18. *See* Cass R. Sunstein, *Is Cost–Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299, 299–300 (2001) (noting that recent presidential administrations have moved toward making cost–benefit analysis the basis for all decisions).

19. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS, 235–39 (John E. Chubb & Paul Peterson eds., 1985) (discussing arguments against presidential regulatory review based on the perceived value of bureaucratic "neutral competence"); *see also* Richard W. Waterman, Amelia Rouse & Robert Wright, *The Venues of Influence: A New Theory of Political Control of the Bureaucracy*, 8 J. PUB. ADMIN. RES. & THEORY 13, 14 (1998) (noting the persistence of the neutral competence theory through the 1970s); Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1060–62 (1956) (providing a history of the role of neutral competence in public administration theory).

20. *See* Lloyd N. Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830, 833–34 (1982) (noting the presumption that administrative policymaking is "a wholly empirical process").

21. *Id*. at 835.

22. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND

view, must be brought into the process.

But introducing political accountability into the bureaucratic process introduces immediate conflict between the President and Congress as to the appropriate source of that political accountability.[23] What to the White House may seem like reasonable efforts to centralize, coordinate, and oversee agency action may be interpreted by Congress as inappropriate attempts to thwart statutorily mandated programs.

Presidents Nixon, Ford, and Carter all made some early attempts at controlling bureaucracy.[24] But a sea change occurred in 1981, when President Ronald Reagan issued Executive Order 12,291[25] and introduced the first mandatory review procedure for agency rulemaking. That executive order required all executive agencies to submit regulations to OIRA for review. The order required OIRA to review those regulations under a cost–benefit analysis, determine the extent to which the regulations accomplished the Administration's goals, and it prohibited agencies from publishing regulations without OIRA's approval.[26] These requirements set off policy and constitutional debates on the appropriate roles and constitutional powers of Congress and the President in the rulemaking process, a political firestorm over the value and impact of regulation on the public and industry, and accusations of procedural subterfuge.[27]

Despite this initial controversy, every president since Reagan has

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WHY THEY DO IT, at ix–x (1989) (stating that bureaucrats are eclipsing the power of elected officers and making decisions that maximize their "utility").

23. *See* Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J., 451, 451–52 (1979) (discussing the appropriate role of the President in regulatory decisionmaking by federal agencies).

24. President Nixon instituted a procedure under which OMB, with White House staff in attendance, would preside over meetings to resolve disagreements about regulations issued by the then newly established Environmental Protection Agency (EPA). *Id*. at 464–65. Critics referred to Nixon's OMB as "The Office of Meddling and Bumbling," a reference to OMB's growing tendency to interfere "in the internal management processes of departments and agencies." LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY, 1921–1979, at ix (1979). President Ford issued executive orders requiring "inflation impact analysis" for specified agencies and rulemakings. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 62 (1994). President Carter's Executive Order 12,044, entitled "Improving Government Regulations," established a regulatory council to coordinate the rulemaking activities of federal agencies. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

25. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

26. *Id*.

27. *See* Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062–63 (1986) (discussing the friction between the President and Congress due to the new regulatory review process); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1076, 1083 (1986) (exploring criticisms of the new review process and noting that the new executive order did not solve the ongoing tension between agency review requirements and presidential accountability).

adopted mandatory centralized review procedures. President George H.W. Bush continued the practice under Executive Order 12,291 and attempted to push the centralized review process further by setting up a council that would assist OIRA in determining ways in which rules could be crafted to better suit the preferences of the Administration.[28] President Clinton adopted his own centralized regulatory review process, issuing Executive Order 12,866.[29] While he instituted some changes to address criticisms faced by Presidents Reagan and Bush regarding OIRA's secrecy, President Clinton maintained the centralized review process and its requirement that agencies obtain OIRA approval before publication of rules.[30] President George W. Bush continued to operate under Clinton's executive order. During that Administration, OIRA was harshly criticized by public interest organizations, particularly environmental groups, who accused President Bush of using the review process to benefit industry and undermine congressional mandates.[31]

The history of regulatory review and cost–benefit analysis reveals that presidents view the federal bureaucracy as an entity over which they must gain a measure of control if they are to achieve the goals that they hope will help to ensure the policies and legacies they desire. What started with sporadic attempts to control agency policy grew into a systematic procedural mandate by President Reagan, an accepted institutional role for the presidency by the Clinton era, and a renewed battleground for influence during the George W. Bush Administration. With this legacy, we look to the future of regulatory review and cost–benefit analysis in the Obama Administration.

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28. Robert J. Duffy, *Divided Government and Institutional Combat: The Case of the Quayle Council on Competitiveness*, 28 POLITY 379, 383–84 (1996) (stating that the first Bush Administration undertook "the most ambitious effort to consolidate regulatory authority in the White House").

29. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

30. *See* SHELLEY LYNNE TOMKIN, INSIDE OMB: POLITICS AND PROCESS IN THE PRESIDENT'S BUDGET OFFICE 256–57 (1998) (detailing how Executive Order 12,866 "retained centralized regulatory review responsibilities").

31. *See, e.g.*, ROBERT PERKS & GREGORY WETSTONE, NATURAL RES. DEF. COUNCIL, REWRITING THE RULES, YEAR-END REPORT 2002: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT, at v (2003) ("John Graham [OIRA Director] has routinely rejected agency actions that are fully consistent with environmental laws but do not adequately reflect his industry orientation and conservative ideology."); *see also* Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1; Dana Milbank, *Bush Averts Showdown with Congress: Senate Committee to Be Given Access to Documents on Environmental Policy*, WASH. POST, July 28, 2001, at A4.

II. THE OBAMA ADMINISTRATION AND REGULATORY REVIEW

A. President Obama's New Executive Order

President Obama's memorandum directing OMB to provide recommendations for a new executive order on regulatory review seemed to take into account every major criticism leveled against OIRA and the use of cost–benefit analysis in the last twenty-eight years. The President directed OMB to offer suggestions regarding "the relationship between OIRA and the agencies," and to

> provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost–benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.[32]

President Obama further directed OMB to act "in consultation with representatives of regulatory agencies, as appropriate, to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review."[33]

Public comment was not sought until twenty-seven days later, on February 26, 2009.[34] The comments and attendance logs of meetings with representatives of government agencies and private groups are posted at the RegInfo.gov website.[35] The early postings reveal that the Administration sought out the views of certain individuals before inviting public comment.[36] A number of the comments "thank" an OMB staff member for contacting them, via e-mail, to seek their views.[37] Such private solicitation

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32. Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5,977 (Feb. 3, 2009).

33. *Id.*

34. *See* Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009) (soliciting comments to assist OMB in improving "the process and principles governing regulation").

35. RegInfo.gov, Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp (last visited Jan. 20, 2010). RegInfo.gov is a website produced by the OMB and General Services Administration (GSA).

36. *See, e.g.*, Letter from Eric A. Posner, Kirkland & Ellis Professor of Law, Univ. of Chicago, to Jessica Hertz, Office of Mgmt. & Budget (Feb. 10, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Eric_Posner.pdf [hereinafter Posner Letter]. The letter indicates that Hertz invited Posner's views via e-mail on February 5, 2009.

37. *See, e.g.*, Letter from Peter Strauss to Jessica Hertz, Office of Mgmt. & Budget (posted Mar. 4, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Strauss_Comments.pdf; Letter from Susan Rose-Ackerman, Henry R. Luce Professor of Jurisprudence, Yale Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Mar. 5, 2009),

of views might be troubling if this were an agency rulemaking, which would be governed by ex parte rules forbidding some private contacts.[38] However, as OMB noted in its request for public comment, "Executive Orders are not subject to notice and comment procedures, and as a general rule, public comment is not formally sought before they are issued."[39] It appears that the Administration sought advice from leading scholars but did not seek comments from representatives of regulated industries.[40]

There are 183 postings at the RegInfo.gov site regarding a new executive order on regulatory review.[41] The postings do not include comments from the heads of federal executive departments and agencies to whom the initial memorandum was addressed.[42] Nine submissions are from academic sources who were personally invited to offer suggestions on the new executive order.[43] Eight postings indicate meetings between OMB and various groups and provide the names of attendees at these meetings.[44] While the groups represent a diverse array of interests, these diverse groups never actually met together in person.[45] For example, representatives of

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http://www.reginfo.gov/public/jsp/EO/fedRegReview/susan_rose-ackerman.pdf.

38. *See* Administrative Procedure Act, 5 U.S.C. § 557 (2006) (limiting the involvement of interested parties outside an agency in the rulemaking process)*;* Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932, 941–42 (1980) (noting that administrative rulemaking is superior to judicial policymaking because agencies are better equipped to develop facts relevant to lawmaking).

39. Federal Regulatory Review, 74 Fed. Reg. 8,819 (Feb. 26, 2009).

40. OMB Watch, a well-known watchdog organization that advocates transparency and disfavors presidential influence over agency action, suggested that OMB seek public comment. OMB Watch seemingly was writing in response to the President's published memorandum and not at the special invitation of the Administration. *See* Responding to President Obama's Call for Recommendations to Improve Regulatory Review (Feb. 18, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_Watch.pdf. The Center for Progressive Reform (CPR) submitted comments stating that the Center was "aware that you [OMB] have invited some people with expertise in the area to give you comments on the not-yet-drafted Order." Letter from Rena Steinzor, President, Ctr. for Progressive Reform, to Peter Orszag, Dir., Office of Mgmt. & Budget (Feb. 20, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/PreliminaryCommentsonNewEO-Orszag.pdf.

41. *See* RegInfo.gov, *supra* note 35.

42. Two postings indicate meetings with officials from federal agencies: the EPA and the Small Business Administration. *See id.*

43. Three additional comment letters from academics were dated before the public was invited to comment; however, they do not indicate that they were personally invited to comment. Additional comment letters from academics are dated after the opening of the public comment period. *See id.*

44. These postings do not provide any information as to the topics discussed or the views of those in attendance. *See id.*

45. Groups meeting with OMB include (1) the "Public Interest Group Committee," which met with OMB twice and included professors such as David Vladeck of Georgetown University and David Michaels of George Washington University, environmental groups such as National Resources Defense Council and Earthjustice, and watchdog organizations such as OMB Watch and Public Citizen; (2) the "Business Group," which included the Chamber of Commerce and National Association of Manufacturers; (3) the National League

business interests met with OMB separately from representatives of public interest groups, and both met separately from labor organization representatives. As such, no debate of competing ideas and interests would have been included at the meetings.[46] Predictably, the comments from business interests emphasized the extent to which it is difficult to capture the true costs of regulation,[47] while the environmental and other public interest groups emphasized the difficulty in quantifying benefits.[48] Overall, commenters from across the spectrum emphasized the importance of transparency.[49]

Those indicating that they had been invited to comment are well-published academics from top-tier institutions. Several championed cost–benefit analysis and centralized review.[50] For example, one of these scholars, Eric A. Posner, noted that cost–benefit analysis "helps ensure that the executive branch devotes its scarce resources to correcting the worst problems at least cost."[51] The rest of those indicating that they had been invited to comment had harsh critiques of the application of centralized review and cost–benefit analysis by previous administrations. However,

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of Cities; (4) the "Labor Group," which included the AFL–CIO and United Auto Workers; (5) "Environmental Groups," which included the Environmental Defense Fund and Sierra Club; (6) the Small Business Administration; and (7) the EPA. *See id.*

46. Other sources of written comments include state officials, members of Congress, and private citizens. *See id.*

47. *See, e.g.*, Letter from William L. Kovacs, Vice President, Env't, Tech. & Regulatory Affairs, Chamber of Commerce of the United States of America, to Mabel Echols, Office of Mgmt. & Budget (Mar. 16, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Chamber_of_Commerce_of_the_US_comments.pdf (noting that federal agencies calculate costs and benefits through use of *ex ante* studies which are "an inadequate form of economic modeling because they do not present the public with a reasonable and true account of the costs of regulatory impacts").

48. *See, e.g.*, Letter from Wesley Warren, Dir. of Programs, Natural Res. Def. Council, to Kevin Neyland, Acting Adm'r, Office of Info. & Regulatory Affairs (March 30, 2009) ("One of the most troubling aspects of cost–benefit analysis is not simply its tendency to misstate costs and benefits, but to systematically overstate the costs while understating the benefits.").

49. *See, e.g.*, Letter from Kirsten Stade, Program Manager, Integrity in Sci., and Ilene Ringel Heller, Senior Staff Attorney, Ctr. for Sci. in the Pub. Interest, to Mabel Echols, Records Mgmt. Ctr., Office of Info. & Regulatory Affairs (Mar. 19, 2009) ("[W]e believe the transparency provisions already contained in E.O. 12866 are of the utmost importance and should be strengthened."); Letter from Cindy L. Squires, Chief Counsel for Pub. Affairs and Dir. of Regulatory Affairs, Nat'l Marine Mfrs. Ass'n, to Peter Orszag, Dir., Office of Mgmt. & Budget (Mar. 16, 2009) ("Voluntary consensus standards that are developed and adopted through an open and transparent process can provide enormous efficiencies for agencies, industry and society and should be encouraged.").

50. The most supportive comments of cost–benefit analysis and strong centralized authority for OIRA were received separately from Eric Posner and Adrian Vermeule. *See* Posner Letter, *supra* note 36; Letter from Adrian Vermeule, John H. Watson, Jr. Professor of Law, Harvard Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Mar. 5, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/adrian_vermeule.pdf.

51. *See* Posner Letter, *supra* note 36.

none of those invited to comment called for abandoning the process, but rather they suggested reforms.[52] For example, while one scholar asserted that cost–benefit analysis and centralized review has, in practice, resulted in an antiregulatory bias and has provided "opportunities for undue presidential influence at the expense of agency expertise; and fail[ed] to take adequate account of the benefits of regulation or distributional concerns,"[53] she also called centralized review an "important mechanism to ensure presidential awareness and oversight of agency actions."[54] Some suggested reforms included requiring agencies to "quantify distributive impacts,"[55] achieving better coordination among agencies,[56] and using "prompt letters" to encourage agencies to move more quickly.[57]

The fact that the Obama Administration turned to academics, not industry, in seeking advice on regulatory review contrasts sharply with President George W. Bush's Administration, which was much more likely to invite the views of industry leaders regarding regulatory decisions.[58] The academics chosen also provide an interesting insight. Each of these professors is well published in the area of bureaucracy and their opinions are well-known among regulatory scholars. No professor advocates an

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52. Dr. Frank Ackerman is a scholar at the Stockholm Environment Institute-US Center at Tufts University and is strongly opposed to cost–benefit analysis. He submitted a comment that advocated ending the process and adopting his preferred alternatives, but he did not indicate whether he had been invited to comment. *See* Frank Ackerman, Stockholm Env't Inst.-US Ctr., Tufts Univ., Comments on the Role of Cost–Benefit Analysis in Regulatory Review (Feb. 24, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Dr_Frank_Ackerman.pdf (arguing that conventional cost–benefit analysis "errs in its final stage of converting non-monetary information into pseudo-prices" and offering two "better" methods for regulatory evaluation); *see also* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 35, 40 (2004) (noting that there are built-in biases to cost–benefit analysis and that its methodology "disfavors protection of goods that, like health and environmental protection, are priceless").

53. *See* Letter from Gillian Metzger, Professor of Law, Columbia Univ. Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Feb. 10, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/OMB_Metzger.pdf.

54. *Id.*

55. Letter from Matthew D. Adler, Leon Meltzer Professor, Univ. of Pa. Law Sch. & James S. Carpentier, Visiting Professor, Columbia Univ. Law Sch., to Jessica Hertz, Office of Mgmt. & Budget (Feb. 16, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Adler12866suggestions.pdf.

56. Letter from Jacob E. Gersen, Assistant Professor of Law, Univ. of Chi. Law Sch., & Anne Joseph O'Connell, Univ. of Cal. Berkley Sch. of Law, to Jessica Hertz, Office of Mgmt. & Budget (posted Feb. 27, 2009), http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf.

57. *Id.*

58. *See, e.g.*, Michael Abramowitz & Steven Mufson, *Papers Detail Industry's Role in Cheney's Energy Report*, WASH. POST, July 18, 2007, at A1 (describing former Vice President Cheney's efforts to meet with various interest groups, "most of them from energy-producing industries" as part of a task force to draft new national energy policy under the Bush Administration in 2001).

extreme position—either that cost–benefit analysis should be the determinative factor alone, or at the other end of the spectrum, that cost–benefit analysis be abandoned. The choice of advisors indicates that the Obama Administration will favor centralized regulatory review and a "mend it, don't end it" approach to cost–benefit analysis—a view that is shared by the Obama nominee to lead regulatory review, Cass Sunstein.[59]

B. President Obama's Nominee to Lead Regulatory Review

Certainly the most direct evidence of President Obama's plans for regulatory review is his appointment of Cass Sunstein to head OIRA. Sunstein has consistently favored presidential regulatory review and cost–benefit analysis of regulations. As a young lawyer,[60] Sunstein was in the Office of Legal Counsel during the drafting of the original mandate for presidential regulatory review, President Reagan's Executive Order 12,291.[61] Having served as a professor at both the University of Chicago Law School and Harvard Law School, Professor Sunstein's views are well documented in his many books and articles on bureaucracy and law.[62] He has staunchly defended cost–benefit analysis and urged rationality in regulation. Business interests initially called Sunstein "the most you can hope for" in a Democratic appointee to head OIRA.[63] All of this caused concern among some liberal interest groups and scholars.[64]

To the Senate Homeland Security and Governmental Affairs Committee, Professor Sunstein characterized himself as a pragmatist who would not be governed by ideological motives in making decisions regarding regulatory review.[65] His scholarship supports this assessment. As explained by

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59. *See* Cass R. Sunstein, *Your Money or Your Life*, NEW REPUBLIC, Mar. 15, 2004, at 29, *available at* http://www.tnr.com/story (reviewing and critiquing Frank Ackerman and Lisa Heinzerling's view that cost–benefit analysis should be abandoned).

60. Curriculum Vitae, Cass R. Sunstein, http://home.uchicago.edu/~csunstei/cv.html (last visited Jan. 20, 2010).

61. Cass Sunstein was an Attorney–Advisor in the Office of Legal Counsel, U.S. Department of Justice, in 1980–1981 when the Office drafted Executive Order 12,291 for President Reagan's signature on February 17, 1981. *See id.*; *see also* Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

62. *See, e.g.*, SUNSTEIN, *supra* note 6.

63. John D. McKinnon, *Businesses Encouraged by Nominee for Regulatory Czar*, WALL ST. J., May 13, 2009, at A4, *available at* http://online.wsj.com/article/SB124216908634512665.html (quoting William Kovacs, Vice President for Regulatory Affairs, U.S. Chamber of Commerce).

64. *See* Burns, *supra* note 7 ("Leaders of the orthodox left had been hoping for an appointee who would roll back [the] Bush legacy with a vengeance. Instead, they got Sunstein . . . .").

65. *See generally* U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, Pre-hearing Questionnaire for the Nomination of Cass R. Sunstein to Be Administrator of the Office of Information and Regulatory Affairs,

Professor Sunstein, critics of cost–benefit analysis "do not sufficiently appreciate the risk that expensive regulation will actually hurt real people"[66] and that "[t]he costs of regulation are often borne not only by 'employers,' but also by consumers, whose prices increase, and by workers, who might find fewer and less remunerative jobs."[67] Sunstein feels that "[s]ince this is so, it is especially important to learn how much regulation costs and how much we're getting for it."[68] These are hardly words of war against industry. At the same time, Sunstein recognizes that regulators have not always been sufficiently reflective regarding the benefits of regulation, particularly in the area of human health benefits, and that regulators "should take account of all the potential benefits."[69] This pragmatic approach serves to reduce the burdens of inefficient regulations, while ensuring that justified regulations go forward.

Sunstein recognizes that cost–benefit analysis is not without its flaws. However, he has vigorously defended cost–benefit analysis against the leading alternatives: pollution prevention, the precautionary principle, and sustainable development.[70]

Sunstein dismisses "pollution prevention" in the absence of cost–benefit analysis as idealistic. The theory of pollution prevention seeks to prevent pollution from ever occurring in the first place. But Sunstein feels that the costs of this approach "dwarf the benefits."[71] To adhere to a true pollution-prevention policy, the government would need to eliminate production of cars, coal, and most industrial activity. As Sunstein explains, the pollution-prevention model leads to "ludicrous" results.[72]

He similarly dismisses "the precautionary principle" as "paralyzing."[73] Under this theory, regulators would seek to ensure that "impacts are reduced or prevented even before the threshold of risks is reached."[74] This

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http://www.ombwatch.org/files/regs/PDFs/Sunstein_questions.pdf [hereinafter Pre-hearing Questionnaire]. *See also* Press Release, OMB Watch, OMB Watch Statement on Cass Sunstein Confirmation Hearing (May 13, 2009), http://www.ombwatch.org/print/9989 (emphasizing that in his written responses and at his confirmation hearing, Sunstein promised to follow statutory direction and presidential policies and noted "the importance of the law in guiding both agencies' decisions and OIRA's review").

66. *See* Sunstein, *supra* note 59, at 30.

67. *Id.*

68. *Id*.

69. *Id*. at 29.

70. *See* Sunstein, *supra* note 18, at 304 (asserting that the argument for cost–benefit analysis is "strengthened by comparing it" against the alternatives).

71. *See id.* ("Sometimes pollution prevention might even cause health problems, if it leads to unsafe substitutes.").

72. *Id.*

73. *Id*. at 305 (arguing that the principle stands as an obstacle to regulation and nonregulation and to everything in between).

74. *See* Lothar Gündling, *The Status in International Law of the Principle of*

principle "requires action even if risks are not yet certain but only probable, or, even less, not excluded."[75] As Sunstein notes, this alternative would prevent regulation and nonregulation, as both action and inaction could result in some risks.[76]

As for "sustainable development," Sunstein explains that while this alternative champions a worthy goal, its inherent ambiguity provides little guidance in making regulatory choices. Sustainable development occurs "on a scale that does not exceed the carrying capacity of the biosphere."[77] Sunstein applauds the extent to which proponents of sustainable development bring attention to "the future consequences of current actions."[78] This goal works in the easy cases—if an activity will knowingly end the possibility of decent life on the planet, then that action should not be taken. But regulators face more complicated and nuanced decisions. If a regulatory action would increase sustainability but cause suffering in terms of costs, he would question the action's desirability.[79] Sustainability, Sunstein explains, is not at odds with cost–benefit analysis.[80] For Sunstein, cost–benefit analysis provides meaningful guidance to regulators who must decide how much should be done today to achieve the long-term goal of sustainability.[81]

Sunstein has addressed the criticisms against cost–benefit analysis. Most often, critics point to the fact that costs tend to be easier to quantify than benefits, such as improved human health or a cleaner environment, leading to a bias against regulatory action. Dr. Frank Ackerman of the Stockholm Environment Institute-US Center at Tufts University[82] and Liza Heinzerling,[83] a law professor at Georgetown, have called cost–benefit analysis "morally obtuse."[84] They claim that cost–benefit analysis inevitably favors powerful industry and leads to deregulation. They prefer

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Precautionary Action, 5 INT'L J. ESTUARINE & COASTAL L. 23, 26 (1990) (positing the precautionary principle as a more stringent form of preventive policy because it is "more than repair of damage or prevention of risks").

75. *Id.*

76. Sunstein, *supra* note 18, at 305.

77. *Id*. (quoting ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1182 (3d ed. 2000)).

78. *See* Sunstein, *supra* note 18, at 305.

79. *Id* at 306.

80. *Id*.

81. *Id.* at 305–06.

82. Dr. Ackerman included these points in the comment he submitted regarding a new executive order on regulatory review. *See* Ackerman, *supra* note 52.

83. Liza Heinzerling has been appointed by Environmental Protection Agency (EPA) Administrator Lisa Jackson to be her chief advisor on climate change. *See* Posting of Dan Farber to Legal Planet, http://environmentallaw.wordpress.com/2009/01/26/lisa-heinzerling-to-epa (Jan. 26, 2009). This should make for interesting contacts between OIRA and EPA.

84. *See* Sunstein, *supra* note 59, at 27.

the precautionary principle, which they call a more "holistic evaluation"[85] that "ensure[s] fairness in the treatment of the current and future generations."[86] Sunstein argues that Professors Ackerman and Heinzerling suffer from an "anachronistic"[87] view of the regulatory world. In all instances, they view regulation as the means necessary to prevent "evildoers" from hurting people.[88] The reality is, Sunstein argues, that most environmental questions do not involve evildoers but "complex questions about how to control risks that stem both from nature and from mostly beneficial products, such as automobiles, cell phones, household appliances, and electricity."[89] Cost–benefit analysis allows for regulation that can address the costs and risks of such products, while recognizing their value to society. The potential shortcomings of cost–benefit analysis identified by critics like Ackerman and Heinzerling can be addressed methodologically, according to Sunstein.[90] Good cost–benefit analysis should, and can, take into account qualitative as well as quantitative consequences. The "numbers" do not replace full inquiry but rather are an informative part of the inquiry.[91] As Sunstein explained in his confirmation hearing, cost–benefit analysis need not be an "arithmetic straight jacket."[92]

The evidence indicates that Professor Sunstein will lead an OIRA that continues to adhere to cost–benefit principles where possible.[93] At the same time, it will not be a rigid application of that principle, but rather a "humanized"[94] application that respects the value of hard-to-quantify benefits.

C. President Obama's First Nominee to the Supreme Court

The nomination of Sonia Sotomayor to the Supreme Court led to close examination of her judicial record and controversy over some of her Second Circuit Court of Appeals opinions.[95] Most of the critical attention

85. *See* ACKERMAN & HEINZERLING, *supra* note 52, at 210–16.
86. *See* Sunstein, *supra* note 59, at 27.
87. *Id*. at 30.
88. *Id*. at 27.
89. *Id*. at 30.
90. *See* Sunstein, s*upra* note 18, at 303.
91. *Id.* at 314.
92. Pre-hearing Questionnaire, *supra* note 65, at 5.
93. At his confirmation hearing, Senator Susan Collins (R-Me.) asked Cass Sunstein whether he had been advising OIRA on the new Executive Order on regulatory review. Professor Sunstein indicated that he had provided his thoughts to OMB Director Peter Orszag. *See* Hearing Video, *supra* note 9.
94. *See* Pre-hearing Questionnaire, s*upra* note 65, at 14.
95. Robert Barnes & Eli Saslow, *Bias Case Looms Large for Nominee: Ruling on Firefighters' Lawsuit Raises Questions About Sotomayor's Philosophy*, WASH. POST, May 31, 2009, at A1 (noting that although Judge Sotomayor heard thousands of cases while on

went to her decision in the "reverse discrimination" case involving white firefighters in New Haven, Connecticut, recently overturned by the Supreme Court.[96] Going virtually unnoticed was Judge Sotomayor's opinion in *Riverkeeper, Inc. v. EPA*,[97] which held that an agency may not engage in cost–benefit analysis when promulgating regulations pursuant to § 316(b) of the Clean Water Act[98] because Congress did not expressly authorize the agency to do so. This decision, too, was reversed and remanded by the Supreme Court.[99] While Sotomayor's analysis in that case has been rejected, it provides insight into how she, now a Supreme Court Justice, views the very tool long championed by President Obama's regulatory czar. The Obama appointees may be working at cross-purposes on the issue of cost–benefit analysis.[100]

Riverkeeper involved national performance standards and variances that apply to existing power plants with cooling systems that extract water from a water source.[101] The EPA engaged in cost–benefit analysis in determining these standards, intending to protect aquatic organisms from being harmed or killed by cooling water intake structures.[102] The regulations established a mortality rate baseline and required power plants to reduce the number of fish and shellfish killed by specified percentages under that baseline.[103] The EPA explained that it chose this approach because it achieved close to the same benefits as more restrictive regulations "at less cost with fewer implementation problems."[104] Environmental groups challenged this approach, claiming that the Clean Water Act provided no authority for such cost–benefit analysis.[105]

The three-judge Second Circuit panel agreed with the environmental groups, finding that "cost–benefit analysis is not . . . supported by the language or purpose of the statute."[106] According to then-Judge Sotomayor's opinion, because § 316(b) calls for the best technology available it is "technology-driven" and the "[s]tatute therefore precludes

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the federal bench, "the early debate over her judicial philosophy . . . comes down to one paragraph").

96. *See* Ricci v. DeStefano, 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

97. 475 F.3d 83 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1498 (2009).

98. 33 U.S.C. § 1326(b) (2006).

99. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009).

100. Sunstein has asserted, favorably, that "[a] set of 'cost–benefit default rules' is now in place in federal administrative law." Sunstein, s*upra* note 18, at 300.

101. National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,576 (July 9, 2004) (to be codified in scattered sections at 40 C.F.R.).

102. *Id.* at 41,605.

103. *Id.* at 41,599.

104. *Id.* at 41,606.

105. *See* Riverkeeper, Inc. v. EPA, 475 F.3d 83 (2d Cir. 2007).

106. *Id*. at 99.

cost–benefit analysis."[107]

The opinion did not exclude all consideration of cost. Judge Sotomayor explained that when crafting "technology-forcing" regulations, "EPA must . . . ascertain whether the industry as a whole can reasonably bear the cost of the adoption of the technology, [while] bearing in mind the aspirational and technology-forcing character"[108] of the statute. Once that determination has been made, the EPA may then consider other factors, including "cost-effectiveness"[109] and choose "a less expensive technology that achieves essentially the same results as the benchmark."[110] But Judge Sotomayor's opinion insists that cost–benefit analysis is not permitted because "[w]hen Congress has intended that an agency engage in cost–benefit analysis, it has clearly indicated such intent on the face of the statute."[111]

The Supreme Court rejected this approach in *Entergy Corp. v. Riverkeeper, Inc*.[112] The Court, in a decision authored by Justice Scalia—who, like Sunstein, is a former administrative law professor at the University of Chicago—held that nothing about the term "best technology available" necessarily precludes cost–benefit analysis.[113] The term "best technology available" could mean the choice that produces the *most* of some good, as interpreted by Judge Sotomayor, but it just as reasonably could mean the choice that most *efficiently* produces some good, explained Justice Scalia. The agency is therefore free to adopt either interpretation and to use cost–benefit analysis in determining the "best technology available."[114] Justice Scalia thus rejected the notion that agencies may engage in cost–benefit analysis only where Congress expressly authorizes its use. Justice Scalia posited that "if silence here implies prohibition,"[115] then the agency could consider nothing when drafting its standards, because "§ 1326(b) is silent . . . with respect to . . . all potentially relevant factors."[116] For Justice Scalia, the absurdity of this outcome illustrates the failure of the argument.

In light of the Supreme Court's reversal and remand of the Second Circuit's decision, cost–benefit analysis survives as a tool of general

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107. *Id*.
108. *Id*. at 100.
109. *Id*.
110. *Id.*
111. *Id.* at 99 (citing American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981)).
112. Entergy Corp. v. Riverkeeper, Inc. 129 S. Ct. 1498 (2009).
113. *Id*. at 1506.
114. *Id.*
115. *Id*. at 1508.
116. *Id*.

applicability for regulatory agencies, absent congressional prohibition. This outcome would surely cheer Professor Sunstein. Of course, where Congress specifically forbids use of cost–benefit analysis, an agency is bound by that directive. In his written answers to questions from the Senate, Sunstein stated that "cost–benefit analysis should be subordinate to the law."[117]

Riverkeeper suggests that Justice Sotomayor and Professor Sunstein have sharply contrasting views of the value and meaning of cost–benefit analysis. Judging from her Second Circuit opinion in *Riverkeeper*, Justice Sotomayor presumes cost–benefit analysis to be the very "arithmetic straight jacket" that Professor Sunstein insists it is not.[118] In her view, cost–benefit analysis cannot be consistent with a determination of the best technology available because "best technology" and "best net benefits" are opposing concepts under her analysis.[119] If Justice Sotomayor's view were to prevail, agencies would be allowed to engage in cost–benefit analysis only when specifically authorized by Congress.[120] By contrast, Professor Sunstein believes "there should be a firm rule in favor of engaging in CBA [cost–benefit analysis], and a presumption in favor of making CBA the basis for decision."[121] Professor Sunstein considers there to be "[a] set of 'cost–benefit default rules' . . . in place in federal administrative law."[122] In this instance, the Obama appointee to lead regulatory review holds views closer to those of Justice Scalia than to the views of Justice Sotomayor,

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117. *See* Pre-hearing Questionnaire, *supra* note 65, at 14.

118. Sunstein has stated that cost–benefit analysis should be "a tool meant to inform decisions" and should be based on sound science and economics. *Id.* at 5. Then-Judge Sotomayor, by contrast, stated that because under the statute in question "facilities must adopt the *best* technology available . . . cost–benefit analysis cannot be justified." Riverkeeper, Inc. v. EPA, 475 F.3d 83, 98–99 (2d Cir. 2007). This statement indicates that to her cost–benefit analysis inherently precludes finding the *best* technology available.

119. *Riverkeeper*, 475 F.3d at 98.

120. During the confirmation hearings, Senator Arlen Specter (D-Pa.) asked Judge Sotomayor a question about *Riverkeeper*. Senator Specter, noting that the case would have implications for "matters now being considered by Congress on climate control and global warming," asked the nominee, "Can we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and can make that kind of a judgment because you're not bound by precedent?" Then-Judge Sotomayor replied, "Well, I am bound by precedent to the extent that all precedent is entitled to . . . respect under the doctrine of stare decisis. And to the extent that the Supreme Court has addressed this issue of cost–benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came and the framework [is] the framework I would employ to new cases." Transcript, *Sotomayor Confirmation Hearings, Day 4*, N.Y. TIMES, July 16, 2009, http://www.nytimes.com/2009/07/16/us/politics/16confirm-text.html?pagewanted=all#specter.

121. *See* Sunstein, *supra* note 18, at 300. However, Sunstein, as discussed, believes reliance on cost–benefit analysis must be subordinate to law. *See* Pre-hearing Questionnaire, *supra* note 65, at 14.

122. *See* Sunstein, *supra* note 18, at 300.

President Obama's first appointee to the Supreme Court.[123]

CONCLUSION

This review reveals that centralized regulatory review and cost–benefit analysis are here to stay during the Obama Administration.[124] While a source of concern for some,[125] presidential influence has benefits both for notions of democratic accountability and the administration of public policy. As the only democratically elected official with a national constituency, the President has the opportunity to bring a uniquely useful role to the bureaucratic process. Regulatory review allows the President to bring a unique perspective and positive contributions to the regulatory process. As long as OIRA, the President's agent, is working to implement the preferences of the duly elected President, then democracy continues to be served in an even more effective manner. This process, provided that it respects Congress's important constitutional role and the statutory requirements of public participation, can help safeguard regulated entities and the general public from the deleterious effects of ineffective regulation while still providing the public a meaningful role in determining regulatory policy.

With the appointment of Professor Sunstein, the President has selected a regulatory reviewer who has eloquently explained the virtues of cost–benefit analysis. He argues that costs matter and rejects an "end it, don't mend it"[126] approach to address criticisms of its application in the past. As practiced by the Obama Administration, Sunstein asserts, cost–benefit analysis will take account of qualitative as well as quantitative considerations, save lives as well as money, and increase governmental transparency. In short, he believes, "we will do a lot better, morally as well as practically, with it than without it."[127]

President Obama's actions and choices thus far signal an energetic

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123. Interestingly, during her confirmation proceedings, Justice Sotomayor revealed a preference for cost–benefit analysis in making her own decisions. When asked whether she would make use of the "cert pool," in which all of the Justices' clerks (except the clerks for Justices Stevens and Alito) draft joint memoranda recommending which cases should be granted certiorari, the nominee replied that "Senator, my approach would probably be similar to Justice Alito which is, experience the process . . . consider its costs and benefits; and then decide whether to try the alternative or not, and figure out what I think works best in terms of the functioning of my chambers and the court." Transcript, *supra* note 120.

124. At a debate during the 2008 presidential campaign, Cass Sunstein asserted of then-candidate Barack Obama, "He's a fan of cost–benefit analysis." *See* Burns, *supra* note 7.

125. *See, e.g.*, Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost–Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 435 (2008) (describing cost–benefit analysis as "unnecessary and irrelevant" and lacking "sufficient accuracy").

126. *See* Sunstein, *supra* note 59, at 29.

127. *Id.* at 30.

approach to controlling bureaucracy and minimizing the deleterious effects of poorly conceived regulation. His selection of Cass Sunstein should encourage those across the political spectrum who favor a rational and analytical approach to regulatory choices, rather than choices based on ideological motivations or unattainable ideals. Perhaps Professor Sunstein's most important task as he moves from academia to politics will be to educate citizens, interest groups, and officials throughout government on cost–benefit analysis *properly understood.*

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INTERNATIONAL JUDICIAL ASSISTANCE IN ANTITRUST ENFORCEMENT: THE SHORTCOMINGS OF CURRENT PRACTICES AND LEGISLATION, AND THE ROLES OF INTERNATIONAL ORGANIZATIONS

PETER J. WHITE*

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INTRODUCTION

The rise of multinational corporations and globalized industries has led to an increasing number of international antitrust investigations by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Both agencies may increasingly turn to international judicial assistance from other nations during the course of their investigations and trials.[1]

* J.D. Candidate, 2011, American University Washington College of Law; B.S. International Business, State University of New York at Buffalo, 2005. Many thanks to Professor Jonathan B. Baker, Russell W. Damtoft, and William J. Kolasky for advising me during the writing process. I am also grateful for the helpful comments and suggestions from John J. Parisi and Deirdre Shanahan, as well as the *Administrative Law Review* staff, especially Anita Ghosh, Connie Kim, and Colleen O'Boyle. Most of all, thanks to my parents, who have given me love, encouragement, and support in law school and in life.

1. International judicial assistance refers to "the multinational goal of having nations"

Multilateral treaties and domestic legislation have attempted to facilitate cooperation among nations in pursuit of more streamlined international judicial assistance for the United States and foreign nations.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)[2] was enacted to facilitate international relations for judicial assistance purposes. Under this treaty, a "judicial authority,"[3] but not an administrative agency, may request judicial assistance from other countries in the form of depositions or document production.[4] To circumvent the "judicial authority" language of the Hague Evidence Convention, administrative agencies may request a federal court to issue orders on the agencies' behalf under the All Writs Act.[5] Administrative agencies may also rely on other treaties containing international judicial assistance provisions,[6] including those in the field of criminal law.[7] In the context of civil antitrust investigations, however, the scope of international judicial assistance provisions is rather limited in that

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assist each other "in support of their respective . . . tribunals." Karl Schwappach, *The Inter-American Convention on Taking Evidence Abroad: A Functional Comparison with the Hague Convention*, 4 N.Y. INT'L L. REV. 69, 69 (1991) (citing Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 515 (1953)).

2. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 1, Mar. 18, 1970, 23 U.S.T. 2555, 2557 [hereinafter Hague Evidence Convention] ("In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State . . . to obtain evidence, or to perform some other judicial act.").

3. The Hague Evidence Convention contains no definition for *judicial authority*. Parties must analyze each request on an individual basis, focusing on the function, and not the title or categorization, of the requesting authority. *See, e.g.*, DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 90 (1992) (citing *In re* Letters Rogatory Issued by the Director of Inspection of Government of India, 385 F.2d 1017 (2d Cir. 1967) (deciding that a tax assessment agency in India was not a tribunal entitled to the execution of a letter requesting international judicial assistance in New York)).

4. *See* Hague Evidence Convention, *supra* note 2, arts. 1–14; *see also* C. Peck Hayne, Jr., Anschuetz, *International Discovery American-Style, and the Hague Evidence Convention*, 19 N.Y.U. J. INT'L L. & POL. 87, 89 (1986) ("Under the Convention, a judicial authority in one country asks a judicial authority in another to obtain specified evidence, such as through the use of depositions or the production of documents." (citing Hague Evidence Convention, *supra* note 2, arts. 1–14)).

5. The All Writs Act authorizes U.S. federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (2006).

6. As of April 2007, the United States had mutual legal assistance treaties with fifty-three countries. Compliance Week, United States Mutual Legal Assistance Treaties (MLATs), http://www.complianceweek.com/s/documents/MLAT.doc (last visited Aug. 18, 2009).

7. For example, the Securities and Exchange Commission (SEC) has utilized "criminal" treaties because U.S. federal securities laws are both civil and criminal in nature. Securities Exchange Act, 15 U.S.C. § 78aa (2006) ("Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.").

they typically cover criminal and not civil violations of antitrust law.[8]

In 1994, Congress responded to this gap in statutory assistance coverage by adopting the International Antitrust Enforcement Assistance Act (IAEAA or Act),[9] which sought to improve access to evidence located abroad for civil antitrust investigations.[10] The Act vests the United States Attorney General's office with the authority to assist foreign nations in procuring evidence relating to an antitrust matter.[11] Further, the IAEAA encourages cooperation with foreign nations through bilateral agreements called antitrust mutual assistance agreements (AMAAs), which allow both the FTC and the DOJ to disclose to foreign antitrust authorities otherwise confidential information to help enforce their antitrust laws.[12] The IAEAA has proven to be largely ineffective, however, as only one AMAA has been formed under the IAEAA, and that agreement is utilized infrequently.[13]

This Recent Development examines the deficiencies of the existing legislation and practices relating to international judicial assistance. Section I provides a background of international judicial assistance procedure as it relates to antitrust law, with a focus on the Hague Evidence Convention and the IAEAA. Section II highlights the shortcomings of current legislation and customs for seeking and providing international judicial assistance. Section III considers the growing roles of international organizations in fostering a greater level of informal communication among antitrust agencies worldwide. These informal channels of communication are necessary to promote cooperation and convergence in an era of ever-increasing levels of international antitrust enforcement.

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8. *See* William P. Connolly, Note, *Lessons to Be Learned: The Conflict in International Antitrust Law Contrasted with Progress in International Financial Law*, 6 FORDHAM J. CORP. & FIN. L. 207, 209 (2001).

9. 15 U.S.C. §§ 6201–6212 (2006).

10. Press Release, FTC, First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ (Apr. 17, 1997), http://www.ftc.gov/opa/1997/04/iaeaa.shtm.

11. 15 U.S.C. § 6202(a).

12. *Id.* § 6201.

13. *See* William J. Tuttle, Note, *The Return of* Timberlane*? The Fifth Circuit Signals a Return to Restrictive Notions of Extraterritorial Antitrust*, 36 VAND. J. TRANSNAT'L L. 319, 352 (2003) (stating that the 1999 agreement with Australia—the International Antitrust Enforcement Assistance Act's (IAEAA's) only concluded agreement—provides less assistance than what was originally planned in the IAEAA legislation).

I. BACKGROUND

A. A Brief Background of the Hague Evidence Convention

The Hague Evidence Convention, one of the most successful of the Hague conventions,[14] states that courts of one country have a right, through a "letter of request"[15] from a central authority,[16] to obtain evidence or perform some other judicial act through the courts of another country. Courts can exercise this right in judicial proceedings involving civil and commercial matters.[17] When the Hague Evidence Convention was ratified on March 18, 1970, the United States became a party to the treaty in hopes that it would increase levels of international judicial assistance.[18] Some countries, including France and various other civil law countries, had alternative motives, hoping instead that the Hague Evidence Convention would contain the extraterritorial reach of foreign courts during the pretrial discovery phase.[19] Prior to the Hague Evidence Convention, the United States had hoped to increase international judicial assistance by enacting unilateral provisions that would facilitate foreign authorities' ability to obtain evidence from within the United States; however, this did not result in the reciprocity that the United States initially envisioned.[20] The Hague Evidence Convention has since been signed by forty-four nations.[21]

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14. *See* MCCLEAN, *supra* note 3, at 86 (attributing the success of the convention to "the continuing review of its operation").

15. A *letter of request* is defined as a "document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction, and (2) return the testimony or proof of service for use in a pending case." BLACK'S LAW DICTIONARY 988 (9th ed. 2009).

16. Each contracting state must establish a "Central Authority" and may designate "other authorities." Governments may establish more than one central authority. Typically, nations use the same central authority as the one used in other Hague Conventions dealing with civil procedural matters, such as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. MCCLEAN, *supra* note 3, at 91.

17. Hague Evidence Convention, *supra* note 2, arts. 1–2.

18. *See* Schwappach, *supra* note 1, at 69 (indicating that the United States was not only a party to the Hague Evidence Convention but also assisted in its drafting).

19. *See* Cynthia D. Wallace, *'Extraterritorial' Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment*, 5 J. INT'L ECON. L. 353, 365–66 (2002) (explaining that pretrial discovery is often restricted by statutes in foreign countries, such as France and Germany, which have no pretrial discovery phase and that the word *pretrial* connotes a "detachment" from the actual case to many civil law practitioners).

20. Letter from William Rogers, Sec'y of State, U.S. Dep't of State, to President Richard M. Nixon (Nov. 9, 1971), *reprinted in* 12 I.L.M. 324 (1973).

21. For an up-to-date list of signatories to the Hague Evidence Convention, see Hague Conference on Private International Law, Status Table for Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=82 (last visited Jan. 24, 2010).

B. A Brief Background of the IAEAA

Much of today's antitrust cooperation policy is grounded in comity, a principle requiring consideration of other nations' sovereignty and laws.[22] This cooperation has resulted in numerous mutual legal assistance treaties (MLATs), which are compulsory agreements between the United States and other countries wherein each party agrees to provide legal assistance to the other.[23] Since most MLATs focus on criminal matters, antitrust violations, which are predominately recognized as civil matters, do not typically fall under the ambit of MLATs.[24]

In the interest of greater cooperation, Congress enacted the IAEAA in 1994 to grant the United States' antitrust authorities more liberal abilities to share investigatory information with other countries' authorities.[25] The IAEAA allows the DOJ and the FTC to share antitrust evidence that they would not have been able to share prior to its enactment.[26]

The IAEAA also permits federal courts to order testimony or evidence from an entity within the court's jurisdiction to assist a foreign antitrust authority in the enforcement of its antitrust laws, so long as the United States has entered into an AMAA with that foreign country.[27] An AMAA

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22. Connolly, *supra* note 8, at 209 (characterizing the concept of comity as the balancing of other nations' laws "against the rights of one's own nation").

23. *Id.* A mutual legal assistance treaty (MLAT) is a bilateral treaty that obligates signatory countries to provide assistance to each other by allowing each country a means to access evidence in the foreign country. MLATs have the status of federal law, and they create binding and reciprocal international obligations between the signatory countries. The United States has MLATs with over fifty countries ranging from white-collar crime enforcement to organized crime. SECTION OF ANTITRUST LAW, AM. BAR ASS'N, INTERNATIONAL ANTITRUST COOPERATION HANDBOOK 8–9 (2004) [hereinafter HANDBOOK].

24. Connolly, *supra* note 8, at 209. Some MLATs are only applicable when the underlying offense is a criminal offense in both signatory countries—called a "dual criminality" requirement. Other MLATs, however, only require that the underlying offense be criminal in the country requesting assistance. Therefore, depending on the individual MLAT and the laws of the foreign country, MLATs entered into by the United States may or may not be applicable to antitrust offenses. Criminal liability generally exists in cases involving horizontal agreements between competitors to price fix, bid rig, or allocate markets or customers. Offenders can be imprisoned for these offenses in the United States, Canada, France, Ireland, Germany (for bid rigging), Japan, South Korea, Norway, the Slovak Republic, and the United Kingdom. HANDBOOK, *supra* note 23, at 9 & n.27.

25. MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 82 (3d ed. 2006). The IAEAA was met with strong support by both political parties as well as the Clinton Administration. It was drafted with input from the business community and took only ten weeks to pass through Congress after introduction. Connolly, *supra* note 8, at 218.

26. The IAEAA defines *antitrust evidence* as anything "obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws." 15 U.S.C. § 6211(1) (2006). However, it prohibits the sharing of information "in violation of any legally applicable right or privilege." *Id.* § 6202(d).

27. JOELSON, *supra* note 25, at 82.

is a written agreement between a foreign antitrust authority and the United States which ensures that the United States will provide assistance to the foreign authority comparable to the amount the foreign authority provides to the United States.[28] Without an AMAA, the United States is generally prohibited from sharing with other nations confidential information obtained during an antitrust investigation.[29] Further, the United States may order that the manner in which the testimony or evidence is obtained be in accord with the foreign country's normal practices and procedures.[30] The usefulness of AMAAs as bilateral, interagency agreements stems from the fact that they establish a protocol for international judicial assistance while embodying a desire for improved cooperation between agencies.[31]

An AMAA must provide for equal and reciprocal assistance from the foreign country before any confidential information is shared.[32] The foreign country must assure the United States that it has laws and procedures in place that will ensure the continued confidentiality of the shared information and that it will respect the confidentiality of the shared information to an equal or greater degree than the United States.[33] The United States' antitrust enforcement agencies are allowed to share some information that is deemed agency confidential.[34] Although Congress intended for the IAEAA to encourage international cooperation in civil and criminal antitrust matters, Australia is the only country ever to enter into an AMAA under the IAEAA.[35]

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28. *See* Tuttle, *supra* note 13, at 352 (indicating that an exception to the written agreement requirement is available if the Attorney General or the FTC believes that the foreign agency is capable of fulfilling the confidentiality requirements and that it will provide comparable assistance to the United States).

29. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 218 (2007) [hereinafter AMC REPORT], http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. Even under the IAEAA, agencies cannot share confidential *business* information, which is protected by statute. They may, however, share confidential *agency* information, which agencies treat as nonpublic, but are not prohibited from disclosing. Examples of confidential agency information include, among others, market definitions, assessments of competitive effects, and the fact that an agency has opened an investigation. John J. Parisi, Int'l Antitrust Div., FTC, Presentation at the Sixth Annual London Conference on EC Competition Law: Enforcement Cooperation Among Antitrust Authorities (May 19, 1999), http://www.ftc.gov/speeches/other/ibc99059911update.shtm (last visited Dec. 2, 2009).

30. JOELSON, *supra* note 25, at 82.

31. HANDBOOK, *supra* note 23, at 47.

32. 15 U.S.C. § 6211(2) (2006).

33. JOELSON, *supra* note 25, at 83.

34. HANDBOOK, *supra* note 23, at 48 (stating that, in addition to certain agency confidential information, publicly filed information and information under the Freedom of Information Act may also be shared).

35. *See* Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, U.S.-Austl., Apr. 27, 1999, http://www.justice.gov/atr/public/international/docs/usaus7.htm [hereinafter U.S.-Austl. Agreement]; *cf.* JOELSON, *supra* note 25, at 83 (noting that the AMAA between the

II. SHORTCOMINGS OF CURRENT PRACTICES AND LEGISLATION

A potential cause of disharmony in the field of international judicial assistance is the notion that extraterritorial discovery infringes upon foreign sovereign interests.[36] International law recognizes the well-founded principle that a nation is forbidden from seizing documents or taking depositions on foreign soil absent the foreign nation's authorization.[37]

The rise of domestic litigation has resulted in an increasing need to conduct discovery abroad.[38] Fundamental differences among nations concerning the different methods of discovery have led to conflicts in extraterritorial discovery that remain far from resolved.[39] In particular, the different identities of the evidence gatherer among different countries can be a potential cause of friction for international judicial assistance purposes. In common law countries such as the United States, discovery is conducted by the parties.[40] In civil law countries, however, discovery is conducted by a court official.[41] Although the Hague Evidence Convention and the IAEAA sought to standardize procedure and facilitate international judicial assistance, each has shortcomings that have prevented the realization of their purposes.

A. Problems with the Hague Evidence Convention

The Hague Evidence Convention sought to remedy problems in

United States and Australia contains a provision requiring the United States to declare whether the information it seeks is in furtherance of a possible criminal proceeding, in which case Australia reserves the right to decline). The Australian antitrust enforcement agency would not have benefited from an MLAT, as Australian competition enforcement is currently in civil, and not criminal, jurisdiction. Antitrust & Trade Law Section, Int'l Bar Ass'n, Submission to the U.S. Antitrust Modernization Committee 20 (Jan. 27, 2006), http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060127_IBA_International.pdf.

36. *See* Wallace, *supra* note 19, at 356 (explaining that noninterference is a sovereign right protected under international law).

37. *See id.* at 357 (noting that United States courts have typically requested that documents be produced in the United States for inspection, thereby avoiding the problem of conducting judicial affairs in a foreign country that might go against the laws in that foreign state). Additionally, by bringing foreign witnesses to the United States, parties may be more confident that the evidence is admissible and was gathered in a method that is familiar to United States courts. INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 277 (David J. Levy ed., 2003) [hereinafter INTERNATIONAL LITIGATION].

38. INTERNATIONAL LITIGATION, *supra* note 37, at 275.

39. *See* Wallace, *supra* note 19, at 391 (explaining that the vast amount of foreign protest and statutes against United States discovery orders attests to the fact that there is still a large amount of disagreement concerning international judicial assistance at the investigational level).

40. INTERNATIONAL LITIGATION, *supra* note 37, at 276.

41. *Id.*

international judicial assistance by formalizing international discovery techniques and providing a standardized procedure for executing requests.[42] The Hague Evidence Convention was enacted with two goals in mind: (1) to simplify the process of obtaining evidence abroad, which was of particular concern to the United States,[43] and (2) to restrict the "'extraterritorial' reach and scope of foreign parties . . . in 'pre-trial' discovery proceedings."[44]

The Hague Evidence Convention, however, was met with opposition from countries like France, Germany, Luxembourg, Norway, and Portugal, all of whom objected to providing evidence for pretrial discovery purposes.[45] The United Kingdom brought about the addition of Article 23[46] in hopes that it would prevent third-party discovery, which was not allowed under its own restrictive discovery rules but is allowed in the United States.[47] This insertion, however, evolved into allowing signatories[48] to refuse unspecific pretrial discovery requests.[49]

Other imperfections exist in the Hague Evidence Convention. For example, in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,[50] the Supreme Court held that litigants in U.S. courts are not required to invoke the Hague Evidence Convention when seeking evidence from foreign entities.[51] This had an adverse effect on other signatory countries that interpreted this holding to mean that when the United States signs an international agreement, it does

42. HANDBOOK, *supra* note 23, at 17.

43. Wallace, *supra* note 19, at 364 (stating that one of the Hague Evidence Convention's original objectives was to "facilitate the obtaining of evidence abroad that would otherwise be unobtainable or fraught with foreign government opposition or obstruction").

44. *Id.* at 364–65.

45. The Hague Evidence Convention may not be used as a precomplaint investigative tool and can only be used by United States antitrust enforcement agencies to the extent that cases brought by the agencies constitute civil, and not penal, litigation. Foreign signatories may consider a case brought by a government agency seeking fines not to be a "civil or commercial matter" and therefore outside of the purview of the Convention. HANDBOOK, *supra* note 23, at 17.

46. Article 23 states that "a contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Hague Evidence Convention, *supra* note 2, art. 23.

47. Wallace, *supra* note 19, at 366.

48. See *supra* note 21 for the list of signatories to the Hague Evidence Convention.

49. *See* Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 35 INT'L & COMP. L.Q. 765, 772 (1986) (noting that in the United Kingdom, obligations to make discovery do not arise before the close of pleadings, and the requirement for specificity prohibits American-style "fishing expeditions").

50. 482 U.S. 522 (1987).

51. *See id.* at 538 (reviewing the text and history of the Hague Evidence Convention to reach the conclusion that procedures are optional).

not have to honor the agreement.[52] In contrast, French law requires that parties strictly comply with the procedures set forth in the Hague Evidence Convention.[53]

Further, U.S. courts readily rule that discovery methods under the Hague Evidence Convention are ineffective and instead choose to conduct discovery under the Federal Rules of Civil Procedure.[54] However, utilizing the Federal Rules of Civil Procedure for international discovery purposes may violate the sovereignty of foreign states and result in more nations adopting "blocking statutes" to provide greater protection to their citizens.[55] France is one of several countries that has enacted blocking statutes that forbid their nationals from cooperating with unilateral discovery attempts.[56] The French blocking statute[57] was broadly drafted with the intention of prohibiting all discovery not expressly permitted by the Convention and forbidding pretrial discovery in France based only on United States discovery practices.[58] Further, the legislative history of the blocking statute reflects hostility toward the ability of parties under United States law to conduct pretrial discovery without the supervision of a judicial authority, a concept antithetical to French discovery procedure.[59]

In addition, the Hague Evidence Convention is problematic because it

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52. *See* Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach when American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1028–29 (2009) (asserting that this holding may have lowered the value of international agreements with the United States altogether). The principles in the *Aérospatiale* holding were closely related to those specified in the Restatement of Foreign Relations Law of the United States, which admits exclusive use of the Hague Evidence Convention only where the discovery cannot be carried out on United States soil or where evidence is sought from nonparties to a litigation who reside in another contracting state. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 (1987).

53. Karim Boulmelh & Eric Borysewicz, *Discovery in France Under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, ALFA INT'L, http://www.alfainternational.com/files/tbl_s12Publications%5CFileUpload92%5C201%5C Discovery%20in%20France.pdf (last visited January 24, 2010).

54. *See* HANDBOOK, *supra* note 23, at 18 (providing, as an example of international discovery under the Federal Rules of Civil Procedure, a United States court order requiring evidence to be produced no matter where it is located). For two examples of cases where a United States court circumvented the Hague evidence doctrine and instead relied on the Federal Rules of Civil Procedure for international discovery, see *In re* Air Crash Disaster near Roselawn, Ind. on October 31, 1994, 948 F. Supp. 747, 752 (N.D. Ill. 1996) and *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 356 (D. Conn. 1991).

55. INTERNATIONAL LITIGATION, *supra* note 37, at 283. In addition to blocking statutes, some nations, such as Australia, have "claw-back" provisions, which allow for actions to reduce treble damages awarded by United States courts. Connolly, *supra* note 8, at 215.

56. HANDBOOK, *supra* note 23, at 18–19.

57. Law 80-538 of July 16, 1980, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980, p. 1799.

58. Bate C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585, 596 (1981).

59. *Id.*

allows only a "judicial authority" to make requests under their provisions.[60] Courts and tribunals are considered "judicial authorities" under the Hague Evidence Convention, but executive authorities, legislative bodies, and administrative agencies are not.[61] When seeking to compel discovery abroad, administrative agencies can satisfy the "judicial authority" requirement in the Hague Evidence Convention by obtaining a court order.[62]

B. Problems with the IAEAA

In an attempt to fill this gap in authority to compel discovery abroad, the United States and various foreign antitrust authorities entered into antitrust cooperation agreements (ACAs), which are bilateral, interagency agreements and are strictly used as antitrust enforcement tools.[63] ACAs typically commit antitrust authorities to providing information already in their possession upon request, as well as providing information voluntarily, but they do not override laws prohibiting the sharing of some confidential information.[64] The IAEAA, however, enabled the FTC and the DOJ to enter into AMAAs, which are similar to ACAs but authorize a greater level of cooperation.[65] AMAAs, unlike ACAs, enable the sharing of some confidential information that would otherwise be subject to legal prohibitions.[66]

Although the IAEAA was initially heralded as groundbreaking legislation,[67] the fact that only one AMAA has been implemented suggests

60. *See supra* note 2 and accompanying text.

61. Hague Evidence Convention, *supra* note 2, arts. 1, 6.

62. Peter Q. Noack, Comment, *West German Bank Secrecy: A Barrier to SEC Insider Trading Investigations*, 20 U.C. DAVIS L. REV. 609, 641 (1987) (noting that administrative agencies must obtain court orders because their own investigative subpoenas do not authorize foreign discovery).

63. The United States antitrust enforcement agencies have entered into formal bilateral agreements with antitrust authorities in Brazil, Canada, Germany, Israel, Japan, Mexico, Australia, and the EC. HANDBOOK, *supra* note 23, at 38–39.

64. To circumvent confidentiality laws, parties are often asked to waive the protections governing materials received in connection with a merger review. As a result of such waivers, the United States and the EC have been able to coordinate their merger reviews of numerous international transactions including AOL–Time Warner, MCI–WorldCom, Boeing–Hughes, AstraZeneca–Novartis, GE–Honeywell, and Metso–Sveldala. *Id.* at 40–41. Antitrust cooperation agreements (ACAs) are generally best suited for investigative cooperation whereas MLATs are typically best suited for accessing foreign-based evidence. However, because many international agreements are loose commitments and not binding engagements, the "requested state"—i.e., the jurisdiction providing the assistance—may not be strictly obligated to provide the assistance. HANDBOOK, *supra* note 23, at 12.

65. *Id.* at 47.

66. *Id.* at 48.

67. Attorney General Janet Reno, Senator Howard Metzenbaum, Representative Jack Brooks & Assistant Attorney General Anne Bingaman, News Conference for the Introduction of the International Antitrust Enforcement Assistance Act of 1994 (June 13,

that the legislation may lack efficacy.[68] When the legislation first passed, several jurisdictions, including Japan, the European Union, and Britain,[69] voiced their criticisms of the Act.[70]

The European Union's concern with the IAEAA was based on Article 20 of Regulation 17 of the European Community Treaty. Under Article 20 of the European Community Treaty, members can only use information acquired during antitrust investigations for the purposes for which it was acquired.[71] Because foreign authorities are not mentioned in Regulation 17, providing the United States with confidential information through an AMAA would be prohibited, and the EC was reluctant to revise Regulation 17 to allow for such sharing of confidential information.[72]

Another problem with the IAEAA is that it does not require a jurisdictional analysis prior to issuing a request for information.[73] In the absence of an AMAA under the IAEAA, administrative agencies must obtain a court order from a federal court,[74] which sometimes proves successful for the agencies but can result in delays.[75]

1994) (transcript available from the Federal News Service).

68. It took three years after the enactment of the IAEAA for the Australian AMAA, the first and only AMAA, to be implemented. *See* JOELSON, *supra* note 25, at 83.

69. Robert Rice, *Rebuff for U.S. over Antitrust Stance—Draft Guidelines on Jurisdiction Outside the Country Are Unpopular with Other Governments*, FIN. TIMES (London), Mar. 7, 1995, at 13. Another grounds for international distrust of the IAEAA is that requests under the IAEAA are made on a case-by-case basis and can be denied by the DOJ or FTC. This allowed for the interpretation of the Act as having an attitude of "we will get what we can and move on." Connolly, *supra* note 8, at 228.

70. Connolly, *supra* note 8, at 228–29.

71. *U.S. Antitrust Bill and the EC*, BUS. L. EUR., Sept. 14, 1994, at 2.

72. *Id.* In 1998, after witnessing the lack of success of the IAEAA, Charles Stark, Chief of the Foreign Commerce Division of the Antitrust Department of the DOJ, indicated that many nations still needed legislation allowing them to enter into agreements such as AMAAs. Connolly, *supra* note 8, at 225.

73. Won Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea*, 7 SING. J. INT'L & COMP. L. 386, 397–98 (explaining that under the IAEAA, invasive discovery orders could be issued without first conducting a jurisdictional analysis and without "balancing relevant considerations of effects, comity, economic impact, and international interests").

74. A federal court has the authority to issue such orders under the All Writs Act. 28 U.S.C. § 1651 (2006). Japan has advised the United States that it requires a court order and special deposition visas, and that it will not accept orders issued by administrative law judges. Additionally, Japan does not permit telephone depositions. *Obtaining Evidence in Japan*, *in* 740 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 27, 30 (Practising Law Inst. 2006).

75. For two examples of cases in which the United States utilized this method to obtain evidence, see CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984) and FTC v. Compagnie de Saint Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980). Congress decided that the FTC and the Internal Revenue Service (IRS) should be authorized to issue investigative demands in foreign states in a manner congruent with the service-of-process provisions of Rule 4 of the Federal Rules of Civil Procedure. See 15 U.S.C. § 57b-1 (2006) for the statute regarding the FTC and 26 U.S.C. § 982 (2006) for the statute pertaining to the IRS. *U.S. Department of State Circular: Preparation of Letters Rogatory*, *in* 739 LITIGATION AND

Foreign authorities may feel that AMAAs require them to allow the United States to use AMAA-obtained confidential information outside of antitrust enforcement. This reluctance to enter into AMAAs might stem from two provisions currently contained in the IAEAA.[76] First, the IAEAA contains a provision that requires parties to enter into AMAAs on a reciprocal basis, with the foreign authority having comparable rights and obligations as the United States.[77] Second, the AMAA allows foreign authorities to request permission from United States officials to use confidential information for non-antitrust-enforcement purposes.[78]

The reciprocity requirement allows for the interpretation that the foreign authority must provide a similar means for the United States to request permission to use confidential information for non-antitrust-enforcement purposes.[79] The Antitrust Modernization Commission[80] believes that these two provisions explain the paucity of foreign agencies' entrance into AMAAs with the United States because foreign agencies may not want to offer a mechanism for the United States to request permission to use the information for non-antitrust-enforcement purposes.[81]

The Antitrust Modernization Commission has recommended that the IAEAA be amended to "clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing non-antitrust use of information obtained pursuant to an AMAA."[82] If foreign agencies are dissuaded from entering into AMAAs out of fear that their information will be used for non-antitrust purposes, an amendment to the IAEAA could clarify this issue. The amendment would state that AMAAs are not

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ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 1037, 1040 (Practising Law Inst. 2006).

76. AMC REPORT, *supra* note 29, at 218 (arguing that the combination of two particular provisions in the IAEAA appears to have impeded foreign jurisdictions from entering into AMAAs with the United States because they are not willing to allow the possibility of non-antitrust uses of information).

77. 15 U.S.C. § 6211(2)(A) (2006) ("An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum.").

78. *Id.* § 6211(2)(E)(ii) (noting that information may be released "with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission").

79. *Id.*

80. The Antitrust Modernization Commission is a twelve-member bipartisan commission created by Congress in 2002 to determine whether United States antitrust law needs modernization and to make recommendations. The Commission obtained the views of interested parties and issued its report and recommendations to Congress and the President in April 2007. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002).

81. AMC REPORT, *supra* note 29, at 218.

82. *Id.*

required to contain a provision allowing non-antitrust use of information, which could result in more countries entering into these agreements with United States agencies.[83] If the IAEAA is amended so as to clarify "that downstream disclosure of antitrust evidence for non-antitrust purposes is not a mandatory requirement," a foreign antitrust agency could still "grant" the "right" to the United States if it so chooses.[84]

III. THE VITAL ROLES OF INTERNATIONAL ORGANIZATIONS

One possible explanation for the lack of AMAAs under the IAEAA is that administrative agencies might prefer to utilize alternative means for securing international judicial assistance.[85] For example, the United States has cooperated significantly with the European Union, its Member States, Canada, and other countries in merger investigations.[86] International organizations, such as the Organization for Economic Co-operation and Development (OECD)[87] and the International Competition Network (ICN),[88] provide a framework for this type of cooperation among the

83. *Id.* at 219.

84. Section of Int'l Law, Am. Bar Ass'n, Comments in Response to Antitrust Modernization Commission Request for Public Comment Regarding International Topics (Aug. 29, 2005), http://meetings.abanet.org/webupload/commupload/IC990000/newsletterpubs/abaAMCftaiafinal.pdf. Australia opted to grant the FTC and the DOJ this right in its AMAA with the United States. U.S.-Austl. Agreement, *supra* note 35, art. VIII(B).

85. *See* Section of Antitrust Law, Am. Bar Ass'n, Comments in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding International Cooperation: Are There Technical or Procedural Changes that the United States Could Implement to Facilitate Further Coordination with Foreign Antitrust Authorities? 3 (Feb. 8, 2006) [hereinafter Antitrust Section Comments to the AMC], http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060208_ABA_Intl_Cooperation_Intl.pdf (listing MLATs, applicable legislation, Interpol, and extradition as alternative means for securing international judicial assistance).

86. *See id.* (stating that when both jurisdictions examine the same transaction, it is rare for the respective outcomes to be inconsistent, as they were in the Boeing–McDonnell Douglas merger). For more information about the Boeing–McDonnell Douglas merger, see generally William E. Kovacic, *Transatlantic Turbulence: The Boeing–McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805 (2001). "The Europeans prefer MLATs" to AMAAs "because [MLATs] usually define whether or not the information that is shared will be used for criminal prosecutions or civil antitrust cases," which is a feature that most European nations' laws do not provide. Connolly, *supra* note 8, at 233.

87. Originally, twenty countries signed the Convention on the Organisation for Economic Co-operation and Development on December 14, 1960, and ten more countries have since become members. Organisation for Economic Co-operation and Development (OECD), Member Countries, http://www.oecd.org/membercountries (last visited Oct. 17, 2009). The OECD recommends that its members cooperate on antitrust law matters, and it provides a forum for agencies to cooperate in the areas of notification, exchange of information, coordination of action, consultation, and conciliation. JOELSON, *supra* note 25, at 78.

88. Almost all of the world's competition agencies are ICN members. Antitrust

agencies.[89]

Arguably, the ICN has the greatest potential to facilitate efficient, informal dialogue among the member agencies for three reasons. First, the ICN is an organization of antitrust agencies and not of governments, unlike the OECD, World Trade Organization, and the United Nations Conference on Trade and Development.[90] Because agencies, and not governments, comprise the ICN, its member agencies are best poised to assist each other informally on issues of antitrust policy.[91] Increases in informal communication and assistance may lead to increased cooperation among the agencies when conducting cross-jurisdictional investigations or when enforcing antitrust laws.

Second, there is no formal structure to the ICN—it operates through working groups made up of government officials, academia, consumer groups, legal societies, and trade associations.[92] These working groups command a level of expertise that may exceed that of the infrastructures of nongovernmental organizations with centralized structures. The compartmentalized structure inherent in working groups may allow the ICN to operate more efficiently than an entity with an operating structure with multiple levels of authority.

Finally, unlike the OECD, which consists mainly of high-income economies,[93] the ICN reaches almost all antitrust agencies. Thus, informal,

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Section Comments to the AMC, *supra* note 85, at 4. For an up-to-date list of member agencies, see ICN Membership Contact List, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx (last visited January 24, 2010).

89. Antitrust Section Comments to the AMC, *supra* note 85, at 2–4. Certain foreign domestic laws are not as permissive as those of the United States, and this lack of domestic authorization obstructs cooperation. The OECD has recognized that this lack of domestic authority interferes with cooperation in anti-cartel enforcement. In light of this effect on international judicial assistance, the organization has adopted a recommendation that its member states adopt more permissive domestic laws that would provide greater assistance, in hopes to combat cartels more effectively. HANDBOOK, *supra* note 23, at 22.

90. The International Competition Network (ICN) works closely with the WTO, OECD, and United Nations Conference on Trade and Development (UNCTAD), and the ICN Steering Group may invite representatives from these international bodies to contribute to ICN activities on the same terms as nongovernmental advisors. International Competition Network, Operational Framework, http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/operational-framework (last visited July 9, 2009).

91. The ICN is the only international body that is devoted exclusively to competition law enforcement. International Competition Network, About the ICN, http://www.internationalcompetitionnetwork.org/index.php/en/about-icn (last visited Aug. 18, 2009).

92. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 (2003), *available at* www.ftc.gov/speeches/other/031210kovacic.pdf.

93. The World Bank categorizes twenty-seven of the thirty OECD member countries as high-income economies. World Bank, Country Groups, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:204

streamlined communication that includes newer antitrust agencies would further the organization's goals of cooperation and convergence.[94] One potential obstacle is that younger agencies with fewer resources may not be willing or able to designate resources to building an institutional framework that would support active participation in international organizations.[95] This obstacle can be overcome by convincing these agencies that investments in institution building are a critical part of enforcement activities.[96] As agencies and governments converge on consistent antitrust enforcement policies, the IAEAA may become more effective as governments go beyond mere cooperation in the sharing of information and shift toward greater cooperation in the evaluation and analysis of cases.[97]

CONCLUSION

The rise of globalized industries has led to a greater need for international judicial assistance in antitrust enforcement. Although treaties exist to facilitate international cooperation for judicial assistance purposes, the United States' agencies still face obstacles when obtaining evidence from abroad. These hardships stem from the differences in the adjudicative cultures of the United States and foreign nations. Specifically, the United States' use of administrative agencies for antitrust enforcement and its unique use of pretrial discovery stand in stark contrast to the procedures and customs of many foreign nations.

The IAEAA sought to balance international cooperation and the protection of confidential data by providing a method for antitrust

21402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html#OECD_members (last visited January 24, 2010).

94. An example of the substantial results that have come from agencies sharing experiences and best practices is the set of ICN Recommended Practices for Merger Notification and Review Procedures. Because these recommendations have become an international standard that has led to changes in various laws, they have reduced costs for parties to international mergers while making their merger review process more efficient and effective. Randolph W. Tritell, Assistant Dir. for Int'l Antitrust, FTC, Statement at the Antitrust Modernization Commission Hearing on International Antitrust Issues 4–5 (Feb. 15, 2006), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Tritell.pdf.

95. *See* Kovacic, *supra* note 92, at 311 (noting that academics and practitioners tend to grade competition authorities based on the cases they prosecute, so agencies may be more apt to allocate resources toward antitrust enforcement and not toward institution building).

96. *See id.* (indicating that successfully developing widely accepted international antitrust policy standards would require that agencies reallocate some resources away from the prosecution of cases).

97. *See* Tuttle, *supra* note 13, at 352–53 n.284 (explaining that the informal accord reached between the European Union and the United States allows for simultaneous review by both authorities of merger proposals, but does not provide for cooperation in the evaluation of the cases because the respective authorities have differing competition policy).

enforcement authorities to share confidential information with other authorities while adhering to strict guidelines. As evidenced by the fact that only one AMAA has been created by its authority, the IAEAA's effectiveness has been minimal. A possible solution proposed by the Antitrust Modernization Commission is to amend the IAEAA to clarify that it does not require that an AMAA include a provision allowing non-antitrust use of information obtained pursuant to the AMAA.

The United States' antitrust agencies rely heavily on alternatives to multilateral treaties and the IAEAA. Specifically, agencies embrace instruments such as MLATs, informal assistance, and letters of request based on reciprocity instead of pursuant to the Hague Evidence Convention. Especially in the absence of an effective IAEAA, international organizations such as the ICN play an important role in establishing efficient channels of informal communication. This interagency communication stimulates cooperation and convergence, thereby strengthening international judicial assistance for the United States' antitrust authorities and those abroad.

ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2009)

REPORT OF THE COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING

Cynthia R. Farina, Reporter

Under the sponsorship of the Administrative Law & Regulatory Practice Section of the American Bar Association, a blue ribbon committee studied the progress and results of the federal eRulemaking Initiative. Its report makes recommendations to Congress, the Administration, and federal agencies for improving the government's online rulemaking system and developing better agency e-rulemaking practices. These recommendations have been endorsed by the Section, the ABA Board of Governors, and a number of organizations concerned with citizen access to, and participation in, government.

The Foreword and Executive Summary of the report are reproduced here. The full text, and the list of endorsing organizations, can be found at http://ceri.law.cornell.edu/erm-comm.php.

FOREWORD

Rulemaking is one of the most frequently used ways of implementing legislation to advance social, economic, environmental, and public health and safety policies.

With the breakthroughs of technology beginning in the 1980's and the growth of the Internet and electronic government in the 1990's, there was near universal agreement that new information and communication technologies could be applied in federal agency rulemaking to enhance public participation, make the process itself more efficient for both the public and the government, and ultimately produce better decisions.

The government set out to construct a single e-rulemaking portal and a common electronic docket for more than 170 federal entities that engage in

rulemaking. Great effort and significant resources have been expended on this federal eRulemaking Initiative, and various groups within the government have reported from time to time on the considerable progress being made. At the same time, there have been critical comments, from both within and outside government, that the choices being made meant that the enormous potential of this project would not be fully realized.

To sort through all of this, a committee was formed under the auspices of the Section of Administrative Law & Regulatory Practice of the American Bar Association. Its mission was to produce a clear-eyed assessment of the state of the present federal e-rulemaking system and to chart a course going forward. The committee included experts in technology and informatics; prominent scholars on regulation, public administration and information science; experienced regulatory practitioners, including distinguished representatives of business and public interest groups, and current and former state and federal government officials. The individuals selected brought very different expertise, experience and perspectives to the committee's discussions. They reflected different parts of the political spectrum, yet all realized that the issues the committee was exploring are nonpartisan, and they approached their work in that spirit.

Over 17 months, the committee met five times, and had briefings by representatives from the Office of Management and Budget, the Program Management Office of the eRulemaking Initiative, various rulemaking agencies, and other government officials. This information was supplemented with interviews of additional people involved in the Initiative, conducted by members of the committee and reported back to whole. Our deliberations were informed by background memos written by our prodigious and extraordinarily able reporter, Cynthia R. Farina, Professor of Law at Cornell University.

The report that follows was drafted by Professor Farina after extensive discussions in the plenary sessions and meetings of smaller groups focusing on governance and funding, technology, and public participation. Many of the committee members would have supported more extensive recommendations going beyond those set forth below. But it was our judgment that the report should reflect the views of all members. Every member (listed below) has reviewed this document prior to publication, and we have indeed achieved consensus on its contents.

A draft final version of the report was circulated to a small group of key government officials, including people at OMB, the e-Rulemaking Project Management Office, and EPA. Our report has benefited from their full cooperation and many questions, corrections and comments—even on issues about which, respectfully, we disagree.

I wish to acknowledge the crucial financial support of the Ewing Marion Kauffman Foundation and the William & Flora Hewlett Foundation, which enabled us to convene people from across the country and to publish this report. I also thank the National Academy of Public Administration and its exceptional staff for providing facilities and support for our meetings.

Our greatest debt is to Professor Farina, who has given not only of her time but also her extremely able mind and pen, and without whom this project would never have been launched, let alone landed.

Sally Katzen
Chair

EXECUTIVE SUMMARY

Federal regulations are among the most important and widely used tools for implementing the laws of the land—affecting the food we eat, the air we breathe, the safety of consumer products, the quality of the workplace, the soundness of our financial institutions, the smooth operation of our businesses, and much more. Despite the central role of rulemaking in executing public policy, both regulated entities (especially small businesses) and the general public find it extremely difficult to follow the regulatory process; actively participating in it is even harder.

E-rulemaking is the use of technology (particularly, computers and the World Wide Web) to: (i) help develop proposed rules; (ii) make rulemaking materials broadly available online, along with tools for searching, analyzing, explaining and managing the information they contain; and (iii) enable more effective and diverse public participation. E-rulemaking has transformative potential to increase the comprehensibility, transparency, and accountability of the regulatory process. Specifically, e-rulemaking—effectively implemented—can open the rulemaking process to a broader range of participants, offer easier access to rulemaking and implementation materials, facilitate dialogue among interested parties about policy and enforcement, enhance regulatory coordination, and help produce better decisions that lead to more effective, accepted, and enforceable rules. If realized, this vision would greatly strengthen civic participation and our democratic form of government.

A. THE EMERGENCE OF FEDERAL E-RULEMAKING

During the 1990s, several individual rulemaking agencies began creating websites that enabled the public to search for regulations, submit comments electronically, and track a rulemaking's progress online. Some—notably the Department of Transportation (DOT), the Federal Communications Commission and the Nuclear Regulatory Commission—developed entire electronic docket systems for their rulemaking materials. By the turn of the century, the Environmental Protection Agency (EPA) had also begun to build an ambitious e-system for rulemaking. In 2002, the Bush Administration published its E-Government Strategy, which included creation of an "online rulemaking management" system. Ultimately, EPA became the lead agency for this eRulemaking Initiative. Plans quickly focused on creating a single government-wide system and one common public web portal, which would supersede all individual agency rulemaking e-systems and websites. All Executive Branch agencies have been required to join this Federal Document Management System (FDMS). Several of the independent regulatory commissions have also chosen to do so, although most of those with substantial rulemaking activity have so far preferred to have their own systems for reasons of cost or functionality.

The eRulemaking Initiative is funded by the participating agencies without dedicated funding from Congress. The Initiative has a complex, multi-tiered governance structure through which all participating agencies make decisions about design, modifications, upgrades, and budget. All are entitled to equal say, regardless of the amount of rulemaking activity or level of monetary contribution. A separate Program Management Office (PMO) staffed predominantly by EPA oversees system operation and maintenance.

The e-rulemaking system can be understood, for present purposes, as comprising three interrelated elements:

> 1) the FDMS e-docket, an electronic repository for digitized versions of rulemaking documents organized in electronic dockets, with associated document management capabilities;
> 2) FDMS.gov, a password-protected interface through which agencies access the repository; and
> 3) Regulations.gov, the public interface through which those outside the federal government access publicly available materials in FDMS, and can submit comments on proposed rules.

B. PROGRESS TO DATE

The federal government's eRulemaking Initiative has had significant success. More than 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions are now using

a common database for rulemaking documents, a universal docket management interface, and a single public website for viewing proposed rules and accepting on-line comments. As of July 2007, the FDMS records management module complies with required standards for agencies to use the electronic docket as their official rulemaking record. This gives agencies the option of no longer retaining paper copies of materials in the system. EPA as managing partner, and the personnel of EPA and the participating agencies who have worked on the Initiative, deserve commendation and gratitude. They were given an inherently challenging task, further complicated by political complexities and resource limitations, and they have made a substantial start in building the powerful government-wide federal e-rulemaking system needed by the public and the government itself.

At the same time, much work remains to be done. So far, the Initiative's focus has been largely limited to putting existing notice-and-comment processes online. Even this has not been entirely successful. A number of significant structural and policy issues must be addressed before the full potential of federal e-rulemaking can be realized:

Architecture

The very early decision to build a single, centralized system made it necessary to design a database and a public website capable of serving all agencies. The result has been a very basic design on which all could agree. Development of additional, or different, applications and web presentations is severely constrained by (i) OMB policy that prohibits agencies from individually operating e-systems and building e-tools related to rulemaking (termed "duplicative and ancillary systems"), and (ii) technical choices that prevent outside groups from easily and efficiently accessing rulemaking information to create richer, more supportive public websites.

Another early decision (which ran in the opposite direction from the decision to build a single, exclusive centralized system) was to retain maximum agency autonomy in formatting and entering rulemaking data and in setting practices for public comment via the system. The decision to retain agency autonomy came about because it proved impossible for all agencies to reach agreement on data standards and practices. This meant, however, that the system lacks harmonization on such essential elements as (i) what agencies call key rulemaking documents; (ii) what information about these documents ("metadata") is supplied during data entry; and (iii) what kinds of documents and metadata will be made available for review by the public (and by other agencies, who can access only materials that are available to the general public). Without harmonization of data standards

and practices, the purpose and utility of a multi-agency rulemaking database and a single public web portal is fundamentally undermined. Beyond a very superficial level, the public does not get a "common look and feel" to rulemaking across agencies. More significantly, searches will produce results that are unreliable in ways that public users are unlikely to realize and cannot, in any event, control.

Funding

Funding the Initiative through existing agency budgets has had several unintended negative consequences. At a minimum, agency and appropriator resistance to this funding method has caused financial instability and uncertainty over the course of the project. Because it often diverted funds from other agency activities, this funding method tended to incline agencies to be less sympathetic to system expansion and evolution, and to support only those features that seem obviously worthwhile to their own operations. Moreover, the particular algorithm currently used for apportioning the costs among participating agencies actually discourages agencies from embracing e-rulemaking because, for example, the more comments received on a proposed rule via regulations.gov, the greater proportion of overall costs the agency must pay.

Governance

Given the fact that all rulemaking agencies were required to contribute to the eRulemaking Initiative, as well as the importance of rulemaking to these agencies, all participating agencies wanted an equal say in the system's design and future direction. The result was a complex multi-level structure of collective decisionmaking—a form of governance that is time consuming and, with its multiple veto points, inclined toward risk-adverse outcomes. At the same time, it provides no clear locus of responsibility and accountability for whether the decisions being made actually further the articulated goals of the Initiative. Moreover, because there has been no sustained and systematic involvement of potential users outside government, design choices and work priorities often undervalue or misapprehend the needs of the public.

Public Access

Lacking sustained and systematic involvement of non-federal users in the design of the public website, regulations.gov continues to reflect an "insider" perspective—i.e., the viewpoint of someone familiar with rulemaking and the agencies that conduct it. The website design also

shows the effects of constrained resources, and the difficulties of designing a single site that must be each agency's official medium for presenting its rulemaking materials to the public. Without doubt, significant improvements have occurred within the last year, and continue to be made. Still, regulations.gov remains neither intuitive nor easy to use, even for those knowledgeable about rulemaking. Recent additions (e.g., e-mail notification, full-text search, RSS feed) are highly desirable improvements, but these important functionalities are not as convenient, effective, or powerful as what is needed and possible.

A deeper problem (and one that limits the government's as well as the public's benefit from the system) is that many agencies are not using FDMS to provide the comprehensive online rulemaking docket contemplated by both the Initiative and the E-Government Act of 2002. No document—even a public comment submitted through regulations.gov—can be viewed by the public (or, for that matter, by other agencies) unless and until the responsible agency approves it for "posting" to the public side of the system. For a variety of reasons, some agencies are failing to post many significant rulemaking materials—including submitted comments. As a result, the publicly accessible portion of the database is not complete and the e-dockets for many agencies are not in fact authoritative, even though the system is capable of meeting official records standards.

Diversification and Innovation

It is exceedingly difficult, if not impossible, to map a single e-rulemaking model onto the many rulemaking needs and circumstances of all participating agencies. Similarly, one universal public website, no matter how well-designed, cannot adequately capture and convey the kind of agency-specific and rule-specific information many public users will need to understand rulemaking and to participate effectively. Yet, the current closed, exclusive, one-size-fits-all technical architecture, in conjunction with the broadly interpreted OMB policy against "duplicative or ancillary systems," prevents the creation of additional components, tools and web presentation formats—either by agencies or by interested individuals and groups outside government. And, in any event, agencies with the greatest rulemaking activity—and thus the greatest incentive to experiment and progress in this area—lack funds to do so because they are now bearing a disproportionate share of the cost of the entire e-rulemaking system. Neither the needs of public users nor the requirements of many agencies are being adequately met, and innovation is being hampered.

C. RECOMMENDATIONS AND GUIDING PRINCIPLES

If a government-wide electronic docket and rulemaking support system were being designed in today's technological environment, the preferred architecture almost certainly would not be a single and exclusive centralized system. The power of web technology is precisely that it allows data and applications to be drawn from multiple sources and presented in multiple ways tailored to the needs of various users. But starting anew would be a radical step, especially given the money and effort already invested. If the current FDMS can be enhanced, and situated within a new open and more flexible technical architecture, it can function as the primary rulemaking system for agencies with modest rulemaking activities, and as the core from which other agencies can build out more robust and innovative e-rulemaking capabilities.

We recommend a number of interrelated actions:

Architecture

The redesigned system should allow for growth, promote innovation, and provide opportunities for information sharing and collaboration through an architecture based on open standards, adaptable to the evolution of the Web, and capable of incorporating non-centralized models of information sharing.

Governance

A single agency should be given responsibility for specifying and implementing the new architecture. To minimize concerns from even the perception that one agency is being empowered to impose its particular rulemaking practices on the entire system, this new lead agency should not be one of the major rulemaking agencies.

An interagency e-rulemaking committee should be created, funded, and charged to provide regular, ongoing advice to the new lead agency about agency needs and preferences. A parallel advisory committee of public users and various relevant outside experts should be created, funded, and charged to provide regular, ongoing advice to the lead agency about the needs and preferences of the wide range of non-federal government users.

Data Standardization

The new lead agency should oversee a process of facilitated discussions among participating agencies, the object of which is to establish the common data and metadata standards and to define the quality information practices essential to effective cross-government electronic rulemaking.

This process must be done independently of any effort that might be undertaken to conform underlying rulemaking practices to a standard model. If agreement still cannot be achieved, the lead agency must be empowered to establish the necessary standards and practices, and OMB must unambiguously support their implementation and use.

Funding

A separate appropriation to the new lead agency for developing and maintaining the core e-rulemaking system should be authorized and funded. The appropriation should include an amount for further modernization and enhancement.

Agency Practice

The online docket should become the authoritative rulemaking record for all agencies, with clear indication and adequate identification of any portions of that record not being made publicly available. Agencies should be expected to create comprehensive, accurate electronic dockets that are well-indexed and effectively searchable. They should be expected to post supporting materials and comments in a prompt and timely manner, and they should receive adequate resources for this and other preparation and entry of data.

Existing communication mechanisms should be used and new ones created to increase communication between agency personnel with technical expertise and those with regulatory program expertise, within as well as across agencies. The goals include identifying both good practices in, and legal or institutional obstacles to, e-rulemaking; creating the basis for collaboration among agencies in developing new e-tools and applications; and sharing of experience with innovative uses of technology in rulemaking.

Public Access

The regulations.gov website should be completely redesigned, making creative use of web capabilities and state-of-the-art web design practices (i) to provide information in formats readily accessible to and comprehensible by the full range of potential users, and (ii) to interact efficiently and effectively with rulemaking information on agency sites. Active engagement in this process by the public users and experts of the public e-rulemaking advisory committee is essential.

Agencies that engage in substantial rulemaking activity should provide more detailed rulemaking information on their own public websites and

explore web-based methods for increasing the breadth and quality of public participation. Such e-rulemaking innovation and entrepreneurship by individual agencies should be encouraged, rather than inhibited.

The history of the eRulemaking Initiative demonstrates that governance, management and funding, technical architecture, agency practice, and public response all interact synergistically. The extent to which agencies and the public use the e-rulemaking system depends on how it is designed and implemented. Design and implementation choices flow from governance and management structures. Governance and management structures rest on how it is funded.

For these reasons, the set of recommendations made in this report should not be read as an á la carte menu, but should be recognized instead as an integrally interrelated plan for moving forward. Continuing to develop a powerful and flexible e-rulemaking system is one of the rare federal projects in which every segment of the public, as well as the government, stands to gain. But before e-rulemaking's potential benefits can become a reality, Congress, the President, and OMB must recognize that the current system—while a remarkable accomplishment given where the Initiative started—is only a first step, and that achieving the great potential of technology-supported rulemaking now demands a fundamentally new approach.

[For the balance of the report, see http://ceri.law.cornell.edu/erm-comm.php.]